IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.04.2018

CORAM

THE HON'BLE MR.JUSTICE HULUVADI G.RAMESH
AND
THE HON'BLE MR.JUSTICE M.DHANDAPANI

W.A.No.1159 of 2017

1.The Southern Railway,
rep.by Chief Mechanical Engineer,
Park Town, Chennai-600 003.

2.The Divisional Railway Manager,
Southern Railway, Park Town,
Chennai-600 003.

3.The Senior Divisional Mechanical Engineer,
Southern Railway, Park Town,
Chennai-600 003. ..Appellants/Respondents

-vs-

M/s.Orion Ventures
rep.by its Partner,
No.15/355Q, Opposite to Post Office,
Tirur Road, Down Hill,
Malappuram,
Kerala-676 519. ... Respondent/Petitioner

Appeal filed under Clause 15 of Letters Patent, against the order passed by this Court in W.P.No.11796 of 2016 dated 06.02.2017.

WP.No.11796 of 2016:Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Mandamus to Direct the respondents herein to forthwith pay a sum of Rs.3 00 98 332.38 (Rupees Three Crores Ninety Eight Thousand Three hundred and Thirty two and paise thirty eight only) deducted by the respondents out of the price variation bills submitted by the petitioner for the period under the contract agreement dated 17.05.2011 and forbear the respondents from effecting any deductions in future under vitiation of contract

For Appellants :: Mr.P.T.Ramkumar

For Respondent :: Mr.AR.L.Sundaresan, Sr.Counsel
for Mrs.AL.Gandhimathi

JUDGMENT
(Delivered by HULUVADI G.RAMESH, J.)

In the tender floated by the appellant-Southern Railway for collection of soiled linen, washing, packing and distribution of the same to the AC coaches on Build-Own-Operate and Transfer basis, the respondent was found as L1 and they were given the letter of acceptance dated 01.04.2011. Subsequently, they entered into a contract agreement with the first appellant on 17.05.2011 and commenced the work. In terms of the tender conditions and contract agreement, they started raising bills for the works done by them, for which, the appellants have unilaterally effected deductions of substantial amount and paid only the balance. Further, invoking Clause 7.3 of the Letter of Acceptance, the appellants have passed the bills for price variation on Distribution in respect of enhancement of minimum wages by the Government of Tamil Nadu by applying the enhanced percentage on Distribution rate quoted by L3 bidder. It would be appropriate to extract Clause 7.3 of the letter of acceptance as under:

> "PV clause as stipulated in the tender conditions will be applied to the rates of L1, L2 ad L3 as per PVC formulae throughout the period of contract to ensure that different rates of price variation as applicable on washing and distribution do not vitiate the contract."

2.The specific case of the respondent is that there is no clause for effecting deductions either in the tender document or in the contract agreement. Even the clause in the letter of acceptance is very vague and does not show the basis on which price vitiation would be effected. According to the respondent, the appellants have unilaterally and arbitrarily interpreted Clause 7.3 of the letter of acceptance awarded to them. Apart from that, before making such deduction, no opportunity was given to the respondent to put forth their contentions.

3.A writ petition was filed before this Court in W.P.No.11796 of 2016 by the respondent herein, praying for a direction to the appellants herein to forthwith pay a sum of Rs.3,00,98,332.38 deducted by them, out of the price variation bills submitted by the respondent for the period under the contract agreement dated 17.05.2011 and forbear the appellants from effecting any deductions in future under variation of contract.

4.A counter affidavit was filed on behalf of the appellants before the writ Court, denying the contentions raised by the respondent. In the counter, they have not specifically stated as to how the said clause was included in the tender conditions. Therefore, this Court held that there is no clear cut explanation for inclusion and interpretation of the said clause in the documents in question and hence, the said deductions made are not correct. It was also held that the overall cost of Build-Own-Operate-Transfer ("BOOT" in short) contract on the basis of the rates quoted by the respondent calculated for a period of 10 years is on the lower side, while the rates quoted by other bidders is on the higher side. At the same time, the rate quoted by the respondent herein in the break up towards Distribution is Rs.6.80, while the rates quoted by L2 and L3 are Rs.5.90 and Rs.1.30 respectively. However, when the rate quoted by L3 bidder for Distribution has been recorded as impossible of performance and the same has been declared as unworkable in the tender committee meeting held on 07.02.2011, the same cannot be taken as the basis for calculating the price variation. Coming to such conclusion, the learned single Judge held that the so called price vitiation clause is totally unfair, arbitrary and unjust and the deduction effected on that score is liable to be set aside.

5.With regard to the contention raised in respect of arbitration, the learned single Judge relied upon the decision of a Division Bench of this Court in the case of the Union of India owning Southern Railway, Bangalore vs. M/s.Best Cast Construction (P) Ltd and others, which has been relied upon by the learned senior counsel for the respondent herein, and held that the principle enunciated in the said judgment is applicable to the case on hand, since there is no clause for referring the dispute for arbitration. In the said judgment, it has been held that that if a question of law is specifically referred and it becomes evident that the parties are desirous to have a decision on the specific question from the arbitrator, rather than one from the Court, then the Court will not interfere with the award of the arbitrator even if the view of law taken by the arbitrator did not accord with the view of the Court. The learned single Judge, finally held that the appellants are liable to pay the amount deducted by them out of the price various bills submitted by the respondent.

6.It was also observed by the learned single Judge that since the contract period is for 10 years, in respect of the deduction to be made in future, both the parties have to sit together and set right all the things; that if the appellants want to include or interpret any of the clauses in the contract agreement, it is open to them to do the same, after issuing notice and after affording an opportunity of personal hearing to the respondent.

7.Challenging the said judgment, the present appeal is filed by the appellants-Southern Railway.

8.The learned counsel for the appellants has submitted that the learned single Judge has erred in allowing the writ petition without considering the aspects that as per Clauses 63 and 64 of General Conditions of Contract executed between the parties, the respondent ought to have invoked Arbitration Proceedings if any dispute arises between the parties relating to the contract. He further submitted that the learned single Judge has failed to see that the terms and conditions of the contract has been mentioned in the Letter of Acceptance and the contents specified therein. He contended that the learned single Judge has failed to see that Clause 7.3 in the Letter of Acceptance issued to the respondent clearly indicates that the Railway Administration is entitled to apply Price Vitiation Clause considering the rates quoted by L2 and L3 in this case for any item of work if the rate quoted by other tenderer is less. He finally submitted that applying the Price Variation Clause, bills were settled to the respondent considering the minimum wages prevailing at the relevant time of award of the tender on the subsequent periods.

9.The learned senior counsel appearing for the respondent has submitted that the overall cost of BOOT contract on the basis of the rates quoted by the respondent calculated for a period of 10 years is on the lower side, while the rates quoted by other bidders is on the higher side. But, at the same time, the rate quoted by the respondent herein in the break up towards Distribution is Rs.6.80, while the rates quoted by L2 and L3 are Rs.5.90 and Rs.1.30 respectively. However, when the rate quoted by L3 bidder for Distribution has been recorded as impossible of performance and the same has been declared as unworkable in the tender committee meeting held on 07.02.2011, the same cannot be taken as the basis for calculating the price variation. He submitted that this aspect has been correctly observed by the learned single Judge in the impugned order and held that the so called price vitiation clause is totally unfair, arbitrary and unjust and the deduction effected on that basis is liable to be set aside. He also submitted that the learned single Judge has considered all the relevant points in proper perspective and has passed the impugned order, which does not require any interference in the hands of this Court.

10.Heard the learned counsel on either side and perused the materials available on record.

11.It is the vehement submission of the learned senior counsel appearing for the respondent that there is no clause for effecting deductions either in the tender document or in the contract agreement. Even the clause in the letter of acceptance is very vague and does not state the basis on which price vitiation would be effected. Further, according to him, no opportunity was given to the respondent to put forth their defence. It is also his stand that only towards the work relating to Distribution, for which the respondent has quoted Rs.6.80, the appellants have taken into account the rates quoted by L2 and L3, which are Rs.5.90 and Rs.1.30 respectively for calculating price variation. Further it is the specific contention of the learned senior counsel for the respondent that in the letter of acceptance, it is mentioned that PV clause / vitiation as stipulated in the tender conditions will be applied to the rates of L1, L2 and L3 as per PVC formulae throughout the period of contract for price variation purpose, whereas there is no condition as such stipulated in the tender. He also submitted that the wages have to be revised as and when there is enhancement of the same by the State Government as per the relevant Acts.

12.We find considerable force in the submissions made by the learned senior counsel for the respondent. In page-135 of the typed set of papers filed by the appellants, the rates quoted by the parties have been furnished in a tabular form, from which it is seen that in respect of Distribution, the rate quoted by L1, ie., the respondent herein, is Rs.7.00 and the rates quoted by L2 and L3 are Rs.5.90 and Rs.1.30 respectively. It appears that subsequently the said rate of Rs.7.00 has been reduced to Rs.6.80 after negotiation. In the minutes of the Tender Committee Meeting held on 25.03.2011, after a thorough perusal of the tenders quoted, it has been discussed that the rate of Rs.1.30 quoted by L3 for Distribution, is unworkable. After having discussed that the said amount is unworkable even according to the appellants, it is not proper on their part to take into consideration the said quoted rate of Rs.1.30 by L3 for calculating price variation, while accepting the rates quoted by L1 for all the other heads.

13.When once contract is finalised by having accepted the rates quoted by the tenderer, ie., the respondent herein, on various aspects of work, it is not correct on the part of the appellants to rely upon the rates quoted by other tenderers for one aspect of work alone for price variation purpose.

14.In this connection, it would be appropriate to refer to the judgment of the Hon'ble Supreme Court in the case of Sardar Sucha Singh v. Union of India and others, reported in 1987 (Supp) Supreme Court Cases 127, wherein the Hon'ble Supreme Court has held that it was not obligatory on the part of the appellant therein to comply with the request requiring the appellant to deposit a further sum of Rs.700/- after the tender was accepted and the contract came into existence, if it was not a part of the condition of the tender.

15.We also reiterate the view expressed by the learned single Judge that since the contract period is for 10 years, with regard to the deduction to be made in future, both the parties shall sit together for setting right all the things, and further, if the appellants want to include or interpret any of the clauses in the contract agreement, it is open to them to do the same, after issuing notice in accordance with law.

16.With the above observation, the writ appeal stands dismissed. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

KM

To

1.The Chief Mechanical Engineer
Southern Railway, Park Town, Chennai-3

2.The Divisional Railway Manager
Southern Railway, Park Town, Chennai-3

3.The Senior Divisional Mechnical Engineer
Southern Railway, Park Town, Chennai-3

+1 cc to Mr.P.T.Ramkumar Advocate sr 28027
+1 cc to Mrs.AL.Ganthimathi Advocate sr 28167

aa04/05/2018