

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:18.08.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

CMA.Nos.2860 and 2861 of 2013
and MP Nos.1 and 1 of 2013

P.Samiappa Gounder

Managing Partner,

M/s. P.Samiappa Gounder and Bros.,

41, Majid Street, Kangeyam,

Erode District, Tamil Nadu.

...Appellant /1st Respondent in
both the Appeals

Vs

1. The Superintending Engineer,

P.W.D/WRO Parambikulam Aliyar.

Basin Circle, Pollachi 642 003. ...1st Respondent/Petitioner

2. S.Kuppuswamy,

B.E., Special Chief Engineer,

P.W.D., Retd., 49, Anna Nagar,

1st Main Street, Shanmugapuram,

Palani.

... 2nd Respondent/Respondent in
both the Appeals

These appeals are filed under Section 37 of the Arbitration and Conciliation Act, 1996, to set aside the Impugned Order dated 19th October, 2012 passed by the Learned Principal District Judge, Coimbatore in Arbitration O.P.Nos.61 and 62 of 2005 and set aside the same and consequently affirm the Arbitral Award passed by Respondent No.2 dated 29 September, 2004 respectively.

For Appellant : Mr.Thriyambak J.Kannan

For 1st Respondent : Mr.M.Venugopal

Special Govt. Pleader (C.S.)

For 2nd Respondent : No appearance

J U D G E M E N T

These two Civil Miscellaneous Appeals have been filed under Section 37(1) of the Arbitration and Conciliation Act, 1996, challenging the order dated 19.10.2012 passed in Arbitration, OP Nos.61 and 62 of 2005 on the file of the Principal District

Court, Coimbatore.

The admitted facts are as follows:

2. The appellant has been entrusted with the work of Rehabilitation of Parambikulam Main canal and Rehabilitation of Distributories of Trippur Branch canal and Vadasinnaripalayam Branch Canal. The terms of both the contracts are identical. The dispute relates to the price adjustment claimed by the appellant. The fact that the works were completed within the period fixed under the contract is not in dispute. The final bills raised by the appellant/contractor have also been paid fully. As far as the price adjustment claimed by the appellant, the appellant had sent their bill for price adjustment on 04.04.2001 making a claim for Rs.41,13,751/- in CMA No.2860 of 2013 and Rs.14,18,014/- in CMA No.2861 of 2013.

3. The respondents took a plea that the claim relating to price adjustment is belated, therefore they are not liable to pay. The matter was later referred to an Arbitrator as per the Arbitration Clause contained in the agreements entered into between the parties. Before the learned Arbitrator, the claim of the appellants was resisted mainly on the ground that the price adjustment bills were received by the Department only on 04.04.2001 and under Clause 47.1.C of the conditions of the contract, the price adjustment bills are to be made every quarter. Therefore, according to the respondents, they are not liable for payment of any amount. It also claimed that having raised a final bill and having accepted payment of the final bill amount on 31.03.2001, the appellant cannot make a claim for price adjustment bill. The correctness of the quantum of the claim made under the price adjustment bills, was not disputed by the respondents.

4. The learned Arbitrator, based on the evidence on record found that the claim of the respondents that the price adjustment bills have been submitted belatedly and therefore, the appellant is not entitled to claim, is not correct. After referring to clause 57.1 of the Conditions of contract, the learned Arbitrator concluded that the price adjustment bills have been submitted within the time frame provided under Clause 57. Therefore, there is no question of there being any delay on the part of the appellant in preferring the price adjustment bills. The claim that the appellant/claimant had accepted the final bill amount and therefore, he is not entitled to make a claim regarding price adjustment bills was also rejected by the Arbitrator.

5. The learned Arbitrator found that even in the final bill, the claimant stated that the final bill was received with a condition that the price escalation amount will have to be

settled at an early date. The copy of the letter had been filed to show that the claimant had in fact made such an endorsement in the final bill. Though the respondents would claim that there is no such endorsement, the respondent desisted from producing the final bill before the Arbitrator. Therefore, the Arbitrator has drawn an adverse inference against the respondent and concluded that there is no question of claimant being disentitled to the price adjustment claimed. As regards the third contention that under clause 47.1.C of the conditions of contract the price adjustment should be determined every quarter and the price adjustment bill should have been submitted at the end of every quarter, the submission of a consolidated bill at the end of the contract, after completing the contract is not correct, the learned Arbitrator, however, did not enter upon a finding but the learned Arbitrator had concluded that the amount claimed has not been denied by the respondents and the fact that the price adjustment had been claimed on the basis of price variation at the end of every quarter and concluded that the consolidated bill would suffice to satisfy the requirement of conditional Clause 47.1.C of the conditions of contract.

6. On the aforesaid conclusion, the learned Arbitrator passed an award in favour of the appellant/claimant. Aggrieved, the respondents filed the above Arbitration OP Nos.61 and 62 before the Principal District Court, Coimbatore. The learned Principal District Judge, who heard the petition rejected the contention of the respondents herein on the ground of delay. In fact, the learned Principal District Judge found that the interpretation of Clauses 57.1 and 47 made by the Arbitrator appears to be plausible and the same cannot be substituted or said to be perverse. Therefore it should be taken that the learned Principal District Judge had confirmed the findings of the Arbitrator on the interpretation of Clauses 57.1 and 47 of the conditions of contract. The learned Principal District Judge, however came to the conclusion that the arbitrator had not determined the price adjustment in terms of Clause 47.1.C of the conditions of contract. He has also pointed out that there is no indication in the award of the Arbitrator to check the correctness of the claim as has been pointed out by the adjudicator. On these two grounds the learned Principal District Judge set aside the award and remitted the matter to the Arbitrator. This order made by the learned Principal District Judge is under challenge in these appeals filed by the appellant.

7. I have heard Mr. Thriyambak J.Kannan, learned counsel appearing for the appellant and Mr.M.Venugopal, learned Special Government Pleader (C.S.) appearing for the 1st respondent.

8. Mr.Thriyambak J.Kannan, learned counsel appearing for the appellant would contend that having upheld the findings of the

Arbitrator with reference to the interpretation of Clauses 57 and 47 of the conditions of contract, the learned Principal District Judge was not right in holding that the Arbitrator has not worked out the claim as per Clause 47.1.C. Pointing out the fact that the Arbitrator has awarded the claim on the basis that the correctness of the amount claimed as price adjustment was never in dispute before the Arbitrator and Arbitrator had recorded a specific finding that the respondents are not questioning the correctness of the claim. Mr.Thriyambak J.Kannan, learned counsel would further contend that the learned Principal District Judge was not justified in setting aside the award on that ground and further remitting the matter. Relying upon the judgement of the Hon'ble Supreme Court in the case of Kinnari Mullick and Another v. Ghanshyam Das Damani, reported in 2017 SCC online SC 528, wherein the Hon'ble Supreme Court had pointed out that Section 34 of the Arbitration Act does not empower the Court to set aside an award and remit the matter to the arbitrator. In view of the said pronouncement of Hon'ble Supreme Court, the order of the learned Principal District Judge remitting the matter to the Arbitrator cannot be sustained. The question to be decided is as to whether the learned Principal District Judge was right in holding that the Arbitrator has not determined the price adjustment as per the Clause 47.1.C of the conditions of the contract. Clause 47.1.(C) reads as follows:

"47.1.(C). The price adjustment shall be determined during each quarter from the formula given in the contract data."

9. Even in the claim petition, the claimant has stated as to how the price adjustment has been worked out and the price variations in each quarter had been taken into account with reference to the quantum of cement or lubricants or labour that has been utilized during the relevant period. These calculations or the overall claim has not at all been disputed before the Arbitrator. In fact, the Arbitrator has said the respondents have not disputed the quantum of the claim. Therefore, I do not think the learned Principal District Judge was right in holding that the Arbitrator has not determined the actual quantum of the amount of price adjustment by resorting to calculation provided under Clause 47.1.C. At this juncture, it is useful to refer to Clause 57.1 of the conditions of contract, which reads as follows:

"57.1. The Contractor supply to the Engineer a detailed account of the total amount that the Contractor considers payable under the Contract before the end of the Defects Liability Period. The Engineer shall issue a Defect Liability Certificate and certify any final payment that is due to the Contractor within 56 days of receiving the Contractor's account if it is correct and compete. It is is not, the Engineer shall issue within 56 days a schedule that states the scope

of the corrections or additions that are necessary. If the Final Account is still unsatisfactory after it has been resubmitted, the Engineer shall decide on the amount payable to the Contractor and issue a payment certificate."

10. It is not the case of the respondents that the Engineer had exercised his right under Clause 57.1 to seek rectification of the price adjustment bills submitted by the claimants. In fact, Rule 57.1 fixes a period of 56 days for the Engineer to state the scope of the corrections and conditions that are necessary and admittedly the said exercise has not been carried out in the case on hand.

11. The Arbitrator has concluded that the claimant is entitled to the amount claimed along with interest at 10% per annum from 01.04.2001 to 29.09.2004 and also from 29.09.2004 till the date of payment. Therefore, in the absence of any dispute regarding the correctness of the claim made, I do not think the learned Principal District Judge was right in going into the question of the correctness of the amount claimed by the appellant. The scope of the proceedings under Section 34 of the Arbitration Act is very limited and I find that the learned Principal District Judge has exceeded the scope of the proceedings under Section 34 of the Arbitration Act while setting aside the award and remitted the matter back to the Arbitrator.

12. For the above reasons, both the Civil Miscellaneous Appeals are allowed. The order of the Principal District Judge setting aside the award and remitting the matter to the Arbitrator is set aside and the award passed by the Arbitrator is restored. However, there will be no order as to costs in these appeals. Consequently, the connected miscellaneous petition is closed.

s/d-
सुतारगोविन्द नरगते
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

jv

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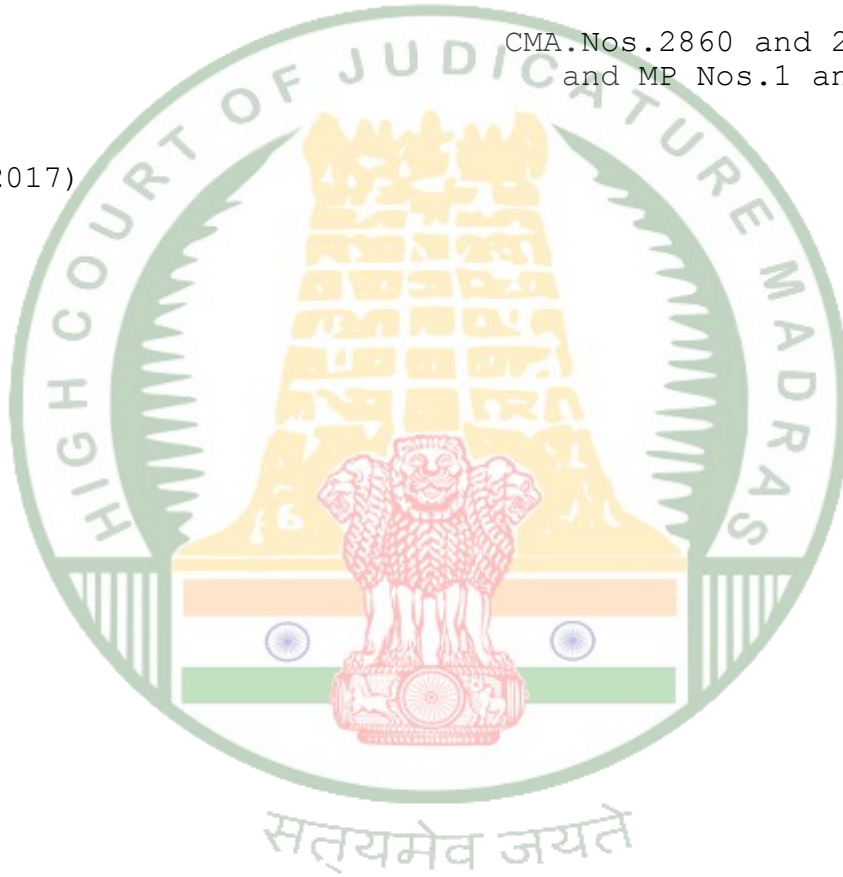
To

1. The Principal District Judge
Coimbatore.

+1 CC to Mr.Thriyambak J.Kannan, Advocate sr 58582.

CMA.Nos.2860 and 2861 of 2013
and MP Nos.1 and 1 of 2013

PPA (CO)
sp(14/09/2017)



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