

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.12.2017

Delivered on : 02.01.2018

Coram

The Hon'ble Mr. Justice **M.M.SUNDRESH**

O.P.No.532 of 2017

M/s.KGS Constructions Ltd.,
No.43, Besant Avenue Road,
Adyar, Chennai - 600 020.

... Petitioner

vs.

Statco Infraprojects Pvt. Ltd.,
Formerly known as Karismaa MEP Services
Private Ltd.,
Rep. by Manoj Sheth,
Flat 1-C, KG Spring Manor,
23, 1st Main Road, Sastrinagar, Adyar,
Chennai - 600 020.

... Respondent

Petition under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 09.11.2016 passed by the Sole Arbitrator.

For Petitioner : Mr.Prahalad Bhat

For Respondent : Mr.Nithyaesh Natraj

ORDER

This Original Petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996, seeking to set

aside the Award dated 09.11.2016 passed against it by the Arbitral Tribunal.

2. The petitioner is a public limited company, whereas, the respondent is a private limited company. The petitioner issued three work orders in favour of the respondent. These work orders were with respect to electrical and plumbing works to be done by the respondent. A sum of Rs.30 lakhs was paid to the respondent as advance by the petitioner.

3. The respondent started and proceeded with the work. For the work executed, bills were raised and submitted to the petitioner for certification and the same were certified by the petitioner. The bills would include the work done by the respondent along with the items used as materials. Though the bills were certified by the petitioner, no payment was made. Hence, the respondent stopped the work. The petitioner did not question the stoppage of work. According to the respondent, the work was stopped in the midway due to the failure of the petitioner in making payments. Thus, claiming a specific amount under various categories, the respondent invoked the arbitration clause.

4. Before the Tribunal, the petitioner raised the question of maintainability and without prejudice to the same, it had also made a counter claim. The preliminary objection raised with regard to maintainability was rejected by the Tribunal. A contention was raised by the petitioner that the respondent was deemed to be a Public Limited Company in not making amendment to the Bylaws by removing the clause, which provides for receiving monies from private as deposits. After rejecting the preliminary objection, the matter was proceeded by the Tribunal.

5. Issues have been framed by the Tribunal. After considering the entire materials available on record, the Tribunal has awarded a sum of Rs.23,83,595.33 for Contract No.1, Rs.2,72,658.27 for Contract No.2 and Rs.4,26,395/- for Contract No.3 together with interest at the rate of 18% per annum. Besides that, a cost of Rs.1 lakh was also awarded. Incidentally, the counter claim of the petitioner was also rejected. It is to be noted that in the claim petition, the respondent has claimed a total sum of Rs.95,32,418.80/-.

6. The learned counsel appearing for the petitioner would submit that the claim made before the Tribunal is not maintainable. The

Bylaws of the respondent has not been amended. Section 3(1)(3)(d) of the Companies Act, as amended in 2000 prohibits acceptance of deposits from the public. Since the respondent did not amend the Bylaws, which provides for such activity, it partakes the character of a public company and the Directors being less than 7, as mandated under the Companies Act and the others are being liable, but not parties to the arbitral agreement, the only remedy lies before the jurisdictional civil court. The contracts are lump-sum contracts. Therefore, there cannot be any claim for damages item-wise. In other words, unless and until, the entire contract is completed, the claims as made are not maintainable. It is the respondent, which unilaterally rescinded the contract. There cannot be any damage as sought for. There is a clear violation of Sections 297 and 299 of the Companies Act, 1956. Thus, the contracts being voidable, the claims ought to have been dismissed by the Tribunal.

7. To buttress his submissions, the learned counsel for the petitioner has relied upon the following decisions:-

(i) 1948 61 LW 449 (Govindram Seksaria a firm and another vs. Edward Radbone)

(ii) AIR 1958 SC 560 (State of Madras... Vs. Gannon Dunkerley & Co., (Madras) Ltd.....)

(iii) (2015) 14 SCC 277 (Darius Rutton Kavasam A Neck Vs. Gharda Chemicals Limited and others)

(iv) (2004) 11 SCC 425 (Draupadi Devi and others Vs. Union of India and others)

8. The learned counsel appearing for the respondent would submit that the execution of agreements are not in dispute. The Tribunal gave a factual finding that the contracts were hybrid contracts. The fact that materials were supplied apart from the work done is not in dispute. The bills raised were approved and certified by the petitioner. The Tribunal has given a factual finding that the contracts were hybrid ones and therefore, both the elements of work done and the materials supplied formed part of the contract. Such interpretation is not required to be interfered with. The respondent company is a private limited company. The provision relied upon by the petitioner does not have any application to extend the company with retrospective effect. It is nobody's case that the respondent was receiving any deposit from public. The Registrar of Companies also recognised and issued certification declaring the respondent as a private company. The

petitioner did not claim the contracts as voidable. There is no material to apply Section 297 of the Companies Act as the Tribunal rightly found that Ex.R1 showed that Mr.Rakesh Sheth was not a shareholder of the respondent company. Therefore, the aforesaid person was not a member of the respondent company. Similarly, Section 299 of the Companies Act does not have any application. At the best, it can be applied against Mr.Rakesh Sheth. There is no allegation of work being not satisfactory. This issue was not raised earlier before this Court on an application filed under Section 9 of the Arbitration and Conciliation Act. The decisions relied upon by the petitioner was rightly found to be not applicable by the Tribunal. Though the respondent itself has decided to rescind the contract, it was accordingly accepted by the petitioner, as recorded by the Tribunal. The Tribunal has awarded only a small sum as against the large amount claimed by the respondent. It was accordingly awarded based upon documents supplied. Therefore, there is no need for interference under Section 34 of the Act.

9. As rightly held by the Tribunal, it is nobody's case that the respondent company was receiving deposits from the public. Admittedly, the Registrar of Companies certified that the respondent is a private company. This was done even after the relevant provision viz.,

Section 43 has come into being. We are dealing with a private company *per se*. The finding rendered by the Tribunal in this regard cannot be found fault with as there is no deemed transformation from an existing private company into a public company. In this connection, the following extract from Ramaiya's Commentary on Companies Act, 1956 would be apposite:

"a company cannot be incorporated into a private limited company after the commencement of companies amendment act 2000 unless its articles provide for the aforesaid prohibition. No provision has however been made in this behalf of existing private companies, unlike subsection (3) to (5) for enhancing the paid up capital within 2 years. It appears that non-insertion of such a prohibition in its articles by an existing private company shall not ipsofacto change its character to public company. Such company should however ensure that deposits are not accepted from persons other than its members, directors and their relatives".

10. Therefore, the contentions raised by the learned counsel for the petitioner as dealt with by the Tribunal cannot be accepted. After all, the scope of the Tribunal and one under the Companies Act are distinct and different.

11. On the submissions made placing reliance upon Section 297 of the Companies Act, 1956, the Tribunal has rightly held that there is absolutely no material to hold that Mr.Rakesh Sheth was having any interest with the respondent company. RW.1, who deposed on behalf of the petitioner has clearly stated that Ex.R1, which was the foundation of the petitioner's contention did not disclose the name of Mr.Rakesh Sheth as a Shareholder or Director. Hence, in the absence of any materials produced by the petitioner, the finding of the fact rendered by the Tribunal on the application of Section 297 of the Companies Act, 1956 cannot be disturbed.

12. Section 299 of the Companies Act, 1956 speaks about the disclosure of interest by the Director. According to the petitioner, prior to the agreements, CW.1 and his wife, who are the relatives of Mr.Rakesh Sheth sold their shares in the respondent company to a sister company by name, Karishmaa Foundation. This contention was also rightly rejected by the Tribunal. Mr.Rakesh Sheth is not a party before us or the Tribunal. Section 299 of the Companies Act, at best can make a transaction voidable. The petitioner did not exercise the option of declaring the contracts as voidable. The petitioner, on the other hand, kept silent when the respondent wriggled out of the

contract. The possible consequence of violation of Section 299 of the Companies Act would be a criminal liability on the part of Mr.Rakesh Sheth. We are not concerned with such a situation. Even according to the petitioner, the contracts are only voidable. Therefore, the contentions raised are nothing but an after thought. Admittedly, there is no allegation of work being not satisfactory. Suffice it is to state that the petitioner did not take any action under Section 299 of the Companies Act against Mr.Rakesh Sheth. There is a difference between a contract being void or voidable. As clearly understood by the petitioner, the transaction could at best be declared as voidable. That can be done after proving the non-compliance of Section 299 of the Companies Act as against Mr.Rakesh Sheth. It appears that this issue was also not raised on an earlier occasion before this Court. Thus, the decision relied upon in **"Transvaal Lands Company Vs. New Belgium (Transvaal) Land and development Act (1914) 2 Ch.488"** does not have any application to the case on hand. The facts involved there in are totally different.

13. Though the learned counsel appearing for the petitioner has made reliance upon Section 64 of the Indian Contract Act, it would not help its case. As discussed earlier, the petitioner has not rescinded the

contract as voidable and even in that case, it is bound to restore the benefit received. Hence, even assuming Section 64 of the Indian Contract Act, 1872 does apply, it may not help the petitioner's case.

14. The Tribunal gave a finding that the contracts were hybrid contracts. Therefore, it is not necessary to describe them as lump-sum or item-rated. This finding has been given based upon the materials. Such an interpretation by the Tribunal being a possible one and based upon the materials not disputed cannot be described as perverse. The Tribunal having acted within his jurisdiction and on consideration of materials available, has rightly rendered a finding, which does not warrant interference.

15. After answering all the above issues, the Tribunal went into merits. Though a larger claim was made on different items, the Tribunal has granted only a lesser sum. The amounts have been awarded for each of the contracts. These amounts have been arrived at, after taking into consideration the bills which were duly certified. The fact that the respondent had completed the work to the satisfaction of the petitioner and there is no dispute on the price fixed for payment were taken into consideration. These factors were taken note of while passing an award

in favour of the respondent and in consideration of the counter claim raised. Thus, the findings being factual, this Court is not expected to interfere with them.

16. A further submission has been made by the learned counsel for the petitioner with respect to interest levied at 18% per annum. It is submitted that normally, interest levied is at 12% per annum.

17. Though the learned counsel for the respondent tried to justify the interest levied, this Court is inclined to modify the same from 18% per annum to 12% per annum as the same being the normal practice adopted by this Court as well as the Hon'ble Apex Court in number of cases.

18. Accordingly, this Original Petition stands dismissed, except modifying the interest payable at the rate of 18 % p.a. to 12% p.a.

02.01.2018

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Index : :Yes/No

M.M.SUNDRESH.J.

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