IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 02.07.2018

DELIVERED ON: 12.07.2018

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

OP No.57 of 2016

The Chief Engineer/CN/East,
Construction Office,
Southern Railway,
Egmore,
Chennai – 600 008. ...Petitioner

vs.

1.Mrs.V.Kalyani
2.Mr.Justice S.Jagadeesan,
Presiding Arbitrator,
National Stock Exchange of India Limited,
2nd Floor, Isphanai Centre,
Door No.123 – 124,
Nungambakkam High Road,
Chennai - 600 034.

3.Mr.Sridharan Krishnamurthy,
Arbitrator,
National Stock Exchange of India Limited,
2nd Floor, Isphanai Centre,
Door No.123 – 124,
Nungambakkam High Road,
Chennai - 600 034.

4.Mrs.P.S.Prema
Arbitrator,
National Stock Exchange of India Limited,
2nd Floor, Isphanai Centre,
Door No.123 – 124,
Nungambakkam High Road,
Chennai - 600 034. ...Respondents

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award of respondents 2 to 4 dated 28.5.2015 made in relation to disputes arising out of Agreement No.15/Dy.CE/CN/MAS/2007 in so far as the Award directing release of the performance guarantee and return of security deposit are concerned.

For Petitioner : Mr. C. V. Ramachandramurthy

For Respondents :Mr. J. Chandrasekaran for R1
for Mr.Amalraj S.Penikilapatti

ORDER

The instant petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, challenging the Award dated 28.5.2015, passed by the Arbitral Tribunal against the petitioner.

2.The Arbitral Tribunal comprising the second, third and fourth respondents as the Arbitrators passed the Award dated 28.5.2015, directing the petitioner to pay to the first respondent a sum of Rs.5,02,851/- within a period of 45 days from the date of the Award, failing which the Award amount shall carry simple interest at the rate of 12% per annum from the date of the Award till the date of payment.

3.The first respondent was appointed as a contractor by the petitioner under an agreement dated 10.04.2007, and the total value of the contract was Rs.39,03,354/-. There arose disputes between the first respondent and the petitioner and the dispute was referred to Arbitration in accordance with the Arbitration clause contained under the agreement.

4.The petitioner nominated the second, third and fourth respondents as the Arbitrators to decide the dispute between the petitioner and the first respondent on merits. Before the Arbitral Tribunal, the first respondent made a claim against the petitioner under seven different heads and the total claim was for a sum of Rs.17,00,000/-. The petitioner had also made a counter claim against the first respondent under two different heads for a total sum of Rs.3,90,336/-. Even though, the first respondent made a claim for Rs.17,00,000/-, the Arbitral Tribunal awarded only in its favour a sum of Rs.1,12,515/-, towards release of final bill i.e., unpaid gravel works Rs.1,95,168/- + interest for release of original FDR, for Rs.1,95,168/- towards the contractor performance guarantee, Rs.1,95,168/- towards return of security deposit.

5.Insofar as, the other claims made by the first respondent, the Arbitral Tribunal rejected them. Insofar as, the counter claim made by the petitioner, the Arbitral Tribunal rejected the counter claim *in toto*.

6.Heard. Mr.Ramachandramurthy, learned Counsel for the petitioner and Mr.J.Chandrasekaran for Mr.Amalraj S.Penikilapatti, learned Counsel for the first respondent.

7.The learned Counsel for the petitioner drew the attention of this Court to the Arbitral Award dated 28.5.2015 and submitted that the Arbitral Tribunal failed to take note of the fact that the first respondent committed breach of the contract by not completing the work as per the contract dated 10.04.2007. As per the contract, the value of the contract awarded to the first respondent is Rs.39,03,354/, but the first respondent was able to perform only a part of the contract valued at Rs.13,54,396/-.

8.According to the learned Counsel, in view of the breach of contract committed by the first respondent, the petitioner had to engage the services of another contractor to complete the work. According to the learned Counsel, though notices of termination were issued by the petitioner to the first respondent only in February and

April 2008, after the expiry of the period of the contract, the fact remains is during the pendency of the contract, the first respondent has not shown progress in his work and not completed the same within the stipulated time.

9.According to the learned Counsel, the reasons given by the first respondent for not showing progress in his work do not justify non completion of work. In such circumstances, the Arbitral Tribunal erred in not considering the issue as to who had committed breach in the performance of the contract. According to the learned Counsel, the Arbitral Tribunal has not given any finding on the issue of breach of contract. According to him, it is an accepted proposition that damages are to be levied only on the party which committed the breach and in the absence of any finding in this regard, the Award of the Aribitral Tribunal, directing refund of the performance guarantee and security deposit is not sustainable.

10.The learned Counsel for the petitioner, relied upon the decision of a Single Judge of this Court dated 27.11.2017 in OP No.544 of 2017, that termination order can be issued even after the expiry of the period of the agreement.

11.Per contra, the learned Counsel for the first respondent, drew the attention of this Court to Arbitral Tribunal's findings that the termination notice sent by the petitioner to the first respondent is not a valid termination since it was issued after the expiry of the contract, which was extended only up to 30.09.2007. The Arbitral Tribunal has given its findings on this issue, which is extracted hereunder:

> *"As per LOA, the period of completion is 6 months i.e. 02.05.2007. Based on claimant's requisition dated 03.05.2007, the contract was extended up to 30.09.2007. After that, the claimant has neither made any valid request for extension of currency nor a valid request to foreclose the contract. As per the available records, Seven days notice was issued on 24.04.2008, 48 Hrs notice was issued on 16.05.2008 and finally the contract was terminated on 24.06.2008.*
>
> *From the above it is very clear that, though the currency of contract was available only upto 30.09.2007, the contract was terminated on 24.06.2008, by which time a legally binding contract doesn't exist between both the parties. Hence, the termination is not tenable and the tribunal awards the release of FDR amount of Rs.1,95,168/- (which was already encashed) with interest thereon accrued, up to the date of encashment of FDR."*

12.Similarly, the learned Counsel for the first respondent also drew the attention of this Court to the findings on the claim made by the first respondent for return of security deposit of Rs.2,00,000/-, furnished by the contractor. The findings of the Arbitrator on this issue, which is supported by reasons is extracted hereunder:

Item No.3: Return of Security Deposit furnished by the contractor – Rs.2,00,000/-

As discussed above for Claim No.2, though the currency of contract was available up to 30.09.2007, the contract was terminated on 24.06.2008, by which time a legally binding contract doesn't exist between both the parties. Hence, the termination is not tenable and the tribunal awards a sum of Rs.1,95,968/- which was already forfeited.

AWARD – Releasing of SD amount of Rs.1,95,168/-

13.Insofar as, the Award of Rs.1,12,515/- towards release of final bill (i.e. unpaid gravel works), the petitioner has not raised any objection for that portion of the Award.

14.The learned Counsel for the first respondent in support of his submissions that the termination notice issued beyond the pendency period is an invalid termination, relied upon the decision of the Hon'ble Supreme Court in the case of ***M/s.Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by L.R's Appellants v. State of Maharashtra*** reported in ***AIR 1979 SC 720.*** Paragraph No.8 of the said judgment cited supra referred to by the learned Counsel for the first respondent, is extracted hereunder:

***8.**It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. The emphasised portion of the aforesaid statement of law is based on Lamprell v. Billericay Union[(1849) 3 Exch 283, 308] ,Webb v.Hughes[(1870) LR 10 Eq 281] andCharles Rickards Ltd. v. Oppenheim [(1950) 1 KB 616 : (1950) 1 All ER 420 (CA)]...*

15.Relying upon the said judgment, the learned Counsel for the first respondent submitted that when the contract provides for extension of time for certain contingencies, time is not the essence of the contract. According to him, in the instant case, the bills submitted by the first respondent were paid by the petitioner and the extension was granted only by the petitioner and therefore, there is no breach of contract committed by the first respondent.

16.This Court, after considering the materials available on record and after hearing the submissions of the respective Counsels comes to the conclusion that the learned Arbitrator has passed a reasoned Award giving reasons in accordance with the settled provisions of law that once the contract provides for extension of time on account of certain contingencies and such extensions were granted, time is not the essence of the contract. As seen from the judgment by the Hon'ble Supreme Court cited by the learned Counsel for the petitioner, the contract cannot be terminated after the expiry of the period of the contract. The Arbitrator has rightly held the termination of the contract by the petitioner to be invalid as termination notice is beyond the pendency of the contract. The Award of Rs.1,12,515/- towards release of final bill i.e. unpaid gravel works of Rs.1,95,168/- + interest for release of original FDR for Rs.1,95,168/- furnished towards contractor performance guarantee and Rs.1,95,168/- for return of security guarantee furnished by the contractor is in accordance with law and do not call for any interference by this Court. The scope of Section 34 is limited. This Court, cannot re-appreciate the evidence available with the Arbitrator. The Arbitrator has passed the reasoned and well considered Award in accordance with law and therefore, no interference is called for from this Court.

17.The Hon'ble Supreme Court in a Catena of decisions starting from ***Renusagar Power Company Ltd vs. General Electric Company 1994 Supp (1) SCC 644 to the recent Associated Builders Vs DDA (2015) 3 SCC 49*** has held only under the following grounds the Arbitral Award can be challenged under Section 34 of the Arbitration and Conciliation Act:

(a) Procedure contemplated under Arbitration and Conciliation Act was not followed by the Arbitrator.
(b)The Arbitral Award is a non speaking Award.
(c)The Arbitrator has transgressed his jurisdiction.
(d)The Arbitral Award is in conflict with the public policy of India.
(iii)An award would be regarded as conflicting with the public policy of India if:-
(a) it is contrary to the fundamental policy of Indian law, or
(b) it is contrary to the interests of India,
(c) it is contrary to justice or morality,
(d) it is patently illegal, or
(e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.

(iv)An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if
(a) it disregards orders passed by superior courts, or the binding effect thereof, or
(b) it is patently violative of statutory provisions, or
(c) it is not in public interest, or
(d) the arbitrator has not adopted a "judicial approach", i.e.

has not acted in a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or

(e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or

(f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or

(g) the principles of natural justice have been violated.

(v)Insofar the "patent illegality" has to go to the root of the matter. Trivial illegalities are inconsequential.

(vi) Additionally, an award could be set aside if

(a) either party was under some incapacity, or

(b) the arbitration agreement is invalid under the law, Or

(c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

(d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

(e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(g) the award contravenes the Act, or

(h) the award is contrary to the contract between the parties.

(vii) "Perversity", as a ground for setting aside an arbitral award,has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which

(a) the findings, in the award, are based on no evidence, or

(b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or

(c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) At the same time,

(a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse",

(b) if the view adopted by the arbitrator is a plausible view, it has to pass muster,

(c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.

(ix)"Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.

18.The petitioner has not satisfied any of the grounds mentioned above to interfere with the Award dated 28.5.2015.

19.Accordingly, the Original petition shall stand dismissed. However, there shall be no order as to costs.

12.07.2018

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Internet: Yes

Index: Yes

Speaking order/Non-Speaking order

ABDUL QUDDHOSE, J.

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Pre-delivery order in
OP No.57 of 2016

12.07.2018