IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 05.07.2019

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THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.P. No.45 of 2009

The Controller of Stores
New Joint Office,
Southern Railway,
Ayanavaram,
Chennai – 600 023.
Represented by Deputy
Chief Materials Manager .. Petitioner

-vs-

1.M/s.GEE CAB Industries Limited,
E-447, RIICO Industrial Area,
Chopanki District,
Alwar,
Rajasthan – 301 707.

2. Sri Manoj Mahajan,
Dy.Chief Electrical Engineer,
(Traction Rolling Stock),
Southern Railway,
Chennai – 600 003.
(Sole Arbitrator) .. Respondents

Prayer: Petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 to set aside the arbitral award of the 2nd respondent dated 21.07.2008 made in relation to the disputes raised by the 1st respondent against the petitioner in relation to Purchase order No.82/04/0042/1/01597 dated 05.01.2005 in so far as Claim No.1 is concerned.

For Petitioner : Mr.M.T.Arunan

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

O R D E R

This petition has been filed to set aside the arbitral award of the 2nd respondent dated 21.07.2008 made in relation to the disputes raised by the 1st respondent against the petitioner in relation to Purchase Order No.82/04/0042/1/01597, dated 05.01.2005 in so far as Claim No.1 is concerned.

2. The brief facts leading to file this petition is as follows:

The petitioner in terms of the purchase order dated 05.01.2005 awarded contract for supply of "Railway Signalling Cable" under ground copper size of 19C X 1.5 sq.mm unscreened to specification IRS-S.63/89 with amendment No.5 under category Trial Order, with Bill Passing Officer as per Annexure 'I', Terms and Conditions as per Annexure 'II' and PVC, short for Price Variation Clause with a delivery date of 30.06.2005. Subsequently, the petitioner in terms of modification of purchase order dated 01.07.2005 re-fixed the delivery date.

3. Learned counsel appearing on behalf of the petitioner would submit that the claimant has preferred a claim for price escalation and also for the loss suffered by the claimant.

4. Learned counsel appearing on behalf of the respondent would submit that the supply has not been made as agreed. Therefore, there cannot be any price variation.

5. The learned Arbitrator has considered the entire materials on record and recorded the factual findings. The only contention of the counsel for the petitioner that when the contract stipulates the delivery date, the supply has not been done by the respondent within a specified time. There was a delay of more than 1-1/2 years, therefore, there cannot be any price variation. Hence, it is the contention of the learned counsel for the petitioner that the learned Arbitrator has fixed the value for price variation beyond the contract and submitted that the award cannot be sustained.

6. The learned counsel for the respondent would contend that the price variation in fact is agreed by the respondent and the delivery

date also re-fixed by the petitioner was really established. All these facts have been taken note by the Arbitrator. Hence, submitted that this Court cannot re-appreciate the entire evidence. Therefore, prays for dismissal.

7. Before going to the merit submission of the learned counsel, it is relevant to refer the factual findings of the learned Arbitrator.

> *"12. In paragraph (6) above it has been noted that the respondent had granted the price variation during the 're-fixed' delivery period of 15.07.2005 albeit with a difference of a month in the date/month the rates of which shall be applicable. It has been further noted that the 're-fixed' DD entitled the claimant of the price variation dues. The only dispute that emerged there for adjudication is whether the rates of April, 2005 shall be applicable as claimed by the Claimant or that of May,2005 as applied by the Respondent. The respondent in this behalf has submitted that the rates prevailing in the month of May, 2005 shall be applicable for price variation purpose which happens to be 2 months prior to the contracted delivery date of 15.07.2005. This is not consistent with the provisions of Annexure 'III' of the PO, "The date of delivery is the date on which the cable is notified as being ready for inspection/despatch (in the absence of such notification, date of manufacturer's despatch note is to be considered as the date of delivery)*

or the contracted delivery date". The claimant had duly notified the respondent of the date on which the material is ready for inspection/despatch in terms of his call letter for inspection dated 20.06.2005. Hence, the respondent's counter cannot be acceded to. The claimant's claim, therefore stands. This was the first dispute to be adjudicated upon.

13. The second dispute that arises from the facts brought out in paragraph(7) onwards is whether PVC is applicable during the DP refixed by the respondent from 15.07.2005 to 31.10.2006 in terms of MOP dated 1.9.2006. The respondent has denied the PV on the grounds that 'As per IRS conditions of contract, 3400(C) that notwithstanding any stipulation in the contract for increase in price on any other ground, no such increase which takes place after the date of delivery stipulated in the contract shall be admissible on such of the said stores as are delivered after the expiry of delivery period stipulated in the contract' as per his submissions vide paragraph (3) of his counter. Interpretably, the said provisions of the Indian Railways Standard Conditions of Contract, for short IRS Conditions of Contract, 3400(C) pertain to the inadmissibility of price increase after the date of delivery. The Claimant's claims are, however, not after the date of delivery but within the date of delivery duly refixed by the respondent as sated above. Further, the claimant had all along been insisting for re-fixation of the DP and, was not agreeing to execute the contract *under the extended period. This obviously has financial implications. The respondent on his part had all along been refusing to re-fix the DP and insisting on granting only extensions. This too had, obviously, financial implications. Else, if there were no financial implications, there was no reason for the respondent not to re-fix the DP in the first instance itself, ie, beyond 15.7.2005. So, the fact that the re-fixing of the DP has substantial financial implications has in effect been admitted by the respondent. Further, if the rates after price variation were not beneficial to the respondent, why the respondent did not fore-close the contract and go in for a fresh contract is a question that begs answer. Furthermore, the respondent has treated the originally refixed date of 15.7.2005 as the 'contracted delivery date of 15.7.2005' in terms of his submissions vide paragraph(3) of his counter. Likewise, why the subsequently refixed DD of 31.10.2006 cannot be treated as contracted delivery date of 31.10.2006 has not been clarified by the respondent. Furthermore, the respondent has sought to rely on Clause 3400(D) of the IRS Conditions of Contract for disallowing the price variation due to hike in the cost of raw material. However, the said Clause deals with firstly, the taxes and duties and not the material cost and, secondly, for the contractual currency after the date of delivery, not prior. Hence, the respondent's counter cannot be acceded to the claimant's claim, therefore, stands."*

8. The above factual finding recorded by the learned Arbitrator makes it clear that the arbitrator has considered the entire documents, particularly, the documents of the respondent and factually found that the claimant is entitled for the amount as ordered by the Arbitrator. When the learned Arbitrator has factually arrived at a finding and taken note of all the documents and found that the delivery date has been re-fixed by the respondent, the delay is due to non-inspection by petitioner.

9. Based on the documents and having recorded the factual findings, the learned Arbitrator has passed the award. He also taken note of the letter dated 17.11.2006 issued by the petitioner herein. The letter dated 17.11.2006 reads as under:

> *"With reference to, your letter No cited above, the following remarks are offered to the enclosure to your letter of FA&CAO/CN/Ms.*
>
> *The applicability of PVC clause for the extended period is not included as one of the tender condition. PVC Clause is not applicable for supplies made during extended delivery period. However, in this case, Due Date of delivery is not extended. Due Date of delivery is re fixed from 30.06.205 to 15.07.05 and further it is*

re fixed from 15.07.2015 to 31.10.06. Hence bill may

N.SATHISH KUMAR,J.

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be passed as per PO original terms and conditions including PVC."

10. Considering the above, the learned Arbitrator has recorded the factual findings. Hence, this Court cannot sit as an Appellate Court to re-appreciate the entire evidence and the award cannot be interfered. The award is based on the evidence and this Court did not find any materials to interfere with the well reasoned award.

11. Accordingly, the original petition is dismissed. No costs.

05.07.2019

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Index:Yes/No
Internet:Yes/No
Speaking order:Non-speaking order
Note: Issue order copy on 12.07.2019.

O.P. No.45 of 2009