

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.08.2017

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

O.P.No.288 of 2016

M/s. Madras Fertilizers Ltd.,
represented by its Deputy General
Manager (P&A),
Chennai 600 028.

.... Petitioner

Vs

1. M/s. Bavani Security & Night Patrol,
represented by Proprietor,
S.V.Sethuraj,
No.53/103, 2nd Street,
Adyar, Chennai 600 020.
2. Hon'ble Justice K. Venkatraman,
(Retd.) Judge, Sole Arbitrator,
L-125, 17th Street, Anna Nagar East,
Chennai 600 102.

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act 1996 to set aside the Award dated 14.09.2015 praying to set aside the Award dated 14.09.2015 by the 2nd respondent herein.

For Petitioner : Mr. G.Jeremiah

For Respondent : Mr. R.Yashod Vardhan for
Mr.R.Murali

ORDER

This petition is filed in terms of section 34 of the Arbitration and Conciliation Act challenging an Award passed by the sole arbitrator dated 14.9.2015.

2. The grounds of challenge are twofold: firstly, whether the conclusion of the learned Arbitrator to the effect that the person representing the petitioner before the Arbitrator was not duly authorised to do so was correct and secondly, whether there is any security lapse in terms of section 11 of the Agreement between the parties so as to invite the levy of penalty in terms of the aforesaid clause.

3. An agreement was entered into between the petitioner Madras Fertilisers Limited, (in short 'MFL'), and Bavani Security and Night Patrol, (in short 'Bavani') the 1st respondent herein on 3.1.2012, whereby the latter was to provide security services to the former at various plant sites. Consideration was fixed for the scope of services as per Attachment 1, Deployment pattern of personnel as per Attachment II and the category wise number of persons to be deployed and their rates as per Attachment III of the aforesaid Agreement between the parties. The respondent, in terms of the Agreement, provided the services from 3.1.2012 and

raised monthly bills towards the services rendered. While settling the bills however, the petitioner withheld adhoc amounts that were not paid despite issuance of legal notice.

4. Proceedings for Arbitration were thus commenced and the following issues raised:

'(1) Whether there was any shortage of man power on the side of the claimant as pleaded by the respondent?

(2) Whether the shortage of man power, if any, will attract clause 11 of the agreement dated 03.01.2012?

(3) Whether Mr.R.Kumar can represent respondent company solely on the basis of the authorization letter given to him dated 12.09.2014?

(4) Whether the claimant is entitled to the amounts claimed in the claim statement?

(5) Whether the claimant is entitled to any interest and if so, the rate of interest?

(6) Whether the claimant is entitled to any cost?

(7) To what relief the claimant is entitled to?'

5. The learned Arbitrator, vide Award dated 14.9.2015 held issue no.3 above against the petitioner. On merits, the petitioner was held liable to pay a sum of Rs.42,05,671/- to the respondent herein along with pre and post award interest and costs.

6. Mr. G.Jeremiah, learned counsel appears for the petitioner and Mr. R.Yashod Vardhan, learned senior counsel appearing for Mr.R.Murali, learned counsel for the respondent and the rival considerations of both learned counsel have been heard and taken into careful consideration.

7. The 1st contention on behalf of the petitioner is that it ought not to have been non-suited on the ground that one Mr.Kumar, who appeared before the Arbitrator was not, in fact, duly authorised by the petitioner in this regard. Detailed reference has been made by the learned Arbitrator to the Articles of Association (AOA) of the company that provide for the powers of the Board as well as the Managing Director.

8. The learned Arbitrator, has, after a close examination of the AOA noted the position that the Board, in terms of clause 106 of the AOA has the power to control and direct the functions of the Managing Director as well as exclusive powers to institute, conduct, defend and refer differences to arbitration and observe and performs awards made thereunder. The powers of the Managing Director in terms of Article 108 have also been noted and extracted in the Award. In conclusion, the Arbitrator states that a harmonious reading of Article 106 and Article 108 lead to the inevitable and inescapable conclusion that it is the Board that has

powers, to the exclusion of the Managing Director to authorise or engage a person to represent the company in proceedings for arbitration on its behalf. Mr. Kumar having been, admittedly appointed only by the Managing Director, was not duly authorised to appear in the proceedings for arbitration. I find no infirmity in the conclusion of the learned Arbitrator and confirm his conclusion in this regard.

9. Mr. Jeremiah would raise a feeble objection to the fact that the AOA had not, in fact, been marked as a document in the proceedings for arbitration. However, a perusal of the Award would reveal extensive reference as well as quoting of the AOA by the learned Arbitrator. The document thus has not only been produced in the course of Arbitration but has also been taken into detailed consideration. Admittedly, there is no variation between the clauses extracted in the award and the same clauses in the AOA circulated before me now.

10. Adverting to the merits, clause 11, the interpretation of which is at issue in the present Petition, reads as follows;

'11. The Contractor shall be solely responsible for any security lapses of his personnel while on duty. MFL shall levy a penalty of Rs.5,000/- per incidence for any security lapses noticed or reported such as theft, permitting unauthorised persons etc., during the period of contract.'

11. The only argument of the petitioner both in arbitration as well as before me, is that the non-provision of sufficient security personnel is itself a security lapse attracting penalty. I do not agree. Clause 11 does not provide for a penalty for short fall in the number of security staff deputed. The clause provides for a penalty for security lapses, the commission of which have to be substantiated after letting in appropriate evidence in this regard. The conclusion of the learned arbitrator on facts is that no evidence has been let in to prove the security lapses based upon which penalty has been levied and claimed by the petitioner.

12. Useful reference may be made to section 74 of the Indian Contract Act, 1872 that provides thus:

'When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.'

13. The Supreme Court in the case of *Fateh Chand v. Balkishan Dass* ((1964) 1 SCR 515) observed as follows:

'Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulation by way of penalty x x x". "The measure of damages in the case of breach of 'a stipulation by Way of penalty is by s. 74 reasonable compensation not exceeding the penalty stipulated for.'

14. In the light of the aforesaid, the Full Bench, in the case of *Maula Bux V. Union of India* (1969 (2) SCC 554) held thus:

It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine preestimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation

must prove the loss suffered by him.

15. I am, based on the admitted position that there has been no evidence let in to establish or quantify the damages claimed and in the light of the case-law extracted above, of the considered view that the conclusion of the learned Arbitrator on this issue is unimpeachable.

16. This Original Petition is dismissed. No costs.

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Index:Yes/No

msr/sl

Speaking order/non-speaking order



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DR. ANITA SUMANTH, J.

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