

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.01.2017

Coram

The Hon'ble Mr.Justice T.S. SIVAGNANAM

O.P.No.451 of 2009

The Divisional Railway Manager (Works),
Rep., by Divisional Engineer,
Southern Railway,
Park Town, Chennai - 600 003.

.. Petitioner

vs

1.M/s.Indguard Engineers,
Flat No.203, Sapthapadi Towers,
Huda X Road, Gangaram,
Chanda Nagar,
Hyderabad - 500 050.

2.G.Paneer Selvam
Sole Arbitrator,
Dy Chief Engineer/Work Shop/Perambur

.. Respondents

Prayer: Petition is filed under Section 34(2) of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 25.06.2008 passed by the learned Arbitrator, Sole Arbitrator Dy Chief Engineer/Work Shop/Perambur.

For Petitioner : Mr.M.Udhayakumar

For Respondent : Mr.V.Surya Narayana Reddy for R1

ORDER

Heard Mr.M.Udayakumar, learned Standing counsel for the Railway Administration and Mr.V.Surya Narayana Reddy, learned counsel for the first respondent.

2. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, (Act), to set aside the award dated 25.06.2008 passed by the second respondent, sole Arbitrator, who was the Deputy Chief Engineer working in the Railway Administration.

3. The respondent was awarded a contract for construction of Foot over Bridges at Akkampet, Arambakkam, Kathivakkam, Annanur, Ekattur, Senjipanapakkam stations and an agreement was entered into between the parties on 17.04.2006. The currency period of the contract was between 10.01.2006 and 09.06.2009. The concerned officials of the Railway Administration advised the respondent on 14.09.2006 and 16.09.2006, to start the work. However, subsequently, the contract stood terminated on the ground that the first respondent has not commenced the work, by order dated 14.09.2006. It is thereafter, the respondent filed a claim petition before the authorities, which was referred for arbitration before the second

respondent/sole Arbitrator. In the claim petition, the first respondent sought for relief under four heads namely, refund of earnest money deposit of Rs.50,000/-; amount advanced to labour and material etc at Rs.1,50,000/-; loss of profit at Rs.7,37,879/- and interest at 18% per annum. The Railway Administration filed a counter claim, claiming the difference in cost of original contract value and risk and cost, tender value at Rs.58,27,073/- and for cost of appointing site Engineer for a period of five months at Rs.10,000/-.

4. The learned Arbitrator by the impugned award directed refund of earnest money deposit, directed payment of Rs.47,200/- being 4% of the cost of the road crane purchased by the petitioner, Rs.4,61,172/- towards loss of profit. The claim regarding the payment to labourers and materials was rejected, claim for interest was rejected and both the counter claims made by the Railway Administration were rejected. The Railway Administration before this Court challenges the award, more particularly on the aspect with regard to award of compensation in respect of claim no.2, namely, Rs.47,200/- and amount awarded with loss of profit in claim no.3 at Rs.4,61,170/-.

5. The learned counsel for the petitioner vehemently contended that right from the inception contract first respondent was lethargic and even the execution of the agreement was delayed and not executed, within a period of

10 days from the date of issuing the letter of intent. That apart, in terms of the agreement conditions as well as the general conditions of contract, it is the contractor who has to study all the terms inspect the site and satisfy himself as regards the facility available and he cannot complain about the same at a later point of time. Further by referring to the letter of intent dated 10.01.2006, it is submitted that the terms and conditions clearly stipulate that on direction being issued, work shall be commenced within a period of seven days and completed within the stipulated period and the contractor was required to chalk out a programme of work and submitted to the office, within a time frame, which is a mandatory requirement in terms of clause 19(3) of the General Conditions of Contract (GCC). The learned counsel further submit that Schedule (C) of the contract, clearly states that price variation (escalation clause) is not applicable to the respondent in respect of the subject contract. However, when the petitioner advised the first respondent to apply for extension of currency by enclosing a programme chart, the respondent sought for escalation of the rates by 30%. Therefore, the contract was terminated.

6. The learned counsel for the respondent on the other hand submitted that award passed by the learned Arbitrator is a speaking award and the Arbitrator took into consideration the facts and circumstances of the case and that the approved plans were not given to the contractor and the officials of

the Railway Administration had recommended only for foreclosure of the contract.

7. On the other hand, the contract was abruptly terminated without giving seven days notice or 24 hours notice, as per the procedure under the GCC. Further, it is submitted that for no fault committed by the respondent, he has been put to irreparable hardship and loss and on account of the termination, he is unable to proceed further with the matter. In support of his contention, the learned counsel referred to the decision of the Hon'ble Supreme Court in the case of *Dwaraka Das vs. State of M.P., & Anr.*, reported in (1999) 3 SCC 500, *Asian Techs Limited vs. UOI & Ors.*, reported in (2009) 10 SCC 354 and *Bharat Drilling and Foundation Treatment Private Ltd., vs. State of Jharkhand & Ors.*, reported in 2009 16 SCC 707.

8. After hearing the learned counsel appearing for the parties and perusing the materials placed on record, it is evidently clear that the action of the Railway Administration was arbitrary, in violation of principles of natural justice and illegal. Termination of a contract, for no fault committed by the Contractor, that too without following the procedure prescribed by law entitles the contractor to seek for setting aside the order of termination.

9. The learned Arbitrator has clearly quoted the recommendation of the DEN/CTR/MAS, who has recommended only for the foreclosure of the contract, however, curiously by letter dated 14.09.2006, directed the first respondent to apply for extension of currency. There cannot be such an advice to the respondent, because the currency of the contract was over as on 09.06.2006 and it is admitted fact that the drawings were approved by the concerned authority only on 30.08.2006. In such circumstances, the findings of the learned Arbitrator that the termination of the contract was illegal, is perfectly in order and consequently, the award for refund of full earnest money deposit is correct.

10. With regard to the claim no.2, pertaining to advances paid to the labour and materials, learned Arbitrator rejected the claim for lack of any material or evidence and therefore, the finding cannot be interfered. However, after rendering such a finding, a sum of Rs.47,200/- was awarded as an amount of 4% of the cost of a road crane purchased by the first respondent. Admittedly, this did not form part of the claim petition and if at all road crane was purchased, then it is a capital investment for the first respondent and without proper pleading and proof, the learned Arbitrator could not have awarded the said amount. Therefore, to that extent, the award had gone beyond the terms of submission to the Arbitration and it contains a decision on

a matter beyond the scope of arbitration and therefore, the said amount towards 4% of cost of road crane purchased at Rs.47,200/- is set aside.

11. With regard to the claim for loss of profit, admittedly, the first respondent did not produce any proof to show that he had gathered men and material to perform the contract and admittedly, no work was commenced, since the drawing itself was approved only on 30.08.2006 much after the currency period with the contract.

12. The learned Arbitrator after taking into consideration the decision of the Hon'ble Supreme Court in the case of *Dwaraka Das vs. State of M.P. and Another* reported in (1999) 3 SCC 500, held that when the public authority has committed breach by improperly rescinding a contract and it is proved to be done so, then the contractor is entitled for damages being 10% of the value. After applying the said decision, the learned Arbitrator pronounced an award of 5% of the agreement value as damages on the ground that the first respondent could not earn due profit. The Hon'ble Supreme Court, while considering as to the scope of Section 73 of the Contract Act, held that when the breach of contract is proved being contrary to law and the terms of agreement, the erring party is legally bound to compensate the other party to the agreement. In the said case, damages was quantified at 10% of the value of the contract.

However, in the facts of the said case, though the contractor was willing to perform the work, the Superintending Engineer is said to have obstructed the progress of the work, which resulted in the work not being completed within the time schedule. However, in the instant case, it is not a case, where work was commenced and while the work was in progress, the work was stopped, whereas in the present case, work never commenced. The fact remains that the contract has been illegally rescinded and in total violation of principles of natural justice, which is in contravention with the fundamental policy of the Indian Law. However, fixation of 5% on the agreement value appears to be on the higher side, especially when the finding of the learned Arbitrator in respect of claim No.2 is that no documentary evidence was produced to prove that he has paid advances to the labourers.

13. Therefore, this Court is inclined to interfere with the finding, but however, since the contract has been illegally terminated, this Court is inclined to fix the compensation amount of Rs.2,00,000/- under the said head. The finding with regard to interest does not require any interference, equally so, is the rejection of the counter claim. Accordingly, the Original petition is partly allowed on the following terms:-

(i) The first respondent is entitled to refund of full earnest money deposit of Rs.50,000/-;

(ii) The amount awarded towards 4% of cost of Road Crane at Rs.47,200/- is set aside;

(iii) The compensation awarded at Rs.4,61,170/- is reduced and fixed at Rs.2,00,000/-;

(iv) The finding with regard to claim for interest is confirmed;

(v) The finding rendered with regard to the counter claims Nos.1& 2 of the Railway Administration are confirmed.

30.01.2017

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T.SIVAGNANAM,J.

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