

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.01.2019

CORAM:

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

Original Petition No.433 of 2010

M/s.Consolidated Construction Consortium Ltd.,
No.5, 2nd Link Road, CIT Colony,
Mylapore, Chennai 600 004.

... Petitioner

vs.

1. Software Technology Parks of India,
No.5, 3rd Floor,
Rajiv Gandhi Salai,
Taramani, Chennai.

2. K.Srinivasan,
Sole Arbitrator,
Block No.1, Flat No.C-2,
Mayfair Apartments,
2A, LIC Colony Main Road,
Velachery, Chennai 600 042.

... Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996
to set aside the Arbitral Award dated 10.05.2010.

For Petitioner : Ms.Umamaheswari Ganesh

For 1st Respondent : Mr.Shoban M.Padmanabhan

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ORDER

The Petitioner herein, who is the Claimant before the Arbitrator, has come
up with this Petition seeking to set aside the Arbitral Award dated 10.05.2010.

2. Before the Arbitrator, it is the case of the Petitioner herein that the 1st Respondent had issued a tender on 18.10.2005 for establishment of a permanent building for HSDC/STP activities and STPI Incubation Centre situated at Block No.8, Tiruvanmiyur Village, T.S.No.2/5, Mylapore-Triplicane Taluk, Chennai District. Pursuant to the said tender, the Petitioner had tendered the quote, to undertake and execute the services related to the construction of the above building as mentioned therein and became the successful bidder. As per the terms of the Contract, the project ought to have commenced on 15.03.2006 and completed on or before 15.01.2017. The 1st Respondent had handed over possession of the site of works to the Petitioner on 15.03.2006 under Notification vide his Letter No.STPI/Admin/071/2005-06/11933, dated 15.03.2006.

3. Furthermore, it is the case of the Petitioner that Architects were appointed by the 1st Respondent to supervise the works as well as to certify the RA Bills of the Petitioner, based on the progress of the work. As per the work order dated 09.03.2006, the total cost of the project stood at Rs.16,48,69,970.88 exclusive of service tax and educational cess. Pursuant to the said work, the Petitioner had executed various Bank Guarantees including Retention money to the tune of Rs.41,21,729/-, being 2.5% of the contracted value of the works in accordance with Point No.9 of Important Terms and Conditions of the Contract.

4. According to the Petitioner, right from the date of contract, there had been a delay in the execution of the project, due to various factors, circumstances and events, due to which, they were not contractually obliged or bound to exercise any sort of control or responsibility. He further submitted that the Petitioner informed the same to the 1st Respondent through various letters.

5. The Petitioner herein initiated Arbitration proceedings seeking a direction to the 1st Respondent herein to pay a sum of Rs.1,26,41,794/- being the total outstanding amount as due and payable by the 1st Respondent including the Retention amount of Rs.41,21,749/- and its interest from the respective dates of accrual until 30.11.2008 amounting to a sum of Rs.2,76,544.97 and for a further direction to the 1st Respondent to pay interest at 18% per annum on the outstanding amount of Rs.1,23,65,248/- from 01.12.2008 till the date of realization of the above amount.

6. After hearing both parties, the Arbitrator did not award any amount towards the claim of the Petitioner. Aggrieved by the same, the Petitioner is before this Court.

7. Learned counsel for the Petitioner submitted that the Petitioner's benefits have been deprived on the ground that there was delay in execution of

work. He further submitted that during the execution of work by the Petitioner, there were landslides and rains and hence, there was delay in execution of works as per the contract. Learned counsel went on to state that the Petitioner executed the project as per the design submitted by the 1st Respondent through their Architects M/s.PTK Architects.

8. It is further stated by the learned counsel for the Petitioner that in some of the documents marked by the 1st Respondent, the Petitioner was not a signatory to the same. According to the learned counsel, the objections of the Petitioner should have been taken into account by the Arbitrator, when the claim was actually submitted in May 2008, after adjusting the liquidated damages.

9. The prime contention of the learned counsel for the Petitioner is that Clause 26 and Clause 27 of the Agreement have to be read together and that no damages could be levied and that the Arbitral Award has to be interfered with.

10. Learned counsel appearing for the 1st Respondent submitted that even though the Petitioner was allotted work on 15.03.2006, work was not completed on 15.01.2007, as per the Agreement. Though, landslides and rains are said to have affected the Petitioner's work, that alone cannot be cited as reasons for delay in execution of work by the Petitioner. It was further submitted that the Petitioner

was allowed to continue the work and complete the same, as, had he not been allowed to continue the work, the 1st Respondent would have to incur further loss on account of fresh tender, etc.

11. That apart, learned counsel appearing for the 1st Respondent submitted that the relief sought by the Petitioner with regard to the liquidated damages has been denied by the Arbitrator. Referring to Clause 26 of the Agreement, he submitted that if there is no delay in completion of work and during the extension period, if the work remains incomplete, liquidated damages can be claimed after the original contract period of 10 months, which has been rightly pointed out by the Arbitrator. He further submitted that since the Arbitrator has rendered a finding after discussing evidences in depth, the scope of this Court under Article 34 of the Arbitration and Conciliation Act, is very limited and hence, sought for dismissal of the Original Petition.

12. Heard the learned counsel for the parties and perused the material documents available on record.

13. The fact that the Petitioner was granted the Contract on 15.03.2006 for a period of two months is not in dispute. Though, the work has to be executed within a period of ten months as per the contract, the Petitioner could not execute

the work within the agreed period, due to landslides and rains. The Petitioner could complete the Project on 30.11.2007, by seeking extension of time that was granted by the 1st Respondent and as on date, there appears to be no complaint about the building constructed.

14. The fact that there were rains and landslides is also not in dispute. If the building had been erected and there were landslides, it would affect the building constructed and there would not only have been loss of money, but also loss of lives and that the 1st Respondent should thank the stars that no untoward event took place.

15. Clause 26 cannot be read in isolation without reference to Clause 27 of the Agreement. For better appreciation, both clauses are extracted hereunder:

“26. Liquidated Damages: If the Contractor fails to complete the works by the date stated in the Appendix or within any extended time under Clause 28 hereof, the Contractor shall pay or allow the Employer to deduct the same named in the Appendix as Liquidated Damages' for the period during which the said works shall remain incomplete and the Employer may deduct such damages from any money due or that may become due to the Contractor.

27. Extension of time: If the contractor shall desire an extension of time for completion of the work on the grounds of his having been unavoidably hindered (a) by force majeure or (b) by

reason of any exceptional inclement weather or (c) reason of any proceedings taken or threatened by or dispute with adjoining or neighbouring Employers or public authorities arising otherwise than through the contractor's own defaults or (d) by the work or delays of other contractors or tradesmen engaged or nominated by the Employer or the Architect and not referred to in the Schedule of Quantities and/or specification or (e) by strikes or Lockout affecting any of the building trades or (f) by reason of delays in the supply of materials stipulated to be supplied by the Employer he shall apply in writing to the Architects/Employer within 15 days of such hindrance on account of which he desires such extension as aforesaid and the Architect/Employer, if in his opinion, reasonable extension of time for completion of the contract works, but the contractor shall nevertheless constantly use his endeavours to prevent delay and shall do all that may reasonably be required of him to proceed with the work expeditiously, provided

(a) that the contractor shall have no claim other than extension of time for the delay in completion of the work due to such hindrance and nothing else and

(b) that the contractor shall suspend the works whenever called upon to do so in writing by the Architects/Employer and shall be allowed reasonable extension of time for completion of work due to such suspension of work and nothing else."

16. Although, there is no specific order of extension of time granted by the 1st Respondent, the fact that the Petitioner was allowed to carry on the work and subsequently complete and hand over the building to the 1st Respondent, cannot be denied. Once there is extension of time, a narrow interpretation to Clause 26 that

after completion of a period of 10 months as originally agreed as per the appendix/schedule, liquidated damages can be levied from day one after the completion of original ten months and during the extended period of time also, the liquidated damages can be claimed, cannot be accepted. The purpose of extension of time is only for completion of work.

17. The contention of the Respondents would have been accepted, if there was no extension of time under Clause 26 or the work was incomplete after the extended period of ten months. In such an event, the 1st Respondent would be entitled to recover not only the liquidated damages, but also the loss incurred deeming the original extension as being terminated from day one, and the entire amount would have been required to be forfeited and further damages would have been claimed. The contention of the parties that Civil Procedure Code and Evidence Act applies to the proceedings, cannot be accepted in the light of Section 19 of the Arbitration and Conciliation Act, 1996.

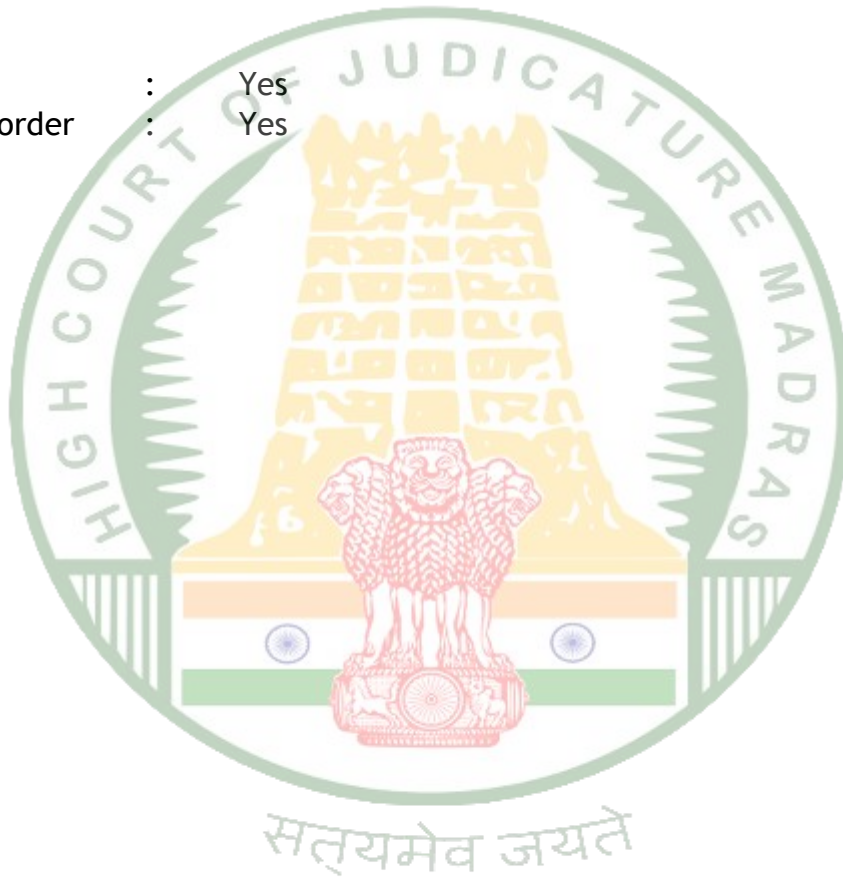
18. As the 1st Respondent did not file any Original Application challenging the counter-claim and that the Petitioner has completed the work agreed during the extended period of time, the grant of liquidated damages in favour of the 1st Respondent cannot be accepted. Hence, I am of the view that the Original Petition has to be allowed.

19. Accordingly, the Arbitral Award dated 10.05.2010 is set aside and the Original Petition is allowed. No costs.

02.01.2019

Index : Yes
Speaking order : Yes

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S.VAIDYANATHAN,J.

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