

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.03.2018

PRONOUNCED ON : 26.03.2018

CORAM

THE HON'BLE MR.JUSTICE **M.M.SUNDRESH**

O.P.No.429 of 2016

M/s Chennai Petroleum Corporation Limited,
536, Anna Salai, Teynampet,
Chennai-600 018.

Represented by its Deputy General Manager
Mr.M.Sankaranarayanan

.. Petitioner

-Vs-

M/s HES Infra Private Limited,
Plot No.39, Road No.14,
B.N.Reddy Colony,
Banjara Hills, Hyderabad-34.

.. Respondent

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the impugned award made on 29.12.2015 by the learned Arbitrator, in so far as it directs the petitioner to pay a sum of Rs.4,24,76,067/- (Rupees four crore twenty four lakhs seventy six thousand sixty seven only) with interest thereon to the respondent under Tender NIT Ref.No.CPCL/PMC/T-025/2010-11 with interest thereon and rejects the counter claim of the petitioner for a sum of Rs.40,30,583/- along with interest at the rate of 18% p.a., from the date of filing the counter claim until realization thereof and allow this

petition with costs.

For Petitioner : Mr.R.Senthil Kumar for
M/s Dua Associates

For respondents : Mr.Sathish Parasaran, S.C.,
for Mr.A.Srinath

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ORDER

The petitioner herein is a Public Sector Undertaking. In pursuant to the decision made to construct a compound wall, the petitioner floated a tender inviting bids. The value of the contract was Rs.13,91,98,977/- to be completed within nine months from the date of advice to commence the work.

2. The respondent emerged as the lowest bidder and thus, became successful. A Fax of Acceptance dated 22.11.2010 was issued to the respondent by the petitioner requiring it to mobilize resources. Thereafter a Letter of Acceptance was issued on 01.12.2010. The site was handed over to the respondent on 06.12.2010.

3. The following are the relevant clauses contained in Letter of Acceptance dated 22.11.2010, Special Conditions of Contract and the

General conditions of Contract.

"12.0 FIRM PRICE:

Subject to Clause 11.2 above, the Contract Price shall remain FIRM and fixed till the completion of work and no escalation in prices on any account shall be admissible to the CONTRACTOR."

This clause clearly specifies that the contract shall remain 'firm' till the completion of the work with no room for escalation of price under any contingencies.

"56.0 SPECIAL INSTRUCTIONS AND INFORMATION TO THE BIDDERS:-

(f) It is anticipated that the local people, living in the area in which the construction of compound wall is proposed, may create certain problems for doing this work. Tackling these problems by way of arranging adequate police protection rests with the executing agency. CPCL, in no way, will come to the assistance of the executing agency except giving authorization letter, if required to be given to any Government bodies, based on the request from the contractor.

(g) If the work cannot be started or is interrupted during any stage of the execution due to whatsoever reasons, it shall be the responsibility of the Contractor to handle such interruption. In case of stoppage of work due to any

reason other than contractor's fault, CPCL may give only extension of time for completing the work, if the reasons for delay are genuine. No compensation whatsoever on any other account except extension of time for genuine reasons will be entertained or admissible under this contract. The bidders have to take care of the same while quoting the rates.

(h) The rate quoted by the successful bidder shall be inclusive of to take care of the above provisions and no separate payment or claim for non-familiarity of the above will be entertained or admissible.”

4. The aforesaid come under Clause 56, which deals with special instructions and information to the bidders. These sub-clauses make it clear that it is the look out of the respondent to undertake the work anticipating obstruction and trouble. Incidentally, the rate quoted is expected to cover such an eventuality. Therefore, anticipated disturbance has also been factored into the price quoted. From this, it is rather very apparent that the respondent was quite aware of the ground reality, which has been put in clear terms by the petitioner.

5. The General Conditions of Contract (GCC) deals with interpretation of contract documents under Section 3, which is as

follows:

3.3. ORDER OF PRECEDENCE OF DOCUMENTS:

3. 3.1 The Contract Documents shall be interpreted in the following order of precedence, that is to say, in the event of any inconsistency, the document later in precedence shall stand modified/abrogated by the document(s) higher in precedence.

- (i) Fax of Acceptance/Letter of Acceptance along with Schedule of Rates and Statement of Agreed Variations and its enclosures;
- (ii) Special Conditions of Contract;
- (iii) General Conditions of Contract;
- (iv) Relevant Standards/ Technical Specifications;
- (v) Drawings;
- (vi) Any other documents listed as forming part of the Contract Documents.”

6. Hence primacy is given to the Fax of Acceptance/Letter of Acceptance as against Special Conditions of Contract and General Conditions of Contract and others. Therefore, in case of any conflict between the documents, preference will have to be given as per the hierarchy provided above.

7. Clause 7.46 makes it clear that the contractor will not be eligible for extension except during the existence of *force majeure*. It is apposite to furnish the following clause.

“7.4.6 Subject as elsewhere herein or in the Contract Documents expressly provided, only the existence of *force majeure* circumstances as defined in clause 7.8 hereof shall afford the Contractor a ground for extension of time for completion of the work or any part of the work or any operation(s) involved therein, and specifically without prejudice to the generality aforesaid, inclement or unforeseen weather, strike, shut-down, third party breach, delay in payment or commercial hardship shall not afford Contractor a ground for extension of time or relieve the Contractor of his full obligations under the Contract, nor will any shut-down or idle time charges be payable by Owner to Contractor for any delay in the commencement, progress or completion of the work due to any reason whatsoever, inclusive due to the existence of *force majeure* circumstances.”

8. Section 9.4 deals with schedule of rates. As per this provision, the final bill prepared based upon schedule of rates shall be deemed to include and cover of costs, expenses etc. The said clause is furnished hereunder.

"9.4.2. Without prejudice to the generality of the provisions of Clause 9.4.1 hereof, the Final Bill prepared based on the Schedule of Rates shall be deemed to include and cover:

(a) All costs, expenses, outgoings and liabilities of every nature and description whatsoever and all risks whatsoever (Foreseen or unforeseen) to be taken or which may occur in or relative to the execution, completion, testing and/or handing over the work to the Owner and/or in or relative to acquisition, loading, unloading, transportation, storing, working upon, using, converting, fabricating, erecting any item, equipment, material or component in or relative to the works and the Contractor shall be deemed to have known the nature, scope, magnitude and the extent of the works and items, materials, equipment, and components required for the proper and complete execution of the works though the Contract Documents may not fully and

precisely set out, describe or specify them; and the generality hereof shall not be deemed to be anywise limited, restricted or abridged because in certain cases the Contract Documents or any of them expressly state that the Contractor shall do or perform any particular work or operation or supply of any particular item, article or material or perform any particular labour or service, or because in certain cases the Contract Documents state a particular work, operation, supply, labour or service shall be performed/made by the Contractor at his own cost or without additional payment, compensation or charge or without entitlement of claim against the Owner or words to similar effect, and in other cases they do not, or because, in cases it is stated that the same are included in or covered by the Schedule of Rates and in other cases it is not so stated.”

(g) Except to the extent specifically provided in the Special Conditions of Contract, the cost, if any, of all escalations (foreseen and unforeseen) including but not limited to labour cost and material cost.”

9. Letter of Acceptance dated 01.12.2010 deals with the contract value. This value is only subject to variation depending upon the

actual quantity of work executed, measured jointly and thereafter, accepted for payment by the Engineer in-charge.

1.0 CONTRACT VALUE:

The contract value for work of “**Construction of Compound Wall (Phase-II) in Southern and Western (Partly) boundary of Aromatics Projects Lands at Amullaivoyal, Vaikkadu and Mathur Villages for CPCL**” shall be **Rs.13,81,98,977/-**(Rupees thirteen crore eighty one lakh ninety eight thousand nine hundred and seventy seven only), exclusive of Service Tax and inclusive of all other applicable taxes and duties as per the enclosed Schedule of Rates marked as **Annexure-I**. This is, however, subject to variation depending upon the actual quantities of work executed, measured jointly and accepted for payment by the Engineer-in-Charge.”

10. The respondent is stated to have made a request to the petitioner to make the payment. However, the petitioner did not acknowledge the factum of such request having been made. However, it is the specific case of the respondent that despite a request made some of the bills were not cleared. A final bill is stated to have been claimed by the respondent on 05.09.2012. Thereafter, “No claim Certificate” was issued by the respondent on 29.12.2012 stating that with the payment of the final bill, there will not be any other one. For

the better appreciation, the aforesaid "No claim Certificate" dated 29.12.2012 is recorded hereunder.

"NAME OF WORK: Construction of Compound Wall
(Phase-II) in Southern and Western (Partly) Boundary of
Aromatic Projects Lands At Amullaivoyal, Vaikkadu and
Mathur Villages for CPCL.

WORK ORDER NO: 23267423 dated 01.12.2010.

1. Certified that no tools and plants have been issued for this job.
2. Certified that with the payment of this final bill there will be no claim whatsoever pertaining to this contract.
3. Certified that the work has been carried out as per drawings and specifications issued for this job.
4. No water charge is to be levied as per terms of the contract.
5. No electricity charge is to be levied as per terms of the contract."

11. For the RCC work under water, the respondent did not raise any bill nor any claim. However, the document stated to have been attached along with the written submissions made after the judgment was reserved by way of letter said to have been addressed by the

petitioner dated 01.01.2013. According to the petitioner, even the said so called letter has not been served either prior, during or after the orders were reserved by the Tribunal.

12. The Tribunal went into the issues raised and passed an Award in favour of the respondent. It gave a finding that the problem created by the third parties cannot be put against the petitioner. As the petitioner delayed the progress, the respondent is entitled for price variation compensation. Though no bill was raised, as the claim was placed on record, taking note of the documents filed along with written arguments, the respondent was given an award of Rs.93,31,200/- towards RCC work under water. Incidentally, a sum of Rs.1,52,50,400/- was awarded for idling charges. For the reduced scope of work being less than 25%, a further sum of Rs.23,03,757/- was awarded. Challenging the above, the present original petition has been filed.

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13. Heard the learned counsel appearing for the petitioner and the learned Senior Counsel appearing for the respondent and perused the documents.

14. The learned counsel appearing for the petitioner would submit that the Tribunal ought not to have exercised its jurisdiction since there was no real claim before it. It is not the case of the respondent that No due Certificate has been obtained by force and coercion and there was no pleading to that effect. The claim itself has been made 2 ½ years after the issuance of No claim Certificate. The relevant clauses, which in clear terms put the onus on the respondent in terms of any obstruction from the villagers, have not been taken into consideration. Thus, the onus was wrongly fixed on the petitioner. The claim for idling charges as per Section 7.46 of the General Clauses of Contract is not maintainable. The Tribunal has not taken into consideration Clause Section 3.3. of the General Clauses of Contract, which deals with the order of precedence of documents. Thus, the Letter of Acceptance will have primacy. The letter dated 05.09.2012 said to have been sent by the respondent is without any basis. Thus, it is a clear case of the award having been passed against public policy apart from suffering from patent illegality. To support his submissions, the learned counsel has made reliance upon the following judgments.

1.K.N.SATHYAPALAN (DEAD) BY LRS. V. STATE OF KERALA AND ANOTHER ((2007) 13 Supreme Court Cases 43);

2. OIL & NATURAL GAS CORPORATION LTD., V. SAW PIPES LTD., ((2003) 5 Supreme Court Cases 705);

3. ASSOCIATE BUILDERS V. DELHI DEVELOPMENT AUTHORITY ((2015) 3 Supreme Court Cases 49);

4. CONTINENTAL CONSTRUCTION COMPANY LIMITED V. STATE OF MADHYA PRADESH ((1998) 3 Supreme Court Cases 82);

5. UNION OF INDIA AND OTHERS V. MASTER CONSTRUCTION COMPANY ((2011) 12 Supreme Court Cases 349);

6. NEW INDIA CIVIL ERECTORS (P) LTD., V. OIL & NATURAL GAS CORPORATION ((1997) 11 Supreme Court Cases 75); and

7. UNION OF INDIA AND OTHERS V. ONKAR NATH BHALLA AND SONS ((2009) 7 Supreme Court Cases 350).

15. The learned Senior Counsel appearing for the respondent would submit that on 05.09.2012, the final bill was submitted. Though No Claim Certificate was issued on 29.12.2012, the money was actually paid only on 02.01.2013. Therefore, it has to be construed that the said document was not a voluntary expression of acceptance. Insofar as RCC under water work is concerned, the Tribunal has given a factual finding based upon the records.

16. The learned Senior Counsel would further submit that insofar as the profit for reduced scope of work, the Tribunal has rightly awarded the amount of Rs.23,03,757/- by taking into admitted

position of such reduction. Since the award was passed based upon materials, there is no need for interference.

17. As rightly submitted by the learned counsel for the petitioner, there is absolutely no averment in the claim petition and thus, no finding to the effect that the No Claim Certificate was issued by the respondent to the petitioner by force or coercion. When that is the position, this Court has to hold that the claims barring claim for profit for reduced scope of work, cannot be made as a subject matter of arbitration. In other words, the Tribunal went into the merits of the case without crossing the hurdle. When once the document is not in dispute, it is for the author to explain the circumstance under which it was executed. This has to be done through the pleadings supported by evidence. Therefore, as rightly submitted by the learned counsel for the petitioner, in the absence of pleadings followed by evidence, the Tribunal ought not to have ventured into the claims. The law on this issue is quite settled as held by the Apex Court in **CONTINENTAL CONSTRUCTION COMPANY LIMITED V. STATE OF MADHYA PRADESH ((1998) 3 Supreme Court Cases 82)** and **UNION OF INDIA AND OTHERS V. MASTER CONSTRUCTION COMPANY ((2011) 12 Supreme Court Cases 349)**. Thus, the Tribunal failed to determine the existence of a dispute between the parties to the agreement.

18. In the case on hand, admittedly Clause 12 of the Special Conditions of the Contract makes it clear that the contract price shall remain firm and fixed with no scope of escalation price on any account. Clause 56 inter alia speaks about the anticipated trouble from the local people, which would be the head ache of the respondent. This problem has been foreseen and to be factored into the bid amount. Section 7.4.6 once again reiterates that there is no room for extension. Therefore, from the aforesaid provisions, it is very clear that it is the primary look out of the respondent to take care of the situation. It is not, as if, the respondent was not unaware of the situation as with open eyes and without any external pressure, it did enter into the contract. Therefore, the Tribunal was totally wrong in fixing the responsibility on the petitioner. It is to be noted that the petitioner is not a State though can be called as an instrumentality. In such view of the matter, the Tribunal was wrong in dealing with the issue qua escalation of price.

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19. Much arguments have been made on the decision of the Apex Court in **K.N.SATHYAPALAN (DEAD) BY LRS. V. STATE OF KERALA AND ANOTHER ((2007) 13 Supreme Court Cases 43).**

This Court is afraid that the ratio laid down in the said decision is not applicable to the case on hand. In the aforesaid case, the appellant therein was forced to sign the contract and under protest. As stated above, we did have a specific clause excluding escalation. We do not have any *force majeure* situation before us. Hence, the reliance made on the aforesaid decision by the Tribunal and relied upon by the learned Senior Counsel for the respondent cannot be accepted.

20. Therefore, in view of the above discussion, the other claims including the compensation for idling also cannot be granted. However, this Court is inclined to sustain the award of the Tribunal insofar as the claim awarded for the loss of profit towards the reduced scope of work. Factually it is not in dispute that the work was reduced. The contention of the learned counsel for the petitioner that the amount fixed cannot be modified does not merit acceptance from this Court. There is no conflict between the provisions contained in the documents. Each provision deals with the different contingencies. When there is no apparent conflict, a Court will have to make an attempt to synchronize. As there is no dispute on facts and the Tribunal having adopted a formula, the awarding of the amount of Rs.23,03,757/- has to be sustained. For the aforesaid reason, No due

Certificate also cannot stand in the way as a claim itself was on a different ground not concerned with the regular bills.

21. There is yet another issue which will have to be considered with respect to the award made for the RCC work done under water. Once again the Tribunal has committed a grave error in going into the said issue. The respondent did not raise any bill followed by a claim. There was no material produced except filing some document, which according to the learned counsel for the petitioner, was not furnished to him and that too, at the time of reserving orders. This factum has already been recorded by the Tribunal itself. Now, the very documents sought to be relied upon are being questioned by the petitioner. When a claim itself is disputed and there is no such specific claim made, the Tribunal ought not to have ventured to go into it without even the other side being heard. Therefore, while setting aside the amount awarded for the RCC work done under water, liberty is given to the respondent to raise it separately in an independent proceeding.

22. The petitioner has also filed a counter claim. This claim is for liquidated damages and interest. Law is quite settled that for claiming

liquidated damages, there has to be sufficient material. Actual loss has to be assessed. Onus is on the claimant to prove. As the petitioner did not prove it, the Tribunal has rightly rejected it. Furthermore, if that is the case, the petitioner cannot rely upon even the No Claim Certificate issued by the respondent.

23. Thus, this Court is inclined to interfere with the award to the extent indicated above as it is a fit case to exercise the power under Section 34 of the Arbitration and Conciliation Act, 1996, in the light of the law laid down by the Apex Court in **OIL & NATURAL GAS CORPORATION LTD., V. SAW PIPES LTD., ((2003) 5 Supreme Court Cases 705)** and **ASSOCIATE BUILDERS V. DELHI DEVELOPMENT AUTHORITY ((2015) 3 Supreme Court Cases 49)**. Accordingly, this original petition stands allowed except item No.3 dealing with the profit for reduced scope of work, while giving liberty to the respondent raise a claim for Item No.6 through a separate and independent proceeding. No costs.

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M.M.SUNDRESH, J.

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**Pre-Delivery Order in
O.P.No.429 of 2016**

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