

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.09.2016

CORAM:

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

O.S.A.No.256 of 2010

Union of India
Rep. by the Executive Engineer,
Chennai Central Division III,
CPWD, Chennai - 600 078. .. Appellant

Vs.

1. M/s. Consolidated Constructions
Consortium Ltd.,
No.5, 2nd Link Street,
C.I.T. Colony, Mylapore,
Chennai - 600 004.
2. Sri.P.Ravindranath
Sole Arbitrator ..Respondents

Original Side Appeal filed under Clause 15 of the Letters Patent read with Order XXXVI Rule 1 of Original Side Rules against the Judgment and Decree, dated 18.01.2010 made in O.P.No.603 of 2007.

OP.No.603/07: Petition filed u/s.34 of the Arbitration of Conciliation Act 1996 as against the award passed by the 2nd Respondent arbitrator dt.2.4.2007.

For appellant : Mr.N.Rajan, SCGSC

For respondents : Mr.S.S.Rajesh for R1
R2 - Arbitrator

JUDGMENT

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

This Original Side Appeal is directed against the Order of the learned single Judge, dated 18.01.2010 made in O.P.No.603 of 2007 filed under Section 34 of the Arbitration and Conciliation Act, 1996 as against the Award passed by the Arbitrator.

2. The brief facts of the case are as follows :

(i) The Union of India, rep. by the Executive Engineer, Chennai Central Division III, CPWD is the appellant in this appeal. The first respondent is the claimant before the Arbitrator. The claimant was entrusted with the work of construction of convention centre for Chennai Trade Centre at Chennai by the appellant under agreement, dated 10.10.2002. The scope of the work consisted of construction of a conventional centre, an administrative block and extension to the existing Sub-station building. The period allowed for completion of the work was 200 days and the work had to be started on 15.10.2002 and stipulated date of completion was 02.05.2003. The site was handed over to the claimant on 10.10.2002. The work was not completed within the stipulated period on account of various delays. The provisional extension of time was granted by the appellant herein from time to time reserving their right to levy compensation. The work was completed on 28.10.2004 with a delay of 543 days.

(ii) The claimant submitted several claims to the appellant herein and at request of the claimant, the Chief Engineer appointed sole Arbitrator and referred 12 claims to him for adjudication. He also referred 3 counter claims of the appellant. The claimants sought to be compensated for the increase in cost of the material and labour after the stipulated date of completion, i.e., 02.05.2003.

(iii) The appellant's main contention before the Arbitrator was that Clause 10C of the agreement is applicable only for statutory increase and Clause 10CC is not applicable as the stipulated period of completion is less than 18 months. According to the claimants, the delay is attributable to the appellant and therefore, the claimants are to be compensated for the price increase beyond the original contract period under Sections 73 and 74 of the Indian Contract Act, 1872.

3. The sole Arbitrator, after considering the voluminous materials placed before him, granted all the claims excepting Claim Nos. 7 and 9 and rejected the counter claims of the appellant herein towards damages on account of the delay. Aggrieved by the Award, the Union of India, rep. by the Executive Engineer, Chennai Central Division III, CPWD filed Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996.

4. The learned single Judge, after analysing the divergent contentions of either side, dismissed the O.P, by confirming the Award passed by the Arbitrator. Therefore, the present Original Side Appeal has been preferred as against the orders of the learned single Judge.

5. The learned Senior Central Government Standing Counsel appearing for the appellant contends that the learned Arbitrator ignored the terms of the agreement between the

parties and passed the Award exceeding the terms of the contract. It is further contended that the Arbitrator has traversed beyond Clause 10C and 10CC of the contract and therefore, the Award is liable to be set aside.

6. The learned counsel appearing for the first respondent per contra contends that the claim has been made for the escalation of cost of materials and labour and the delay had occurred only because of the appellant and therefore, the Award has been rightly passed by awarding reasonable compensation as entitled under Sections 73 and 74 of the Indian Contract Act, 1872.

7. Section 28 of the Arbitration and Conciliation Act, 1996 reads thus :

"Rules applicable to substance of dispute -

(1) Where the place of arbitration is situate in India -

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

2. * * *

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

8. The principles of patent illegality has been elaborated under three heads by the Hon'ble Supreme Court in Associate Builders v. DDA, reported in (2015) 3 SCC 49. In this Judgment, it has been held as follows :

"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads :

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under :

"28. Rules applicable to substance of dispute - (1) Where the place of arbitration is situated in India -

(a) in an arbitration other than an international commercial arbitration, the Arbitration Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in

force in India."

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality - for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under :

"28. Rules applicable to substance of dispute - (1)-(2) * * *

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."

9. Clause 10C of the contract relates to payment on account of increase in prices / wages due to statutory orders. Clause 10CC provides payment due to increase / decrease in prices / wages after receipt of tender for works (Time period more than 18 months). The claims have not been made either under Section 10C or 10CC of the Contract. As already pointed out Clause 10C is applicable only in statutory increase and Section 10CC is not applicable to this case, as the stipulated period is less than 18 months. The claims have been made for the escalation of price of materials and wages attributing delay on the part of the appellant and therefore, the claim is made under Sections 73 and 74 of the Indian Contract Act, 1872.

10. The learned Arbitrator also considered all the aspects including the contention of the claims that they are entitled under Sections 73 and 74 of the Indian Contract Act, granted the claims. The Arbitrator has decided the dispute in accordance with the substantive law namely, the Indian Contract Act, 1872 and therefore, the contention of the

appellant about patent illegality is not sustainable.

11. The learned Arbitrator gave a finding after perusing of documents that delay is attributable to the appellant in para 43 of the Award as follows :

"A perusal of the voluminous documents filed by the claimants leaves no doubt that the work was delayed from the very first day itself for want of drawings. These documents also show that the drawings for this prestigious and urgent work were issued in piece meal, many of them after the SDC, that many drawing once issued were revised and that the respondents had suspended parts of the works on several occasions for periods ranging from a few days to four months. The respondents have themselves accepted most of these hold ups. They admitted that some lacuna was noticed in the structural design of consultant architect during the progress of work and as a precautionary measure a major portion of the work (in the convention centre) was stopped for 4 months from 28.02.2003 to 28.06.2003. During this period, the drawings were under revision by the respondents and IIT, Madras. There were several other hold ups such as stoppage of RCC works, brick works etc, listed on pages 6-7 of the SC."

12. The learned Arbitrator granted the claims by well reasoned award on facts. The Court cannot sit in appeal and reappraise the evidence and interfere with the findings of the learned Arbitrator. As already pointed out, the contention of the learned counsel appearing for the appellant that the Arbitrator traversed beyond the provisions of law is not sustainable.

13. Another contention raised by the appellant is that awarding interest is beyond the terms of the contract. As per Section 31(7)(a) of the Arbitration and Conciliation Act, Arbitrator is entitled to award interest at such rate as it deems reasonable. The Arbitrator awarded 10% interest, which is reasonable one. Therefore, the contention of the learned counsel appearing for the appellant with respect to interest is also sans merit.

14. The learned single Judge has rightly dismissed the Original Petition filed under Section 34 of the Arbitration and Conciliation Act and it does not warrant any interference and accordingly, 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 18.10.2010 made in O.P.No.603 of 2007. No costs.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

To

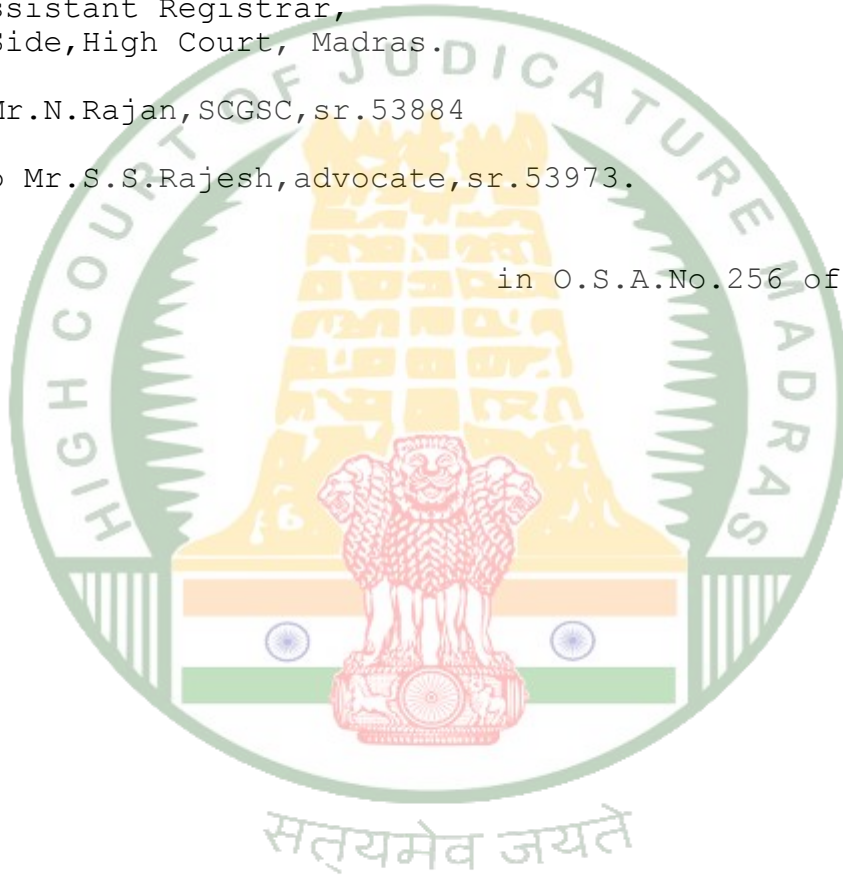
The sub Assistant Registrar,
Original Side, High Court, Madras.

+1 cc to Mr.N.Rajan, SCGSC, sr.53884

+2 cc's to Mr.S.S.Rajesh, advocate, sr.53973.

ssk(co)
krd 28/9

in O.S.A.No.256 of 2010



WEB COPY