IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Judgment : 29.04.2019	Date of Pronouncing Judgment 04.06.2019

Coram

The Hon'ble Mr.Justice R.Subbiah
and
The Hon'ble Mr.Justice Krishnan Ramasamy

O.S.A.Nos.94 and 95 of 2009

S.P. Lakshmanan ...Appellant in both O.S.As

Vs.

1. The Superintending Engineer,
Tamil Nadu Urban Development Project,
Chennai - 600 015.

2. Shri.Selvanayagam Thomas, B.E., M.Sc.,
Chief Engineer (H) (Retd.)
Chairman, Arbitration Committee,
Plot No.87, Poriyalar Nagar,
Madurai - 625 014.

3. Shri. P.L.Manickam, M.E.,
Chief Engineer (H) (Retd.)
Member, Arbitration Committee,
No.28/A-5, Babu Rajendra Prasad Street,
West Mambalam, Chennai - 600 033.

4. Shri N.R.Jayavelu, B.E.,
Chief Engineer (H) (Retd.)
Member, Arbitration Committee,
No.27, H.I.G., 80 Feet Road,
Anna Nagar, Madurai - 625 020.

...Respondents 1 to 4 in both OSAs.

Prayer in O.S.A.No.94 of 2009:

Appeal filed under Order XXXVI Rule 11 Original Side Rules read with Clause 15 of the Letters Patent, against the judgment and decree dated 23.08.2006 in O.P.No.390 of 2000 on the original side of this Court.

Prayer in O.S.A.No.95 of 2009:

Appeal filed under Order XXXVI Rule 11 Original Side Rules read with Clause 15 of the Letters Patent, against the judgment and decree dated 23.08.2006 in O.P.No.118 of 2000 on the original side of this Court.

Appearance of t
he counsel in both Appeals :-

For Appellant : Mr.T.R.Raja Gopalan, Senior Counsel for
Mr. T.R.Rajaraman

For Respondents: Mr. Sricharan Rangarajan
Special Government Pleader (CS)
assisted by
Mr.A.Dev Narendiran
Government Advocate (CS)

COMMON JUDGMENT

[Order was delivered by Krishnan Ramasamy, J.,]

The Original Side Appeal No.94 of 2009 has been filed by the appellant/claimant against the judgment and decree dated 23.08.2006 passed by the learned Single Judge, in O.P.No.390 of 2000. The appellant/claimant also filed O.S.A.No.95 of 2009 against the judgment and decree dated 23.08.2006 made in O.P.No.118 of 2000.

2. Since both the intra Court Appeals have been instituted against the common order passed by the learned Single Judge, dated 23.08.2006, in O.P.No.118 of 2000, filed by the appellant and O.P.No.390 of 2000 filed by the first respondent, they were decided/disposed of by this common judgment.

3. Facts of the case, which led to the filing of these Appeals in gist are as follows:-

i) The first respondent, Government of Tamil Nadu, represented by Superintendent Engineer Highways, Tamil Nadu Urban Development Proeject, Chennai, invited tenders for the work of widening inner ring road to four lanes from km 11/720 to

17/450 in Madras City, including widening of major bridge at km.13/729 and Twin Bridge at Km.13/750 and junction improvements at km.11/720, 15/8 and 17/450, fixing the last date of receipt of tender on 04.09.1991.

ii) The appellant herein, being the Contractor, submitted his tender on 04.09.1991, quoting a sum of Rs.5,63,77,067/- as contract amount for the above said work and stating that the tender should remain valid for 120 days, i.e. 04.01.1992. The first respondent did not communicate to the appellant about the acceptance of his tender within the said date, but, thought for extending the validity of the contract. The appellant had extended the validity of the tender beyond 04.08.1992. After lapse of five months, the first respondent, vide letter, dated 22.01.1993, requested the appellant's willingness for extending the validity beyond 04.08.1992, explaining the developments and subsequent market rates. The appellant, vide letter, dated 28.01.1993 expressed his willingness to extend the validity subject to certain conditions and offered to execute the work at 1992-1993 schedule of rates. Subsequently, the first respondent requested the appellant to furnish item wise rates and the appellant furnished the same vide letter, dated 03.05.1993 and quoted revised contract amount to Rs.8,71,44,712/-. Since there was no positive response, the appellant again informed the first respondent, vide letter dated 10.06.1993 that the validity is restricted only upto 15.07.1993.

iii) The first respondent, in its letter, dated 09.09.1993, requested the appellant to extend the validity for a period of three months beyond 15.09.1993, without modifying the tender condition as per clause 2.12.2 of Volume I of bid document. The said Clause 2.12.2 reads as follows:-

> "2.12.2 (2.12.2, the tender shall remain valid and open for acceptance for a period of 120 (one hundred and twenty) days after the date of tender opening prescribed in clause 2.17.) In exceptional circumstances, prior to expiry of the original tender validity period, the Engineer may request the tenderer for a specified extension in the period of validity. The request and responses thereto shall be made in writing or by cable or telex. However, the tenderer agreeing to the request will not be permitted to modify his tender, the tenderer may refuse the request without forfeiting his earnest

> money. The provisions of clause 2.9 regarding forfeiture of earnest money shall continue to apply during the extended period of tender validity"

iv) The appellant, by his letter, dated 15.09.1993 conveyed the acceptance of the validity of the tender upto 15.10.1993, subject to the contract price of Rs.8,71,44,712/- and the same was finally approved by the Government, in G.O.Ms.No.1526 P.W.D. dated 02.11.1993. The first respondent also communicated the acceptance of the tender, amounting to Rs.8,71,44,712/- vide letter dated 06.11.1993. As consequence thereof, the appellant also executed an agreement on 24.11.1993, and the same was accepted by the first respondent on 26.11.1993. After commencement of work and after 1 ½ months of acceptance of agreement, the first respondent requested the appellant to attest the corrections made in the agreement, altering the operative date of price variation clause as 28.01.1993. The appellant also signed the corrections, however, recording his protest. The performance under the contract was complete in all respects by the appellant.

v) During the course of execution of work, since dispute arose on certain issues, the appellant preferred claim petitions with the first respondent for settlement of dues. The first respondent rejected the same. Since the agreement provides for settlement of the dispute by Arbitrators, the appellant initiated arbitral proceedings by filing detailed claim statement before the Arbitral Tribunal. The first respondent also made a counter claim before the Arbitral Tribunal. The Tribunal entered on reference on 26.04.1997 and finally, passed the award on 19.09.1998 granting the relief sought for by the appellant/claimant vide claim Nos.1, 2, 3A, 3B, 3C, 3D, 3E, 4 and 5 A, 5B, 5C and 5D and rejected the counter claim made by the first respondent.

vi) As against the award passed by the Arbitral Tribunal, O.P.No.118 of 2000 was filed by the appellant/claimant and as against the rejection of the counter claim, O.P.No.390 of 2000 was filed by the first respondent to set aside the same.

vii) The learned Single Judge of this Court, by a common judgement disposed of the Original Petitions in and by which, the award of the Arbitral Tribunal in respect of claim Nos.1, 4, 5(B) and 5(D) were rejected and the award in respect of Claim Nos.3 A, 3B, 3C, 3E, 5 A and 5C were upheld and the counter claim filed by the first respondent was allowed. The details with regard to the award passed by the Arbitral Tribunal as well as the learned Single Judge of this Court, vide the impugned order are mentioned below in a tabulated column:-

Claim No.	Heads of the Claims	Amount awarded by the Arbitrator	Award Amount as modified by the learned Single Judge in O.P.Nos.118 and 390 of 2000
1.	Towards escalation for general labour, general materials and POL	Rs.70,77,990/-	Rejected
2.	Extra cost for formation for embankment with carted earth with longer lead	Nil	Nil
3 A	Dismantling cement concrete, masonry of splayed wing wall of slab culvert at KM 15/600 and 15/667	Rs.5,73,996	Rs.5,73,996
3 B	Removal of unsuitable soil (refuse fill) in areas, where, embankment is to be formed	Rs.1,86,577	Rs.1,86,577
3C	Provision of 20 cm thick kerb stones	Rs.5,72,248	Rs.5,72,248
3D	Provision of retaining wall for the major bridge at KM 15/700	Nil	Nil
3E	Provision of tack coat	Rs.3,12,689	Rs.3,12,689
4	Jungle clearance	Opinion of Court is sought for	Rejected

Claim No.	Heads of the Claims	Amount awarded by the Arbitrator	Award Amount as modified by the learned Single Judge in O.P.Nos.118 and 390 of 2000
5	Compensation on the loss suffered by the claimant on account of various breaches of contract committed by the respondent a) Loss of idle men and machinery under productivity of men and machinery b) Compensation for extra expenditure incurred due to price rise during the extended period of contract c) Compensation due to extended performance guarantee d) Compensation for loss due to retention money as per terms and conditions of contract	Rs.7,62,516 Rs.40,18,069 Rs.87,144 Rs.7,24,178	Rs.7,62,516 Rejected Rs.87,144 Rejected
6	Counter claim of the respondent for refund of Rs.55,90,026 wrongly paid to the contractor towards escalation from closing date of tender on 28.01.1993	Rejected	Allowed

viii) Aggrieved by the said common order of the learned Single Judge, the appellant/claimant has preferred the present Appeals, as already stated supra.

4. It is the contention of the learned Senior Counsel appearing for the appellant/claimant that the Arbitral Tribunal elaborately considered the material facts with reference to the correspondences between the parties, the tender document, agreement, etc., and passed the award of Rs.70,77,990/- in respect of claim No.1. The learned Senior Counsel further

submitted that, the Arbitral Tribunal, while passing the award, took into consideration the important factor that the operative date fixed for price escalation adjustment as per the tender, was from the closing date of the tender, i.e. 04.09.1991, and also found that there cannot be different dates for general labour, general materials and POL. Therefore, under these circumstances, the Arbitral Tribunal arrived at the conclusion that the corrections made in the agreement were only an afterthought of the first respondent and rightly decided that the operative date for price escalation is only the date of receipt of tender, i.e., 04.09.1991 and not 28.01.1993 and awarded a sum of Rs.70,77,990/-, as worked out by the first respondent in Exs.D.11 and D.12, vide claim No.1 in favour of the claimant. Whereas, the learned Single Judge, by taking into consideration the submission made by the learned Additional Advocate General for the first respondent that the claimant himself agreed to the price escalation as on 28.01.1993, vide his letter, dated 28.01.1993, but the Government, at the time of signing the contract had omitted to alter the date 28.01.1993 as the date for price escalation and erroneously, allowed the old date as the date for closing the tender for price escalation, and though the Arbitral Tribunal had considered this contention in detail and found that the first respondent was not for changing any of the tender conditions while accepting the increased value of contract, erroneously awarded claim No.1, the learned Single Judge interfered with the award passed by the Arbitral Tribunal under Claim No.1 and set aside the same.

4.1 The learned Senior Counsel further submitted that, aspect with regard to claim No.1 was dealt by the Arbitral Tribunal in detail and found that the case of the first respondent cannot be accepted as the corrections to the agreement were made long afterwards and that the corrections made were only an after thought of the first respondent. But the learned Single Judge failed to take into consideration such findings and rejected Claim No.1, which is liable to be set aside. The learned Senior Counsel contended that the entire discussion of the learned Single Judge, in para Nos.15, 16 and 17 of the order show that the learned Single Judge decided the case, as if, he is an Appellate Authority sitting over an appeal and not as a petition under Section 34 of the Arbitration Act. Further, the learned Senior Counsel drawn the attention of this Court to the observations made in Para No.48 of the order, wherein, the learned Single Judge after referring to a decision reported in AIR 1987 SC 2316 in the case of [Delhi Municipal Corn Vs. M/s. Jagan Nath Ashok Kumar]observed as follows:

> "Why should the Government refuse to consider the escalation date from 28.01.1993 and why should the Government pay more money

to the contractor by considering the date from 04.09.1991 when the contractor himself agreed to price escalation from 28.01.1993."

4.2 The learned Senior Counsel submitted that the above findings of the learned Single Judge is clearly against the facts placed before the Arbitral Tribunal, wherein, the learned Arbitrators categorically found that it is the Government, which insisted on the terms of the tender condition to be strictly adhered to even while the contract rate was accepted by them and that the corrections made to the agreement long afterwards was an afterthought of the Government. Therefore, he submitted the learned Single Judge committed an error in reversing the award in respect of claim No.1 as though he is deciding an Appeal.

4.3 Insofar as the rejection of Claim No.4, 5B and 5D, the learned Senior Counsel submitted that the Arbitral Tribunal before awarding such claims, carefully gone through the materials facts and evidence and rightly held that the appellant is eligible for compensation under those claims, whereas, the learned Single Judge, despite taking note of the decision of the Hon'ble Supreme Court, in the case of Delhi Municipal Corp. Vs. M/s. Jagan Nath Ashok Kumar, reported in A.I.R. 1987 S.C. 2316, wherein, it is held that, "the reasons given by an Arbitrator in making his award cannot be challenged as the Arbitrator is a Sole Judge of the quality as well as the quantity of evidence, set aside the award in respect of Claims No.4, 5 B and 5C, by holding that, it may be possible that on the same evidence, the Court might have arrived at different conclusion than the one arrived at by the Arbitrator but that by itself is not a ground for upholding the award of the Arbitrator.

4.4 The learned Senior Counsel submitted that due to delay in accepting the tender, the appellant incurred huge expenditures and considering the same, the Arbitral Tribunal awarded Rs.40,18,069 in respect of claim No.5B and Rs.87,144/-, in respect of claim No.5D, whereas, the learned Single Judge rejected the award passed under Claim Nos.5B and5D by holding that, when the parties entered into the contract on 24.11.1993, the contract amount was revised to Rs.8,71,44,712/- and hence, expenditure incurred due to the extension of validity of contract cannot be paid. Therefore, the learned Senior Counsel prayed for setting the impugned order passed by the learned Single Judge, in respect of those claims.

5. Per contra, the learned Special Government Pleader for the respondents submitted that the Appeals are not maintainable, as the scope of the Appeal under Section 37 of the Arbitration Act as against the judgment of this Court under

Section 30 of the said Act is very limited. It is his further submission that under section 30 of the Act, this Court can interfere with the arbitral award when the Arbitrator had misconducted the arbitral proceedings by ignoring the relevant clauses of the contract and evidence and awarding the claims without any proof of substantiation.

5.1 The learned Special Government Pleader further submitted that the Hon'ble Supreme Court, while construing the powers of the Court under Section 30 of the Arbitration Act, in the case of Coimbatore District Podu Thozillar Sangam, represented by its Secretary Vs. Balasubramania Foundry and others reported in (1987) 3 SCC 723, held that the Court can set aside the award on the grounds of misconduct of the arbitrators, award passed against ignoring the contract clauses, error of law apparent on the face of the record, award passed beyond the scope of reference and exceeding his jurisdiction.

5.2. The learned Special Government Pleader, after referring to aforesaid provisions and principles, submitted that the operative date as provided in the contract is 28.01.1993 and the appellant's consent to the modification of the operative date is clearly evident from letter dated 28.01.1993, which fact was not considered and conveniently ignored by the Arbitral Tribunal well while awarding the claim No.1. Therefore, he submitted that the learned Single Judge having found that the Arbitrators had misconducted the arbitral proceedings and the award had been passed ignoring the relevant evidence, interfered with the award of the Arbitral Tribunal under Claim No.1 and rejected the same. The learned Special Government Pleader, further submitted that even in respect of the Claim Nos.4, 5 B and 5 D, learned Single Judge after adverting to all relevant facts, figures, factors and records, has rightly set aside the award passed by the Arbitral Tribunal under such claims and allowed the counter claim of the first respondent and the same requires no interference and prayed for dismissal of the Appeals.

6. Heard the learned Senior Counsel appearing for the appellant and the learned Special Government Pleader for respondents and perused the materials on record.

7. Insofar as the award of the Arbitral Tribunal vide claim No.1 is concerned, it is seen that, as per the tender document, the operative date

fixed for price escalation adjustment is the closing date of the tender, i.e, 04.09.1991. In fact, the appellant in letter, dated 28.01.1993 stated to the effect as follows:- " I agreed to change the date of effect of price escalation from the date now I furnish my option of validity. I may be permitted to have price escalation as on today." Subsequently, the agreement was executed on 24.11.1993, which was accepted by the respondent on 26.11.1993. However, the Arbitral Tribunal conveniently ignored the letter of the appellant, dated 28.01.1993, marked as Ex.C.2 and came to the conclusion that the corrections made to the agreement were only afterthoughts and fixed the operative date for price escalation as from the date of receipt of tender dated 04.09.1991 and passed award vide claim No.1. However, this view was not accepted by the learned Single Judge. In fact, we are also not in a position to agree with the award passed by the Arbitral Tribunal for the reason that the appellant agreed for change of the operative date for price escalation with effect from 28.01.1993, as evident from his letter dated 28.01.1993, Ex.C.2 and the same was mentioned in the contract/agreement and agreed by both the parties. However, after 1 ½ months, entering into the agreement, corrections were made to incorporate the operative date as 28.01.1993, as mentioned by the appellant in his letter, dated 28.01.1993 and such corrections were made based on certain documents and evidence. Therefore, we cannot come to the conclusion that corrections were made by way of coercion or any other manner as alleged by the appellant. Accordingly, we agree with the findings of the learned Single Judge and the consequential rejection of claim No.1.

8. As far as claim No.4, Jungle Clearance is concerned, the Arbitral Tribunal has not dealt with this claim and awarded any compensation and referred the matter to the learned Single Judge for consideration. In this context, we would like to point out that the Arbitral Tribunal is a Fact Finding Authority and they are duty bound to thoroughly analyse the evidence and verify the fact and arrive at conclusion, whereas, in the present case, they themselves failed to arrive at the conclusion and to award any compensation. In these circumstances, the learned Single Judge rightly refused to fix any amount and rejected claim No.4 and we do not find any error in the same and we also agree with the findings of the learned Single Judge, as this Court cannot act as Fact Finding Authority and pass any award by playing the role of Arbitrators.

9. Similarly, insofar as Claim No.5B and 5D are concerned, we are not inclined to interfere with the findings of the learned Single Judge in rejecting such claims. Though the learned Senior Counsel for the appellant submitted that due to delay in accepting the tender, the appellant incurred huge expenditures, and as such, the appellant is entitled for compensation, the same is not sustainable, for the reason that originally, the contract price was Rs.5,63,77,067/-. Subsequently, due to the reason on extending the operative date

of the tender from time to time, and finally, when the parties entered into the contract on 24.11.1993, all the aspects of price escalation were considered and contract amount was revised to Rs.8,71,44,712/-. In these circumstances, the learned Single Judge rightly interfered with the award of the Arbitral Tribunal and held that the award of Rs.24,00,000/- towards the expenditure incurred due to the extension of validity of contract cannot be allowed as the same clearly would amount to going beyond the scope of the contract. In these circumstances, we are not in a position to interfere with the impugned order passed by the learned Single Judge.

10. In view of the above findings, the counter claim filed by the first respondent for refund of Rs.55,90,026 wrongly paid to the appellant/contractor towards escalation price from closing date of tender till 28.01.1993, which was allowed by the learned Single Judge is hereby confirmed.

11. In the result, both the Appeals stand dismissed. No costs.

Sd/-
Assistant Registrar(CS-IV)

//True copy//

Sub Assistant Registrar

sd

To
The Sub Assistant Registrar
Original Side,
High Court, Madras

+2cc to Mr.T.R.Raja Gopalan, Advocate SR.No.45175 & 45176

+1cc to Special Government Pleader (CS)SR.No.45472

O.S.A.Nos.94 and 95 of 2009

MP(CO)
GMY(03/07/2019)