

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.04.2018

CORAM

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

O.P.Nos.326 and 428 of 2016

O.P.No.326 of 2016

M/s Shyam Construction,
Proprietor G.Sathish kumar,
Kasthuri Flats, 48A, Agathiyar Street,
Ambattur, Chennai.

... Petitioner

Vs.

1.M/s Tata Projects Limited,
1-7-80 Mithone Towers,
Opp. to Westly Junior Co-Ed. College,
Prender Ghast Road, Secunderabad.

2.Mr.Justice S.Kaliamoorthy,
No.20/18C, Suprabath Bharathidasan Street,
Neelamangai Nagar, Adambakkam,
Chennai.

(2nd Respondent deleted as per order dt.25.04.2016
and order dated 2.09.2016 in O.P.No.326 of 2016)

.. Respondents

O.P.No.428 of 2016

M/s Tata Projects Limited,
1-7-80 Mithone Towers,
Opp. to Westly Junior Co-Ed. College,
Prender Ghast Road, Secunderabad.

.. Petitioner

Vs.

M/s Shyam Construction,
Proprietor G.Sathish kumar,

Kasthuri Flats, 48A, Agathiyar Street,
Ambattur, Chennai.

.. Respondent

Original Petition No.326 of 2016 is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 15.02.2016 passed by the second respondent (the Arbitrator) insofar as against the petitioner (only defective part and for enhancement of the award) and also requests this Court to direct the first respondent (M/s TATA Project Ltd.,) to deposit the awarded amount in this Court and release the same as an interim relief considering the plight and agony undergone by the petitioner.

Original Petition No.428 of 2016 is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Arbitral Award dated 15.02.2016 passed by the Arbitrator by allowing this petition.

For Petitioner : Mr.R.Sivakumar
in OP.No.326/2016
& respondent in
OP.No.428/2016

For 1st Respondent : Mr.Krishna Ravindran
in OP.No.326/2016
& petitioner in
OP.No.428/2016

COMMON ORDER

Inasmuch as both the parties have challenged the very same award, they have been taken up together and disposed of by way of a common

order.

2. The petitioner in O.P.No.428 of 2016 is arrayed as such governing both the cases and thus, the respondents therein are referred to as the respondents.

3. The petitioner is the construction company. It obtained a contract from Indian Railways for construction of Gauge conversion Project between Villupuram-Mayiladuthurai Section. In pursuant to the aforesaid contract, the petitioner entered into a sub contract with the respondent. The scope of the work order issued has been increased from Rs.12,77,450/- to Rs.27,60,750/-. There were extensions granted by the petitioner in favour of the respondent. Thereafter, the sub contract was terminated. Being aggrieved over the same, the respondent made a claim for a sum of Rs.16,20,000/- on different heads. The claim includes the payment issued for the work done, damages, loss of profit among other things. The petitioner raised a plea that it was the respondent, who abandoned the work despite the extension granted. The breach was on the part of the respondent. Therefore, it was contended that except the admitted liability of **Rs.9,06,000/-** the remaining claim will have to be rejected.

4. The Tribunal framed the following ten issues.

1. Whether there is any default on the part of the claimant in completing the project within stipulated period, even the extension of time was given on the ground of rain fall and other hindrances?
2. Whether there exists termination of contract between the claimant and the Respondent? If not whether it is legal on the part of the respondent company to handover the works of the Petitioner to other agencies without prior notice and without exercising Article 37 of the work order dated 28.02.2007?
3. Whether the amendment #3 dated 6.3.2008 is unilateral or mutually accepted?
4. Whether the claimant has been paid the increased rate as per amendment #3 or not?
5. Whether the claimant had submitted the reconciliation statement for issuance of materials as per the terms of contract or not? If so, whether the claimant is entitled for the release of the amount retained by the respondents Company for the said materials?
6. Whether the works performed by the Claimant were measured in terms of contract or not? (Article-7) (Joint measurement)?
7. Whether the non-completion of work in the case of Bridge No.613 & 615 by the Claimant was only because of non-supply a of construction materials (cement & steel) in time by the Respondent Company?
8. Whether there is any breach of contract on the part of both the parties?

9. Whether the claimant is entitled for all the claims with interest and costs?

10. Whether the claims of the claimant are barred by Limitation?"

5. The Respondent marked Exs.C1 to C15 and examined himself as P.W.1 and his father as P.W.2. The petitioner did not lead any oral evidence but marked Exs.R1 to R3.

6. The Tribunal answered issue No.2 in favour of the respondent. Accordingly, it was held that there was no actual termination of the contract but the same work was handed over to another agency. Similarly, most of the issues were held in favour of the respondent including the issue pertaining to the limitation and work having been not completed due to the non supply of the contract materials by the petitioner. Incidentally, it was held that there was no fault attributed to the respondent in not completing the work within the time. The Tribunal, however, did not accept the claim amount as sought for. The damages was restricted to Rs.15 lakhs. Accordingly, the award was passed for the following claims with interest at 9% per annum.

"15.1. In fine, the Award can be summarized as under:-

- | | |
|---|------------------|
| (i) LOSS of profit and damages due to breach of contract under Claim Nos.1&3) | : Rs. 5,00,000/- |
|---|------------------|

(ii) Sun due applying the increased unit rates under Claim No.4.	: Rs. 3,00,000/-
(iii) Dewatering charges due to floods (claim No.5)	: Rs. 50,000/-
(iv) Anticorrosive treatment charges (Claim No.7)	: Rs. 8,577/-
(v) Steel Fabrication Charges (claim No.8)	: Rs. 10,000/-
(vi) Sum admitted to be payable towards Retention amount and security deposit	: Rs. 73,940/-
Total	: Rs.9,42,517/-"

Challenging the aforesaid award, both the parties have filed respective petitions.

7. The learned counsel appearing for the petitioner would submit that the agreement did not provide for payment of damages. A sum of Rs.5,00,000/- awarded by the Tribunal on a guess work, assessed notionally towards loss of profit and damages is sustainable in the eye of law. The amount of damages fixed is high. The work could not be completed by the respondent. For the fault committed by the respondent, the petitioner cannot make the payment. There was a claim of only Rs.3,00,000/- earlier. In support of his contention, the following decisions have been relied upon.

**(i) OIL AND NATURAL GAS CORPORATION VS. WIG
BROTHERS BUILDERS AND ENGINEERS PRIVATE**

LIMITED ((2010) 13 Supreme Court Cases 377); and

(ii) STEEL AUTHORITY OF INDIA LTD., V.

J.C.BUDHARAJA, GOVERNMENT AND MINING

CONTRACTOR ((1999) 8 Supreme Court Cases 122)

8. The learned counsel appearing for the respondent would submit that most of the issues having been answered in favour of the respondent, the award does not require any interference. However, the Tribunal ought to have enhanced the amount having found the issues in favour of the respondent. The interest ought to have been granted at 18%. Hence, while praying the dismissal of O.P.No.428 of 2016 filed by the petitioner, it is submitted that the other O.P. No.326 of 2016 will have to be allowed.

9. This Court is quite conscious about scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996, over an Award passed by the Tribunal. The Tribunal framed about 10 issues and answered them by giving adequate reasons. These reasons being factual, no interference is required. Obviously, the Tribunal had to do a guess work, after having found that it is the petitioner, who is responsible for the situation created. Therefore, the only other issue, which was required to be

done by the Tribunal was with respect to the quantum. For this, the Tribunal has taken into consideration of relevant materials. It is to be noted that the original work order was modified subsequently. Therefore, the Tribunal took into consideration of the aforesaid fact while granting Rs.5,00,000/- towards damages granted for the work done being factual also cannot be disputed. The fact that the second respondent asked for lesser amount earlier cannot be a ground to deny the claims made as awarded by the Tribunal. It is to be seen that the claim was made only in the year 2014. Thus, there is no question of waiver or acquiescence that can be pleaded.

10. The agreement does not preclude a claim being made on the ground of damages. Therefore, the decision relied upon by the learned counsel for the petitioner is not applicable to the case on hand. Section 73 of the Indian Contract Act, thus provide for compensation for loss or damaged caused by breach of contract by one of the parties. As discussed above, having found that the other issues in favour of the respondent, the Tribunal was duty bound to go into the issue of quantifying the damages. Certainly an element of guesswork is required, which was accordingly done.

11. The claim for Rs.4,00,000/- was rejected by the Tribunal after having found that the respondent did not furnish any basis for estimation. In fact, the claim Nos.1 and 3 were taken together and a sum of Rs.5,00,000/- was fixed. This amount was fixed towards the breach of terms of the contract, illegal termination, failure to allow the respondent to complete the work and enhancement of in the work order.

12. The Tribunal has granted certain amount towards dewatering charges, anticorrosive treatment charges, steel fabrication charges while adding the sum admitted to be payable towards retention amount and security deposit. A sum of Rs.3,00,000/- as discussed above was paid under claim No.4 by applying the increased unit rates. The interest was paid at 9% by taking note of the decision of the Apex Court in **KRISHNA BHAGYA JALA NIGAM LTD V. HARIS CHANDRA REDDY (AIR 2007 Supreme Court 817)**, which cannot be found fault with.

WEB COPY

13. Thus, this Court does not find any error in the well merited Award passed by the Tribunal. Accordingly, both the Original Petitions stand dismissed. No costs.

14. At this juncture, it has been brought to the notice of this Court by the learned counsels appearing for the parties that there is some more amount available on the file of this Court other than the one withdrawn by the respondent. Inasmuch as this Court has confirmed the award passed by the Tribunal, the said amount shall not be withdrawn by the petitioner as it is open to file appropriate petition for withdrawing the abovesaid amount in the execution proceedings.

raa

23.04.2018

M.M.SUNDRESH,J.

raa



WEB COPY

O.P.Nos.326 and 428 of 2016

23.04.2018



WEB COPY