

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.12.2017

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THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

Original Petition Nos.72, 73, 254 and 282 of 2010

Original Petition Nos.72 & 73 of 2010

Union of India,
rep., by the Executive Engineer,
CCD IV, CPWD,
Chennai-600 040.

... Petitioner

Vs.

1.M/s Saraswathi Engineering Constructions
Pvt. Ltd., rep., by its Managing Director
Mr.P.Kandaswamy,
No.54, Gandhi Nagar,
Erode-638 009.

2.Shri A.P.Joshi, Arbitrator,
Ministry of Urban Development,
4th floor, Old CGO Buildings,
101 M.K.Road, New Marine Lines,
Mumbai-400 020.

... Respondents

Original Petition Nos.254 and 282 of 2010

M/s Saraswathi Engineering Construction
(P) Ltd., Having Regional Office at
No.14, Rajankuppam Road,
Maduravoyal (Via),
Ayyanambakkam Post,
Chennai-600 095.

.. Petitioner

Vs.

1.The Union of India,
represented by the Executive Engineer,
CCD IV, CPWD, GPRA Campus,
Thirumangalam, Chennai-600 040.

2.Mr. A.P.Joshi, Arbitrator,
Ministry of Urban Development,
4th floor, Old CGO Buildings,
101, M.K.Road, New Marine Lines,
Mumbai-400 020.

... Respondents

Original Petition No.72 of 2010 is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award in NoARB/APJ/SZ-I/38/09/209 dated 30th September, 2009 in respect of claims 3, 4 and 6 passed by the sole Arbitrator.

Original Petition No.73 of 2010 is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award in No.ARB/APJ/SZ-I/37/09/208 dated 30th September, 2009 in respect of claims 3, 4 and 6 passed by the sole Arbitrator.

Original Petition Nos.254 and 282 of 2010 are filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award for the failure to grant the compensation under Claim Nos.(i) and (ii) of the award dated 30.09.2009 and for granting less compensation under the Claim No.vi and for failure to grant interest at 18% from the date of the claim of the escalation and for costs.

For Petitioner : Mr. N.Rajan, SCGSC.,
in OP.Nos.72 & 73/2010

For 1st Respondent : Mr.K.Surendranath
In OP.Nos.72 & 73/2010

COMMON ORDER

As all the four original petitions arise out of a common award, they have been taken up together and disposed of by a common order.

2. For the sake of convenience, the parties are referred to as arrayed in O.P.Nos.254 and 282 of 2010.

3. On 29.08.2015, an agreement was entered into between the petitioner and the first respondent for the construction of family quarters at GC CRPF, Avadi, Chennai-600 065. The time stipulated was 15 months. As the work could not be completed, it was accordingly extended during which time, the petitioner performed its part of the contract. The entire work was divided into two and accordingly, two contracts were awarded.

4. The petitioner filed claim petitions seeking six claims as against the counter claim by the first respondent towards the costs of the arbitration. The claim No.1 is with respect to the escalation price of sand and aggregate. Claim No.2 is for compensation towards materials used in the nature of cement and steel. Claim No.3 is for compensation towards difference between justified rates by the first respondent and the actual

wages paid by the petitioner. Claim No.4 is towards reduced payment for substituted items. Claim No.5 is with respect to the interest on belated payment. Claim No.6 is pertaining to additional overhead charges and profit. The counter claim of the first respondent, as stated above, is with respect to cost of arbitration.

5. The arbitral Tribunal consists of sole Arbitrator appointed by the first respondent in tune with the Arbitration Agreement dated 29.08.2005. The Tribunal rejected the claim Nos.1 and 2 on the ground that insofar as the claim No.1 is concerned, there is no change in law, rule or order and coming to claim No.2, it was held that the wholesale price index did not indicate the escalation, as rejected by the first respondent. The first respondent has contended that the petitioner has not given any price prevailing at the time of tender and therefore, it is impossible to compare with the price existed and prevailing. Under claim No.3, though a sum of Rs.23,56,000/- was claimed towards the difference between justified rates by the first respondent and the actual wages paid, only a sum of Rs.18,48,601/- was ordered. This was granted by taking into consideration the average increase in minimum wages of various labourers read with clause 10-C of the agreement as well as the guidelines and adopting a formula for fixing the wages. Thus, though the petitioner claimed for higher

wages, a lesser wage, which is marginally higher than the minimum wages, was granted. The petitioner had complied with all the requirements under the agreement, which are inclusive of payment, display in the notice board and subject to supervision of the officials with the first respondent.

6. Claim No.4 forms two parts. One is additional quantity over and above 30% variation and the other is additional items carried out. Of these two, the second part was rejected on the premise that the petitioner has not made the claim in tune with Clause 12 of the agreement. Coming to claim No.6, though the first respondent has stated that at the maximum, the petitioner can claim only 2.5% as the cost towards overheads and 7.5% as the profit, overhead charges alone was granted for the extended period after giving a finding that the delay was not due to the failure on the part of the petitioner. Insofar as the relief towards the profit for 7.5% is concerned, though higher percentage was sought for, it was accordingly rejected on the ground that the petitioner should have taken steps to mitigate his losses by judiciously employing his resources while executing the work. On the counter claim, the Tribunal directed the parties to bear the cost of arbitration.

7. Thus, being aggrieved against the award passed governing two separate agreements and tenders, both the parties have filed their respective petitions under Section 34 of the Arbitration and Conciliation Act, 1996.

8. The learned counsel appearing for the petitioner would submit that claim No.1 has to be seen contextually and even in the absence of any agreement to the contrary escalation price will have to be borne in mind. Therefore, notwithstanding Clause 10C of the Agreement, the petitioner is entitled to get the relief. Clause 10C(a) provides for escalation of price of cement and steel, for which, the petitioner has to produce the bills. The claim ought not to have been rejected merely on the ground of wholesale price index was not updated. Insofar as Claim No.3, the compensation was rightly paid adopting the formula. Though the petitioner has sought for more, it was fixed by placing reliance upon the minimum wages and adopting the procedure. Minimum wages is the barest one. What is important is the just and fair wage as defined under the regulation. The fact that the petitioner made the payment to the workmen is not in dispute and so is the other mandatory compliance. Thus, the payment was made under the supervision of the first respondent. Therefore, the award will have to be confirmed. It is further submitted that the award of the Tribunal

in respect of Claim No.4 towards substituted items cannot be sustained especially for the second part and admittedly, the work was completed during extended time. Clause 12 cannot be given the technical interpretation by reading “may” and “shall”. Insofar as the claim No.6 is concerned, the Tribunal has failed to take into consideration of the profit margin. To buttress his submissions, the learned counsel has made reliance on the following decisions.

- 1.K.N.SATHYAPALAN (DEAD) BY LRS. VS. STATE OF KERALA AND ANOTHER ((2007) 13 Supreme Court Cases 43)
2. P.M.PAUL V. UNION OF INDIA (1989 Supp(1) Supreme Court Cases 368)
- 3.BHARAT COKING COAL LTD., V. L.K.AHUJA ((2004) 5 Supreme Court Cases 109); and
4. V.R.SUBRAMANYAM V. B.THAYAPPA (DECEASED) AND OTHERS (AIR 1966 SC 1034).

9. Learned counsel appearing for the first respondent, who is the petitioner in O.P.Nos.72 and 73 of 2010, would submit that the reasoning adopted by the Tribunal in rejecting the claim Nos 1 and 2 will apply to the Claim No.3 as well. The entitlement can only between the grant of tender and the starting of the work. There is no change in law providing for

escalation price. The wholesale price index is the criteria. The petitioner did not produce any material to show the variation, as the bills by themselves cannot entitle the petitioner to get the relief. The procedure adopted by the Tribunal in awarding Claim No.3 cannot be sustained. For the Claim No.4, the Tribunal ought not to have granted anything. Insofar as Claim No.6 is concerned, as the delay having been caused by the petitioner, there is no need to pay any overhead charges and the petitioner is not entitled for the relief sought for. Having not made the request within the time, the petitioner is not entitled for additional items. There is no question of giving any profit margin, since the petitioner was the one, who is responsible for the extension of time. Hence, the petitions filed by the first respondent will have to be allowed as against petitioner.

10. **DISCUSSIONS:-**

10.1. Coming to the claim Nos.1 and 2, the Tribunal has rightly rejected them. Clause 10C of the Agreement can only be pressed into service when there is an introduction of new law, rule or statutory order. These elements are admittedly lacking. Therefore, clause 10C of the Agreement cannot be pressed into service. Clause 10C of the Agreement prohibits the contractor from getting any compensation by escalation price or otherwise. To put it differently, any entitlement to escalation would

necessarily come under the purview of Clause 10C of the Agreement alone. Therefore, the decisions relied upon by the learned counsel for the petitioner in K.N.SATHYAPALAN (DEAD) BY LRS. VS. STATE OF KERALA AND ANOTHER ((2007) 13 SCC 43) and P.M.PAUL V. UNION OF INDIA (1989 Supp(1) SCC 368) do not apply to the case of hand.

10.2. Admittedly, the claim made by the petitioner for escalation of price in cement and steel was not based upon wholesale price index. There is no comparison available between the price quoted by the petitioner as against the escalation. There is no material to hold that wholesale price index can never be relied upon. Being the claimant, it is for them to substantiate it before the Tribunal and therefore, on its failure it is not entitled for any claim. Accordingly, this Court does not find any error in the award passed by the learned Arbitrator in rejecting the claim.

10.3. Coming to Claim No.3, which is with respect to the compensation towards the difference between justified rates by the first respondent and the actual wages paid, admittedly, the petitioner has complied with all the requirements mandated under Clause 19 and the guidelines governing Clause 10C and Clause 19 of the Agreement are to be read together. Clause 10C is with respect to increase in price/wages

due to statutory prescription and orders, resulting in payment to be made. Clause 19 of the Agreement is in the nature of a mandate towards the workmen. As rightly ordered by the Tribunal, the petitioner has complied with all the requirements in making the payment towards workmen under the supervision of the officers of the first respondent. What the petitioner claimed is the wages that was paid. However, the claim was not granted in entirety, but placing reliance upon the minimum wages and adopting a formula the claim was granted. Such an exercise cannot be stated to be the one beyond the power of the Tribunal. The Contractor is expected under Clause 20 of the Agreement to comply with all the provisions of the Minimum Wages Act, 1948, and Contract Labour (Regulation and Abolition) Act, 1970. There was no objection raised at the time of making payment. The Tribunal did not take the market rate into consideration. It has rightly held that the case of the workmen would come under Clause 10C of the Agreement. A practical view was taken by taking into consideration the labour component as 25% of the value after due deduction. Accordingly, 11% increase was given. The yardstick adopted by the Tribunal, being just and fair, no interference is required. After all, what the guideline mandates is payment of just wages. Thus, no interference is required on the adjudication made on the claim No.3.

10.4. Claim No.4 is with respect of the claim made for the additional items. The learned counsel for the petitioner would submit that as per Clause 12(2) of the Agreement for extra items, due payment will have to be made. Admittedly, the petitioner has not made any claim within the time prescribed. There is no need to mandate the petitioner to make a claim and it is for him to raise it. However, for raising the claim, a time limit is prescribed. Once the claim is made within the time, the onus shifted on to the first respondent to analyse the rates and determine the same. Therefore, there is a process involved under Clause 12.2 of the agreement. To put it differently, a contractor cannot claim it as a matter of right that the rates quoted by him will have to be paid automatically. As the petitioner has not exercised the said option and thereafter, raised the bill after completion of the work, he was rightly denied the relief by the Arbitration Tribunal. Similarly, a factual finding has been given for the seven deviated items and this Court does not find any perversity in it.

10.5. Coming to the claim No.6, which deals with overhead charges and profit, the Tribunal has granted 2.5% on the overheads alone. This was granted on a factual finding that the petitioner was not responsible for the non completion of the contract within time. Accordingly, 2.5% was

given towards the overhead charges. As rightly observed by the Tribunal, even the first respondent did not contest this issue seriously except on the quantum. It was only contended that the petitioner is not entitled for any amount towards profit. The Tribunal, without taking note of the same, was pleased to hold that the petitioner should have taken steps to mitigate his losses by judiciously employing his resources as required. After this observation, which is not backed by any evidence and in spite of the earlier finding that the extension was granted not due to the fault of the petitioner, the profit margin was totally rejected. When once extension was granted on the facts of the case without pointing any mistake committed by the petitioner in performing its part and in pursuant to which the additional work was accordingly done, it should automatically follow some amount to be given towards profit, especially, while granting payment towards overhead charges. The contractor cannot be expected to receive the amount spent by him alone without any profit margin. Therefore, to that extent, this Court is of the view that the Tribunal has committed an error even assuming that this observation is taken as such. In such view of the matter, this Court is inclined to grant 2.5% towards the profit, which would be barest minimum. Accordingly, the petitioner is entitled for a sum of Rs.10,67,943/- and Rs,7,49,005/- respectively towards the profit margin.

11. Accordingly, O.P.Nos.72 and 73 of 2010 stand dismissed and O.P.Nos.254 and 282 of 2010 are allowed in part only to the extent of Rs.10,67,943/- and Rs.7,49,005/- towards claim No.6 under the head “profit”. No costs.

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12.12.2017



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M.M.SUNDRESH,J.

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**O.P.Nos.72, 73, 254 and 282
of 2010**

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