

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 19.07.2017

PRONOUNCED ON: 10. 11.2017

CORAM

THE HON'BLE DR.JUSTICE ANITA SUMANTH

ORIGINAL PETITION Nos.140, 430

and 431 OF 2017

Statco Infraprojects Pvt. Ltd.,
Formerly known as Karismaa MEP Services
Pvt. Limited,

represented by Mr. Manoj K.Sheth,
No.4/4, Justice Ramanujam Street,
Ground Floor, Malavya Avenue,
Thiruvanmiyur, Chennai 600 041.

.. Petitioner in all
OPs

Versus

M/s.KGS Constructions Ltd.,
No.43, Besant Avenue Road,
Adyar, Chennai 600 020
all OPs

.. Respondent in

Original Petitions filed under section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the award dated 09.11.2016 and allow the claim petition filed by the petitioner before the Tribunal against the first respondent as well.

For Petitioner in all OPs : Mr.Nithyaesh Natraj

For Respondent in all OPs : Served, no appearance

COMMON ORDER

These three Original Petitions filed in terms of section 34 of the Arbitration and Conciliation Act, 1996 (in short, Act) challenge an award dated 9.11.2016. Since the award is common to and adjudicates upon disputes arising inter se the parties arising out of three contracts dated 23.5.2011, 31.5.2011 and 1.6.2011, the three original petitions filed are disposed of by means of a single order.

2. The respondent is a builder and engaged the services of the petitioner for executing electrical, plumbing and sanitary works in its construction projects. The 1st contract, dated 23.5.2011 was for electrical works in a project under the name and style of KGS-Vrudhi for a total contract value of Rs. 1,74,28,247/- (Contract 1). The 2nd contract, dated 31.5.2011 was for carrying out electrical works in the project KGS – Green for a total contract value of Rs.1,88,18,509/- (Contract 2). The 3rd contract dated 1.6.2011 was for plumbing and sanitary works in the project KGS - Green for a total contract value of Rs.63,18,536/- (Contract 3).

3. Heard Mr. Nithyaesh Natraj, learned counsel appearing for the petitioner. Notice was directed to be served on the respondent and affidavit of service dated 21.06.2017 is filed enclosing an acknowledgment card indicating service of private notice sent by Speed Post with relevant enclosures and receipt of the same by the respondent on 19.6.2017. The names of the respondent have been printed in the cause list despite which none appears. Service is thus deemed sufficient and the matter proceeded with in the absence of the respondent.

4. In all three contracts, the dispute relates to bills raised by the petitioner in respect of which payments are outstanding from the side of the respondent. Since no payments were forthcoming from the respondent despite demands, proceedings for arbitration were initiated by the petitioner and the following issues framed for adjudication by the learned arbitrator:

'1. Whether the claimant has complied with its obligations under the agreement between the parties?

2. Whether the claimant is entitled to receive payment of any sums under the agreement between the parties?

3. Whether the respondent is entitled to the counter claim for payment of a sum of Rs.1,378,78,696/-?

4. *Whether the parties are entitled to the reliefs as prayed for?*

5. *Whether the parties are entitled to exemplary costs of the arbitration?*

6. *To what other reliefs are the parties entitled to?'*

5. The contract provided for a lumpsum payment toward supply and erection and payments were effected towards each stage in the progress of the work. Upon examination of the contract as well as the annexures thereto, the learned arbitrator concludes that the contract was of a hybrid nature where, along with the breakup of the value of items, the total contract price as well as the stage wise payments were also stipulated.

6. It is a fact that the petitioner had exited prematurely and unilaterally from the contract. However, there appeared to have been no resistance from the respondent in this regard and the exit was accepted as seen from letter dated 7.2.2012 where, post the exit of the petitioner, the respondent has endorsed the last bill submitted with the remark '*extra work site instruction copy to be submitted. Measurement sheet to be submitted*'. The award also records that five payments were made by the respondent to the petitioner post the date of its withdrawal from the projects. The learned Arbitrator thus concludes that there had evidently

been no reservation by the respondent to any right that arises from the premature exit of the claimant from the projects.

7. On merits, the claims raised by the petitioner in the proceedings for arbitration have been dealt with by the learned Arbitrator in extenso. Clauses 2(b) and 6 of the Contracts deal with the submission of running account bills by the petitioner and the terms of payment which provide for payments to be effected by the respondent within 15 days from certification of the bill. The only question that arises for consideration in these original petitions is whether the bills raised by the petitioner had been duly certified by the respondent so as to justify the claim made by the petitioner of non-payment. According to the petitioner, the respondent had, in fact certified the invoices raised and consequently was liable to make payments of the amounts as raised therein. The conclusion of the learned Arbitrator to the contrary is assailed in these petitions.

8. Upon an examination of the bills raised and the certification recorded therein by the respondent, findings of fact have been returned by the learned Arbitrator accepting the endorsements in some cases and rejecting the same in some others. For instance, one of the endorsements made by the

respondent and noted by the learned Arbitrator is '*work order required, rate to be finalised, measurement checked and DB box installation only completed fixing incoming and outgoing side*'.

The conclusion in this instance is to the effect that the execution of work was incomplete and the payment was not certified by the respondents.

9. Thus the award is passed upon a detailed examination of the invoices and the certification thereupon by the respondent. In those instances where the claim is rejected, the learned Arbitrator concludes as a matter of fact that the remarks made by the representative of the respondent reveal incomplete execution of work by the petitioner for which no payments would be due. The Learned Arbitrator acknowledges that the claimant has performed the contract partly. However, in the absence of a valuation offered by the petitioner in respect of that portion of the work completed by the petitioner, there is no basis on which the claim could have considered in part.

10. The Award however recognises that the petitioner has in fact completed part of the project and is liable to be compensated for the value of the materials supplied, duly recieved and acknowledged by the respondents. On this basis,

the claim in respect of invoice for an amount of Rs.23,83,595/- in relation to Contract 1, Rs.2,72,685/- in relation to Contract 2 and Rs.4,26,395/- in relation to Contract 3 have been allowed.

11. The scope of a challenge in terms of Section 34 of the Act is restricted to the grounds set out in section 34(2) as per which the incapacity of a party, invalidity of arbitration agreement, excess of jurisdiction by the Arbitrator or violation of the principles of natural justice are to be established by the person aggrieved. None of the aforesaid grounds either arise or in fact have been canvassed by the petitioner before me. Alternatively, the award must be in conflict with public policy of the Country which is also not the case before me. There is no dispute with regard to the facts *per se* and the petitioner urges a re-appreciation of the evidences that is impermissible in a challenge under section 34 of the Act.

12. I am thus of the considered view that the present case would hardly come within the limited scope of the grounds set out in section 34(2). The learned Arbitrator has examined the endorsements made by the respondent on the invoices prior to allowing the claims in part in the following terms;

'What is definitely due to the claimant is the value of the materials supplied and handed over to the respondent at the site. The materials referred to

at page-59 for which value is fixed at page 60 have been received by the respondent. This amount is Rs.23,83,595.33. The claimant is entitled to this amount. As regards contract No.2, there is no satisfactory certification of the value of work done as we have seen earlier. But, the value of materials handed over has been checked physically and I construe it as certification. This is found at page 92 and 93. The value is Rs.2,72,658.27. The bills at page 95 and 113 (Exs.C-16 and C11) are identical and this has been accepted by the claimant. The return of the plumbing materials has also been certified and this is a value of Rs4,26,395/-. But, there is no satisfactory certification of work entitling the claimant for payment. The claimant is entitled to the three amounts as mentioned above. Issue No.2 is answered accordingly.'

13. The conclusion arrived at by the learned Arbitrator is based on an examination of the evidences and after hearing the parties and no case is made out to warrant interference with the same. The Original Petitions are accordingly dismissed. No costs.

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10.11.2017

Speaking/Non speaking order

Index: Yes/No

msr/msv

DR.ANITA SUMANTH,J.

msr/msv



Pre-delivery order in
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10.11.2017