

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.12.2017

CORAM

THE HONOURABLE MR. **JUSTICE M.M.SUNDRESH**

Original Petition Nos.58 and 528 of 2011

The Superintending Engineer,
Highways Chennai Circle,
ELCOT Building,
Thiru.Vi.Ka.Industrial Estate,
Guindy, Chennai - 32.

.. Petitioner in
O.P.No.58 of 2011

M/s.NAPC Limited,
Khivraj Complex II,
No.480, Anna Salai,
Nandanam, Chennai - 35.

.. Petitioner in
O.P.No.528 of 2011

Vs.

1.M/s.National Asphalt Products and
Construction Company,
Khivraj Complex II, No.480,
Anna Salai, Nandanam, Chennai - 35.

2.S.Saravanavel
3.D.Gopalakrishnan
4.K.D.Arcot

.. Respondents in
O.P.No.58 of 2011

1.The Superintending Engineer,
Highways Chennai Circle,
ELCOT Building,
Thiru.Vi.Ka.Industrial Estate,
Guindy, Chennai - 32.

2.S.Saravanel
3.D.Gopalakrishnan
4.K.D.Arcot

.. Respondents in
O.P.No.528 of 2011

Petitions filed under Section 34 of the Arbitration and Conciliation
Act, 1996 to set aside the Award dated 21.07.2010.

For Petitioner : Mr.T.Jayaramaraj,
Govt. Advocate (C.S.)
in O.P.No.58 of 2011
Mr.Arun C.Mohan
in O.P.No.528 of 2011
For Respondents : Mr.Arun C.Mohan for R1
in O.P.No.58 of 2011
Mr.T.Jayaramaraj,
Govt. Advocate (C.S.) for R1
in O.P.No.528 of 2011

COMMON ORDER

These two petitions have been filed, challenging the very same
award. Therefore, this Court is inclined to pass a common order.

2.For the sake of brevity, the petitioner in O.P.No.528 of 2011,
being the claimant is arrayed as such governing both the petitions.

3.The first respondent invited tenders from pre-qualified contractors for forming the four lane link road from Pallavaram to join Old Mahabalipuram Road. The petitioner, being the successful tenderer, commenced the work on 27.06.1999. The period of completion for the work is 18 months. The work could not be completed within time and after granting an extension by the first respondent, it was accordingly completed on 12.06.2001. The petitioner raised claims over the pending bills and on their non-consideration, invoked the arbitration clause. The Arbitral Tribunal awarded the claim in favour of the petitioner. During the pendency, the petitioner wanted to raise additional claims. As the claims will have to be get crystallised through the Government Order and it was not forthcoming, the additional claims sought to be raised were not considered while passing the first award. The award passed in favour of the petitioner was put into challenge before this Court. It was accordingly confirmed. सत्यमेव जयते

4.In the meanwhile, another Government Order was issued permitting the petitioner to adjudicate the additional claims sought for. Thus the second round of litigation started. The petitioner made the following nine claims:

Claim No.	Description of Claim	Amount Claimed Rs.	Amount awarded Rs.
1	Payment towards difference in rate for filling river sand for the trial formation between change 7/300 - 7/350	3,78,657.37	1,97,160
2	Revised for increase/decrease in quantities of more/less than 25% of agreement of thirteen sub items	1,05,62,146.83	22,51,764
3	Refund of manual workers welfare fund	Not pressed	3,49,578
4	Payment towards cost of excess bitumen used for laying semi dense bituminous carpet (SDBC) as per HRs mix design	3,99,689	4,02,376
5	Payment towards escalation for 24th and part bill	4,01,375.78	Nil
6	Payment towards idle machineries charges	1,61,13,310	Nil
7	Payment towards profit and over needs due to prolongation of contract	1,23,79,928	36,76,626
8	Payment towards interest on payment due	18%	Nil
9	Payment on the cost of these arbitration proceeding	2,95,200	3,25,000

5.Claim Nos.5, 6 and 8 were accordingly rejected. Claim No.3 was not pressed. Now the present petition has been filed by the petitioner with the specific challenge to Claim No.6 alone, which is a

payment towards idle machineries charges. This claim was rejected on the ground that the petitioner did not produce any material to substantiate its availability and usage.

6.The first respondent challenged the award insofar as the other claims granted in favour of the petitioner. Insofar as Claim No.1 is concerned, it is the case of the first respondent that the petitioner is entitled to charge only Rs.300/- towards sand as against Rs.458/- fixed by the Tribunal. Regarding the other issue, it is contended that the petitioner is not entitled for the same inasmuch as it has deliberately delayed the project. It is the case of the first respondent that there is no material to hold that the machineries were kept idle and extension was granted only due to the failure of the petitioner.

7.Learned counsel appearing for the petitioner would submit that the fact that the machineries were used is not in dispute. Extension was given admittedly by the first respondent. There is no insufficiency of the machinery used and so is the case *qua* the adequacy. There is no mandate to keep the log book available. Insofar as the petition filed by the first respondent, learned counsel for the petitioner would submit that considering the scope of Section 34 of the Arbitration and Conciliation Act, 1996 coupled with the fact that the Tribunal consists

of experts in the fields who made an independent analysis, no interference is required.

8.Learned Government Advocate appearing for the first respondent in O.P.No.528 of 2011 and the petitioner in O.P.No.58 of 2011 reiterated the submissions made in the petition filed. In sum and substance, learned Government Advocate would submit that in view of Exs.C24 and C58, the petition filed in O.P.No.58 of 2011 will have to be allowed as against O.P.No.528 of 2011.

9.On a perusal of the award, it would be clear that the Tribunal considered all the claims in extenso. Though the petitioner has made a claim of Rs.400/- per cubic metre of sand, the Tribunal has taken into consideration the market price. This is with reference to river sand. Similarly, for the revision of quantities of more than 25% of sub items, the schedule of rates for the year 2001-2002 has been adopted. Insofar as Claim No.4 is concerned, it is not in dispute that adequate bitumen was accordingly used as per the specification. In other words, the petitioner has used more bitumen in order to satisfy the specification than it was originally intended.

10. There is no material to hold that the delay has occasioned only due to the failure of the petitioner. Exs.C24 and C58 do not disclose such an inference. Therefore, the Tribunal has rightly allowed Claim No.7, that too, in part. Though a sum of Rs.1,23,79,928/- was claimed, on a factual analysis, only a sum of Rs.92,84,962/- was awarded.

11. Coming to the issue pertaining to charge towards idle machineries is concerned, admittedly, there is no evidence on the availability of the machinery at the relevant point of time. While it can be stated that there is no material to hold that the petitioner was responsible for the delay in execution of the work, the same can also be attributed against the first respondent. When a claim is made by the petitioner, it is for it to substantiate the same with evidence. Therefore, there is no evidence to show that the machineries were available, kept idle and thereafter used. Though the log book is not mandatory, being piece of evidence and the same having not been proved, the Tribunal has rightly rejected the claim made in the absence of any other material being substantial in nature.

M.M.SUNDRESH,J.

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12.Thus, this Court does not find any reason to invoke Section 34 of the Arbitration and Conciliation Act, 1996 as all the claims have been adjudicated on a factual premise by the Tribunal by a well merited award.

13.Accordingly, both the Original Petitions stand dismissed. No costs.

11.12.2017

Index:Yes/No
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**O.P.Nos.58 and 528
of 2011****WEB COPY**