

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 11TH DAY OF JULY 2018

THE HON'BLE MRS. JUSTICE PUSHPA SATHYANARAYANA

O.A.No.595 of 2018

In the matter of Arbitration
and Conciliation Act, 1996
and

In the matter of dispute
that has arisen between
the Applicant and the
Respondent under the
Agreement No.43/2015
dated 21.11.2015 and
The Application under
Section 9 of the Arbitration
and Conciliation Act, 1996

M/s. Srishaila -GDCL JV,
6-3-1111/16, NishathBagh,
Begumpet, Hyderabad 500 106
Andhra Pradesh

Represented by its Power of Attorney
Holder Through its authorised
representative

Mr.S.Srinivasa Narayana Rao

...Applicant

-vs-

M/s. Chennai Port Trust,
The Board of Trustees of the Port of Chennai
A Body corporate under Major Port Trusts
Act 1963
No.1, Rajaji Salai,
Chennai 600 001

...Respondent

Original Application praying that this Hon'ble Court
be pleased to grant an order of an Interim Injunction
restraining the Respondent herein from imposing liquidated
damages on the applicant under the Agreement No.43/2015
dated 21.11.2015 pending disposal of the Arbitration
and Conciliation Act, 1996 and dispute Review Board Proceeding, pass any
such or similar order(s) as this Hon'ble Court may deem fit

and proper in the facts and circumstances of the present case.

This Original Application coming on this day before this court for hearing the court made the following order:-

This application has been filed seeking for an order of interim injunction restraining the respondent from imposing liquidated damages on the applicant under the Agreement No.43/2015 dated 21.11.2015 pending disposal of the arbitration proceedings and Dispute Review Board proceedings.

2. The applicant earlier filed O.A.No.109 of 2018 before this Court seeking for an order of interim injunction restraining the respondent herein from in any manner invoking Clause 49 of the Contract Agreement pending disposal of arbitration proceedings, which is almost identical to the present prayer. It is pertinent to mention here that Clause 49 of the Agreement provides for liquidated damages.

3. This Court, after hearing both the parties, disposed of the said application holding that the Dispute Review Board (DRB), in its order, held that there was a time lapse due to the unprecedented conditions, which cannot be solely attributed to the applicant. Accordingly,

the disputes were referred to the DRB, by consent of both the parties, by condoning the delay in approaching the DRB. The said order was passed on 16.04.2018.

4. While so, on 18.06.2018, the applicant had sent a letter to the respondent explaining the reasons for the delay in completion of the project and the same are attributable to (i) presence of bigger size boulders ; (ii) boring through very hard strata and delay in founding level ; (iii) presence of hindrances, viz., access to site blocked due to presence of acropodes, the Vardha cyclone and the death of the former Chief Minister ; (iv) sand shortage or scarcity due to raids in the sand quarries ; and (v) calculation of extra days. While furnishing the above explanation for the delay, the applicant had requested for 936 days extension of time without invocation of liquidated damages. It is the case of the applicant that the delay is caused not due to the fault of the applicant, but other extraneous circumstances explained.

5. In response to the said letter, on 20.06.2018, the respondent sent a letter to the applicant stating that the request to release liquidated damages amount already recovered in RA Bill No.23 and not to impose liquidated damages on future bills cannot be considered now.

6. The respondent also reiterated the same by sending another communication dated 29.06.2018 stating that the request to release the liquidated damages amount already recovered and not to impose liquidated damages on future bills could not be considered.

7. Learned counsel for the applicant contended that when this Court had earlier directed the parties to go before the DRB for resolution of the disputes, it is not open to the respondent to invoke the liquidated damages clause as per Clause 49 of the Contract Agreement. If the liquidated damages is invoked by the respondent, it would cause serious damage to the applicant, as the applicant would be left with no liquid cash even to pay to their labourers. The liquidated damages itself could be levied, in case of delay in completion of the contract, which would be maximum of 10% of the contract price. However, if the respondent allows further extension of time at its discretion, the same may not attract liquidated damages.

8. It is to be stated that as the DRB had earlier pointed out that the delay was not solely due to the applicant, the respondent has to prove the damages with reasonable certainty. Admittedly, the work is not completed as per the contract and 1/3 of the same is still pending. Clause 49 also provides for extension of time by

the respondent by exercising its discretion with or without liquidated damages. When already the matter is *sub judice* before the DRB, the respondent cannot claim damages that are speculative. No doubt, liquidated damages is a good substitute for consequential damages. The consequential damages have to be proved and then quantified to make a claim. Hence, the parties are agree for liquidated damages, but the same agreement has provided for the disputes resolution mechanism by referring the disputes before the DRB, after which, it is open to the parties to go for arbitration, if aggrieved by the decision of the DRB.

9. That being so, it would be appropriate to grant an order of interim injunction restraining the respondent from imposing liquidated damages on the applicant on future bills, under the Agreement No.43/2015, dated 21.11.2015 pending disposal of the proceedings before the DRB.

10. It is made clear that the liquidated damages amount already recovered may be adjusted in future bills, subject to the outcome of the DRB proceedings followed by arbitration.

11. The parties are hereby directed to appear before

<https://hcservices.ecourts.gov.in/hcservices/>

the DRB without fail to resolve the issues within a period

of four weeks from the date of receipt of a copy of this order.

12. With the above directions, this application is disposed of.

Sd./-P.S.N.J
11.07.2018

//Certified to be true copy//

Dated at Madras this the day of 2018
JJ 29/08/2018

COURT OFFICER(O.S.)

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