

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.08.2019

CORAM :

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

O.P.No.159 of 2010

M/s.Chitrahar Traders
Represented by its Proprietor R.Krishnamurthy
69, Uthukuli Main Road,
Karumampalayam,
Manarai, Tiruppur – 7.

... Petitioner

Vs.

1.M/s.Neyveli Lignite Corporation,
Represented by its Chairman cum Managing Director,
Neyveli.

2.Mr. Justice J. Kanakaraj (Retd.)
Presiding Arbitrator,
No.7, Justice Ramanujam Road,
Sashtri Nagar,
Chennai – 600 041.

3.Mr. Justice K. Govindarajan (Retd.)
Arbitrator,
No.5, Justice Ramanujam Road,
Sashtri Nagar
Chennai - 600 041.

4.Mr. Justice R. Balasubramaniam (Retd.)
Arbitrator,
No.5, Tiger Varadhachari 1st Street,
Kalakshetra Colony,
Beasant Nagar, Chennai.

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the impugned award dated 02.11.2009, passed by the respondents 2 to 4, in so far it went against the petitioner.

For Petitioner : Mr.G.Arul Murugan

For R1 : Mr.Nithyanandam

ORDER

This Original Petition has been filed, challenging an award dated 02.11.2009, passed by an Arbitral Tribunal constituted of three Arbitrators.

2.For the sake of convenience, 'petitioner' and '1st respondent' will be referred to by their rank in the Arbitral proceedings, i.e., as 'claimant' and 'respondent' respectively.

3.The brief facts of the case would run thus:

3.1.The respondent M/s.Neyveli Lignite Corporation Ltd. is a Central Public Sector Undertaking and it is primarily engaged in mining lignite and generation of electricity using lignite. In the year 2005, the respondent decided to close down Briquetting and Corborandum Plant, erected in 1960's and to dispose of the said plant as a whole in one lot on 'AS IS WHERE IS BASIS' and on 'NO COMPLAINT BASIS'. In January 2005, e-auction notice was issued by M/s.MSTC, which is also a Central Public Sector Undertaking.

E-auction was held on 19th and 20th January 2005. The claimant M/s.Chitrahar Traders became the successful bidder for a value of Rs.70,01,00,019.00. As contemplated under the special terms and conditions of the e-auction, the claimant deposited a sum of Rs.30,00,000/- (Rupees thirty lakhs only) as Caution Deposit. On the same day, i.e., on 20.01.2005, M/s.MSTC Ltd., who conducted the auction, sent Sale Intimation Letter to the claimant. In the said letter, the claimant was requested to deposit a sum of Rs.7,00,10,002.00 by way of DD/PO in favour of the respondent, within 7 days from the date of closure of e-Auction or as per the special terms and conditions of the e-Auction. The claimant deposited the said amount by way of Demand Drafts, along with letter dated 27.01.2005. On 16.02.2005, M/s.MSTC Ltd. sent Sale Order/Acceptance letter to the claimant, in which, the obligation of the claimant to pay Sales Tax @ 12% with surcharges, 5% and 1.1% I.T. with 2% Educational Cess on I.T. on the total value of scrap was mentioned. Payment schedule was also given in the said letter. It was also indicated that the period for taking delivery of the material, without ground rent was 300 days from the date of issuance of delivery order by the respondent.

3.2.The claimant opted to make payments as per Clause 8(b)(ii) of the terms and conditions, under which, the claimant can make payments in installments. Admittedly, the payments by the claimant were not made in time, as per the said clause. It is relevant to mention that the claimant has

paid the amounts belatedly. With respect to Sales Tax, the respondent collected 12% with surcharges as per the Sale Order and paid to the Department. However, the dispute regarding quantum of tax is pending before this Court.

3.3. In view of the belated payment of 40% of the total lot value, late payment charges @ 1% of the total lot value for one week was calculated and forfeited from EMD by the respondent. It is relevant to mention that, as per the terms and conditions, the claimant is liable to pay late payment charges @ 1% of the total lot value per week up to 3 weeks. The respondent had levied and had recovered a sum of Rs.70,01,000/- towards late payment charges calculated @ 1% for one week only. Further, since, the claimant had paid the payable amounts belatedly, the respondent charged 12% interest for the period of delay along with interest for delay in payment of Sales Tax at 12%, which comes to Rs.91,99,342/-. The respondent, in total, withheld a sum of Rs.1,62,00,342/- from EMD made by the claimant.

4. The claimant referred this matter for Arbitration before the Arbitral Tribunal, putting forth the following claims :

(1) To direct the respondent to release the sum of Rs.1,62,00,000.00 to the claimant which had been withheld from the EMD, towards penalty and interest.

(2) To direct the respondent to pay the claimant the sum of Rs.1 crore as consolidated interest for the period from

28.04.2006 to 03.05.08 for withholding EMD to the tune of Rs.10062,00,000.00

(3) To direct the respondent to pay interest @ 18% per annum on the claimant from the date of notice of Arbitration viz., 03.05.08.

(4) To direct the respondent to pay the cost to Arbitrator including the legal cost incurred by the claimant.

Additional Claims:

To direct the respondent to pay the sum of Rs.5,36,00,000/- to the claimant for the following:

a) Rs.7,00,000.00 for the delay of 21 days in issuing Sale Order

b) Rs.2,80,00,000.00 towards the delay of 28 days in issuing the Delivery Order.

c) Rs.1,40,00,000.00 towards the delay of 14 days in issuing the passes by C.I.S.F.

d) Rs.84,00,000.00 for the loss sustained by the employees, Men and service without work due to non delivery for delay of 14 days.

e) Rs.25,00,000.00 towards delay in releasing the Bank Guarantee payment of installment amount.

f) Interest @ 24% for the sum of Rs.5,36,00,000.00 from the date of claim till date of realization.

5.It is the case of the respondent that the claimant is obliged to pay

the penalty towards belated payment, as per the terms of the contract and since, the claimant has paid installments and the taxes belatedly, the respondent is entitled to levy interest and collect the same; further, there was

no delay or unreasonable delay on their side in issuing delivery order, passes and releasing Bank Guarantee, as alleged by the claimant.

6.After perusing the pleadings and evidence, the Arbitral Tribunal framed the following issues :

(1) Has the claimant any 'locus standi to raise a dispute under the sale order dated 16.02.2005?

(2) Whether there has been any delay on the part of the claimant contractor in remitting any of the periodical payments as due in terms of the contract? If so is the respondent entitled to levy late payment charges and or interest in respect of the such delay?

(3) Whether the claimant is entitled to refund of Rs.1,62,00,000/- as claimed in the claim statement by way of late payment charges and interest?

(4) Whether there has been delay on the part of the respondent in issuing the sale order after the payment of the EMD and again a huge delay in issuing the delivery order even after payment of the entire amount?

(5) Whether there has been delay on the part of the CISF employed by the respondent in issuing the passes to enter in the B& C plant to carry out the dismantling work and take delivery of the materials?

(6) Whether the claimant is entitled to interest as claimed? If so, on what sum and at what rate and for which period, the interest is payable?

(7) Whether there has been any delay on the part of the respondent in releasing the Bank Guarantee as per the

terms of the contract?

(8) Whether the claimant/ respondent is entitled to the costs of the arbitration?

(9) To what relief the parties entitled to?

(10) Whether the claimant is entitled to an additional amount of Rs.5,36,00,000/- as per the additional claim statement?

(11) Is the additional claim arbitrable in view of the respondent's defence statement?

7.The Arbitral Tribunal, upon hearing both sides and considering the oral and documentary evidence, vide impugned award dated 02.11.2009, awarded a sum of Rs.36,50,823.94 in favour of the claimant, payable by the respondent and also Rs.8,44,343.41 and rejected the other claims made by the claimant.

8.Challenging the rejection of certain claims, the claimant is before this Court by way of this Original Petition.

9.Learned counsel for the petitioner/claimant mainly argued before this Court with regard to Issue No.3 framed by the Arbitral Tribunal, i.e., levy of late payment charges @ 1% of total lot value per week, which was levied by the respondent to a tune of Rs.70,01,000/-, for one week. It is the contention of the learned counsel that, as per the terms and conditions, the

claimant has deposited Rs.7,00,10,002.00 as EMD, within seven days from the date of closure of e-auction. The claimant has made payment of 40% of the total value and has furnished Bank Guarantee for the remaining 60% of the total value. Time was extended to pay the amount in installments, but with imposition of interest on delayed payment. It is his contention that, as long as the Bank Guarantee is with the respondent, there is no bar for the respondent for invoking the Bank Guarantee, however, the respondent has invoked the Bank Guarantee. Therefore, interest imposed on the delayed payment is not valid in law. It is his further contention that, withholding such late payment charges along with interest from EMD is also not correct. However, the Arbitral Tribunal has not considered the above aspect. Therefore, the learned counsel submitted that the impugned award requires interference by this Court.

10.Per contra, learned counsel for the respondent would contend that the award amount is fully satisfied and even, the petitioner has received the amount without any delay. It is his contention that, levy of penalty and interest is only as per the contract, which has been rightly considered by the Arbitral Tribunal. Therefore, he submitted that the award cannot be interfered with.

11.This Court gave its anxious consideration to the rival submissions

and perused the award and other materials available on record.

12.It is well settled that the scope of Section 34 of the 'Arbitration and Conciliation Act, 1996', ('the Act' for brevity) is very limited. Unless an award suffers from illegality or perversity or is in violation of fundamental policy of India or any other elements set out under Section 34 of the Act, it cannot be interfered with. The only challenge before this Court in this Original Petition is with regard to levy of penalty and imposition of interest for delayed payment, which was framed as Issue No.3 before the Arbitral Tribunal. The Arbitral Tribunal, while dealing with Issue No.3, has relied upon clauses 8(b)(i) and 8(b)(ii) of the contract. The Arbitral Tribunal has clearly recorded the terms of the contract, viz., EMD at 10% of the bid value has to be paid within 7 days from the date of closure of e-auction; payment of 100% of the total value along with taxes/duties on confirmation of acceptance of the lot must be made within 30 days from the date of issue of sale order; (or) payment can be made in installments with first installment of 40% of the total value plus 100% of the taxes and duties along with a Bank Guarantee for the remaining 60% of the total lot value, within 30 days from the date of issue of sale order; In case of delay, late payment charges at the rate of 1% of the total lot value per week will be charged upto 3 weeks only. The Arbitral Tribunal has factually found that there is a delay in making payment. Inasmuch as the contract clearly provides for levy of late payment charges in case of delayed payment, the Arbitral Tribunal has held that, late payment

charges of Rs.70,01,000/-, levied by the respondent, is justified and is in accordance with law, as per the contract, which finding, in the opinion of this Court, requires no interference.

13.Further, in Para Nos.15 and 19 of the award, the Arbitral Tribunal has factually found that, only on request of the claimant, the respondent did not exercise the right of invoking the Bank Guarantee by extending the time for payment, but with a condition that interest be paid by the claimant and the same was not objected to by the claimant at that time. Therefore, the Arbitral Tribunal has rejected the claim of the claimant that the interest levied by the respondent for belated payment is correct, which finding, in the opinion of this Court, deserves to be countenanced.

In the light of the narrative supra, no ground set out under Section 34 of the Act has been made out, nor this Court finds any illegality, perversity or violation of fundamental policy of India to interfere with the impugned award. Therefore, this Original petition is dismissed and the impugned award is confirmed. No costs.

22.08.2019

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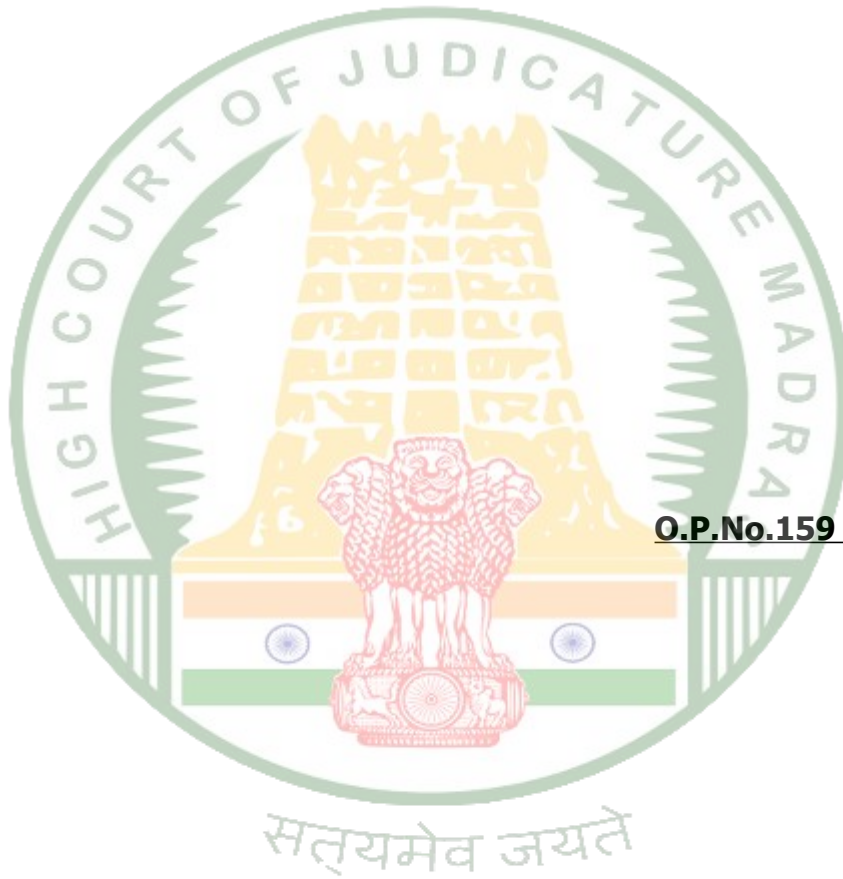
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Speaking Order / Nonspeaking Order

N. SATHISH KUMAR, J.

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O.P.No.159 of 2010

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22.08.2019