

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.01.2018

DATED : 02.02.2018

CORAM

THE HONOURABLE MR. **JUSTICE M.M.SUNDRESH**

O.P.No.650 of 2013

Marg Limited, Rep., by its Managing Director

Shri G.R.K.Reddy,
having its registered office at
No.4/318, Rajiv Gandhi Salai,
Kottivakkam, Chennai-600 041.

..Petitioner

Vs.

1.Van Oord Dredging and Marine,
Contractors BV, Indian Project Office,
VI Floor, Shanghvi Udayan,
B-18, Vaikunthlal Mehta Road,
J.V.P.D. Scheme, Mumbai-400 049.

2.Hon'ble Shri Justice D.Raju,
Presiding Arbitrator, Old No.39,
New No.20, Pooram Prakasam Road,
Balaji Nagar, Royapettah,
Chennai-600 014.

3.Hon'ble Shri Justice B.N.Shrikrishna,
Member Arbitrator,
46, "SHYAMALA" Lotlikar Marg,
Behind Don Bosco High School,
Mathunga, Mumbai-400 019.

4.Hon'ble Shri Justice K.Sampath,
Member Arbitrator, New No.11, II Street,
Jagadambal Colony, Royapettah,
Chennai-600 014.

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 14.04.2013 and consequently, allow the counter claim filed by the petitioner herein.

For Petitioners : Mr.Muralikumaran

For Respondent : Mr.Sathish Parasaran, S.C., for
Mr.P.Giridharan for R1

ORDER

The petitioner is engaged in the business of construction and development of real estate, including Ports and other things. It bagged the contract for the development of a Karaikal Port as a private Port in the Union Territory of Pondicherry under the Public-Private participation mode. The first respondent is a company registered under the laws of The Netherlands engaged in the business of Dredging and Marine Construction universally. There was an earlier agreement entered into between the parties on 24.02.2009. This contract was completed duly without any dispute. Another agreement was entered into on 21.05.2009 for Dredging the access channel and the turning circle at the Karaikal

Port. The contract was in the nature of FIDIC (*Federation Internationale des Ingenieurs-Conciels*). It was agreed that TSHD Volvox Olympia shall be mobilised for carrying out the work. The contract specifically states that the work involves Dredging of soft and medium dense sand. Thus, it does not include removal of stiff marine clay, dense, hard and cemented silts, which cannot be dredged by TSHD dredger. It is specifically mentioned in the contract that lump sum price is not admissible. There were two addendums to the contract dated 20.07.2009 and 04.08.2009 respectively. The addendum No.2 once again reiterates that dredges to be deployed are Volvox Asia and the HAM318. The extent of depth involved was also mentioned along with the width. Thus, the contract among other things makes clear, two factors. The removal does not include certain materials, including rock and dredging has to be done in a particular manner using a specified mechanism. Thus, if one has to see both these factors together the machinery mandated to be used is incapable of doing any other excavation for sucking other materials, such as, stiff marine clay etc.

2.The first respondent did commence the work of dredging and proceeded with it. They have raised invoices, which were duly certified. The internal communications of the petitioner also indicates that they were accordingly recommended for payment. However, the petitioner did not provide any Letter of Credit for any of the bills certified to facilitate payment as per the terms of the contract. The ongoing work got struck because of the under water surface being hard and incapable of clearance using the machinery agreed upon. Finding that no payment was forthcoming and unable to proceed further, the work was stopped and the contract was terminated, after exchange of communications. The petitioner approached this Court and obtained an interim order directing the first respondent to proceed with the work. Ultimately, the application was rejected. For the interregnum period alone, as ordered by the Court, payment was made. Thus, claims in the nature of money have been made by the first respondent invoking arbitration clause. The petitioner also made counter claims.

3. After exchange of pleadings, the Tribunal, which was constituted by three eminent personalities, framed 16 issues and dealt with them in extenso. Documents have been marked and parties were examined. Accordingly, the following award was passed.

"For all the reasons stated above, the claimants are entitled to for and towards the first 6 invoices the sum of Rs.375418344/- as claimed and also as admitted by the respondents in the inter office memos as well as in the tabular statements filed along with the statement of counter claims filed by the respondent. So far as the other 6 invoices which were only partially certified by the respondents as could be found from the inter office memos, we are of the view, having regard to the findings recorded supra, the claimants would be entitled to the amounts as allowed

by us in Rs.3047038/-, relating to dredging by Volvox Olympia, Rs.858470/- pertaining to Nagapattinam Port dues, Rs.3480,362/- relating to the trial dredging in terms of the High Court order, then Rs.15945,400/- towards the quantity of 73135 cubic meters dredged by Volvox Olympia between 13th to 29th October, 2009, Rs.200898/- being the port dues for Cuddalore, Karaikkal and Nagapattinam and Rs.20026730/- being the cost of suspension in relation to the idle time for Volvox Olympia. Thus, in all, the claimants are entitled to the sum of Rs.418977242/- in respect of the above items. Consequently, in our view the claimants are entitled to a sum of Rs.418977242/- with interest at the following rates:

- a) Interest at 12% per annum on Rs.3989505121/- from 22.10.2009 till date of realization and

b) interest at 12% per annum on Rs.20026730/- from 28.09.2010 till date of realization.

Having regard to our findings supra, the counter claims made in the statement of counter claims by the respondent shall stand rejected and dismissed.

So far as costs of the parties are concerned, we hold that the claimants are entitled to the amounts paid to the Arbitrator towards their remuneration and other expenses incurred for ensuring the attendance of the Arbitrators to participate in the Arbitral proceedings and accordingly, we determine the same at Rs.25,00,000/- as payable by the respondent to the claimants. In other respects the claimants will bear their costs. So far as the respondent is concerned, they will bear their own costs in all respects."

4. Challenging the aforesaid award, by which, the counter claims were also rejected, the petitioner has filed the present original petition.

5. Heard the learned counsel appearing for the parties and perused the records, pleadings and written arguments.

6. The learned counsel appearing for the petitioner would submit that what is relevant is the length, depth and breadth of the area to be dredged. Therefore, there is no question of making any payment by way of day charge. As the first respondent did not complete the work admittedly it is not entitled for any payment. There is no valid authorisation and the internal communications cannot be relied upon. Since the termination is bad in law, as per the Clause 12 and 13 of the Contract, the counter claims have to be allowed.

7. The learned Senior Counsel appearing for the first respondent would submit that the objections regarding grounds 1

to 3 are technical in nature and therefore, they are liable to be rejected as rightly found by the Tribunal. Admittedly, no payment has been made. The question regarding lump sum contract has never been raised. It is agreed that only TSHD dredge alone used. The Tribunal rendered its award based upon factual findings. The internal communications have not been denied or disputed. The invoices were duly certified by the authorised personnel of the petitioner. The copies of such certification and communications were also sent to the first respondent. The fact that the first respondent did the work as made out in the claim petition is not disputed. As the adjudication was made on facts, there is no ground available to invoke Section 34 of the Arbitration and Conciliation Act, 1996.

8. The Tribunal found that the same person, who signed the contract was the signatory to the statement of the claim. Secondly, the invoices were raised in the letterhead of the first respondent. If at all, there can be any objection, it should have come from the first respondent. These invoices have been approved and certified by the Officers of the petitioner. The

petitioner has not rejected the invoices on the ground of not having been raised by competent person. In such view of the matter, this Court is of the view that the technical objections raised are to be rejected as unsustainable as could be rejected by the Tribunal. After all, we are concerned with the claims made by the petitioner as against the first respondent on merit. Such objections raised are nothing but mere an after thought.

9. A perusal of the pleadings as recorded by the Tribunal would show that the petitioner did not raise the plea that the contract was not for day charge, but lump sum one. Therefore, as rightly submitted by the learned Senior Counsel appearing for the first respondent, it is not open to the petitioner to claim the same before this Court for the first time. Interpretation of a contract lies within the domain of the Tribunal. When such an interpretation is a possible and plausible one, the same cannot be substituted by this Court. A perusal of the contract would show that it specifically states that it is not a lump sum one. Clause under the head valuation of the work makes a mention about lump sum price, which has been indicated as not

applicable. The contract further states that it has not included the removal of stiff marine clay etc. It is not the case of the petitioner that the removal does include the aforesaid materials. A factual finding was also given that dredging had to be done only by TSHD. This machinery can only be used for removal of soft, medium dense sand alone. All these factors have been taken note of by the Tribunal.

10. The covenants in addendum No.2 were taken note of while giving finding that the work can never be done with the agreed and mandated dredges deployed. We are dealing with the case where for the work done, no payment has been made. By making reliance upon Clauses 12.2 and 12.4, the decision of the first respondent to put an end to the contract was found justified, as there was no abandonment of the obligation or unlawful termination of the contract.

11. The Tribunal further found that the petitioner was not genuine in its approach. As the termination was justified and in the absence of any material to ascertain the damages, the

counter claims cannot be awarded. This Court does not find any perversity in the said decision of the Tribunal.

12. The Tribunal dealt with the contract thoroughly along with the relevant clauses contained therein. Only thereafter, the award was passed in favour of the first respondent. Such a finding based upon a pure factual basis would not come under the purview of Section 34 of the Arbitration and Conciliation Act, 1996. The Apex Court has considered the scope and amplitude of the aforesaid provision in the celebrated judgment in **ASSOCIATE BUILDERS V. DELHI DEVELOPMENT AUTHORITY ((2015) 3 Supreme Court Cases 49)**.

13. In the result, no ground is made out to interfere with the well merited award passed by the Tribunal. Accordingly, the original petition stands dismissed. No costs.

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M.M.SUNDRESH,J.

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