IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.08.2019

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.P.Nos.351 and 343 of 2013

National Projects Construction
Corporation Ltd.,
MRTS Unit, MTP Railway Compound,
Government Estate,
Chennai - 600 002. ... Petitioner
[in both OPs]

versus

1.The Chief Engineer,
Metropolitan Transport Project (Railways),
Poonamallee High Road,
Egmore, Chennai - 600 008.

2.M.Satheesh (Presiding Arbitrator),
Presently employed as the
Principal Chief Engineer,
Head Quarters Office, Southern Railway,
Park Town, Chennai - 600 003.

3.M.A.Inbarasu (Arbitrator),
Presently employed as the
Chief Mechanical Engineer (Planning),
Southern Railway, Park Town,
Chennai - 600 003.

4.Sujatha Jayaraj (Arbitrator),
Presently employed as the
Divisional Railway Manager,
Salem Division,
Southern Railway, Salem. ... Respondents
[in both OPs]

COMMON PRAYER: Original Petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 21.06.2012 passed by the Arbitral Tribunal, comprising of the respondents 2 to 4.

For Petitioner [in both OPs] : Mr.Amalaraj S.Penikilapatti

For Respondent No.1 [in both OPs] : Mr.P.T.Ramkumar

COMMON ORDER

Challenge has been made in these Original Petitions as against the award dated 21.06.2012 passed by the learned Arbitrators.

2. It is the case of the petitioner that he has made several claims in respect of a new BG line between Madras Beach and Luz. The learned Arbitrators had passed the following award (in O.P.No.351 of 2013);

No.	***Description of the Petitioner's claim and amount***	***Award by Arbitrators Rs.***
1	Reimbursement of addl. expenditure incurred for execution of contract items over and above the agreement rates - Rs.38,09,984/-	NIL
2	Reimbursement of actual expenditure for designing of space frame work plus 15% loss of profit - Rs.15,16,258/-	25,000/-
3	Reimbursement of addl. expenditure incurred for executing the extra items - Rs.58,81,800/-	58,062/-
4	Construction of man whole in brick work - Rs.79,920/-	12,000/-
5	Provision of 30 mm thick addl. mortar bed in flooring work (1:4) - Rs.2,44,252/-	92,107/-

No.	*Description of the Petitioner's claim and amount*	*Award by Arbitrators Rs.*
6	Labour charges for dismantling RCC Columns, beams, slabs, lift pit etc. - Rs.47,442/-	10,000/-
7	Supply and fixing of FRPC concrete man - hole cover slab with frame in GLR tank - Rs.4,716/-	NIL
8	Supply and fixing of 25 mm thick shalitex board - Rs.27,838/-	6,901/-
9	Providing fixing MS steel insert in cable trench - Rs.8,884/-	1,000/-
10	Making opening in RCC slab - Rs.3,557/-	1,000/-
11	Providing locking arrangement in GLR tank - Rs.4,416/-	1,500/-
12	Brick work in cable trench and other sub-structures - Rs.28,399/-	3,650/-
13	Brick work (1:6) above lintel beam above platforms in MF-Rs.4,86,352/-	NIL
14	Labour supply for cleaning station building - Rs.60,000/-	15,000/-
15	Labour charges for fixing barricade - Rs.58,235/-	8,000/-
16	Labour charges for removing slush for GLR tank - Rs.4,859/-	NIL
17	Providing and fixing teak wood veneered plywood door - Rs.1,06,069/-	23,000/-
18	Fixing MS flat in concreting for fixing aluminium hand rail shoe - Rs.37,089/-	7,500/-
19	Releasing amount on account of consultancy charges for superstructure - Rs.2,57,500/-	1,15,000/-
20	Waiving of recovery of steel - Rs.51,367/-	NIL

No.	*Description of the Respondent's claim and amount*	*Award by Arbitrators Rs.*
1	Risk cost to be recovered from the default contractor - Rs.9,81,207/-	7,84,966/-
2	Recoverable mobilisation advance at 10% p.a. with interest (31.1.05) - Rs.1,25,44,124 + further interest till date of realisation	96,35,427/-
3	Amount paid towards workmen's compensation of Smt.Ramani W/o late Arumugam - Rs.3,67,136/-	3,67,136/-

3. Similarly, the learned Arbitrators had passed the following award (in O.P.No.343 of 2013);

No.	*Description of the Petitioner's claim and amount*	*Award by Arbitrators Rs.*
1	Reimbursement of addl. expenditure incurred for execution of contract items over and above the agreement rates - Rs.39,97,920/-	NIL
2	Reimbursement of actual expenditure for designing of space frame work plus 15% loss of profit - Rs.15,99,166/-	25,000/-
3	Reimbursement of addl. expenditure incurred for executing the extra items - Rs.73,39,430/-	71,400/-
4	Provision of 30 mm thick addl. mortar bed (1:4) in flooring work - Rs.3,03,716/-	1,17,260/-
5	Labour charges for dismantling RCC Columns, beams, slabs, lift pit etc. - Rs.19,481/-	2,000/-
6	Supply and fixing of FRPC manhole cover slab with frame in GLR tank - Rs.4,716/-	NIL
7	Supply and fixing of 25 mm thick shalitex board - Rs.80,820/-	24,276/-

No.	*Description of the Petitioner's claim and amount*	*Award by Arbitrators Rs.*
8	Providing and fixing MS steel insert in cable trench - Rs.10,793/-	1,000/-
9	Providing locking arrangement in GLR tank - Rs.4,416/-	1,500/-
10	Brick work in cable trench and other sub-structures - Rs.24,622/-	NIL
11	Brick work (1:6) above lintel beam above platforms in MF-Rs.5,47,146/-	NIL
12	Labour supply for cleaning station building - Rs.40,624/-	15,000/-
13	Labour charges for fixing barricade - Rs.52,533/-	7,000/-
14	Providing and fixing teak wood veneered plywood door - Rs.1,19,904/-	27,000/-
15	Fixing MS flat in concreting for fixing aluminium hand rail shoe - Rs.3,861/-	1,000/-
16	Releasing amount on account of consultancy charges for superstructure - Rs.2,48,700/-	1,15,000/-
17	Expenditure incurred for lowering the ticket counter - Rs.13,160/-	5,000/-
18	20 mm thick brick masonry over cat walk slab - Rs.62,155/-	5,280/-
19	Providing aluminium aldrops - Rs.1,800/-	1,680/-
20	Providing drainage arrangement for rain water - Rs.3,000/-	2,500/-
21	Waiving of recovery of Steel - Rs.1,01,370/-	NIL
No.	***Description of the Respondent's claim and amount***	***Award by Arbitrators Rs.***
1	Risk cost to be recovered from the default contractor - Rs.12,92,632/-	10,34,106/-

No.	*Description of the Respondent's claim and amount*	*Award by Arbitrators Rs.*
2	Recoverable mobilisation advance at 10% p.a. with interest (31.1.05) - Rs.1,24,33,599 + further interest till date of realisation	93,81,665/-

4. Though the challenge has been made to all the claims, the learned counsel for the petitioner fairly submitted that the award has been passed on the claims cannot be interfered. It is his further contention that as far as counter claim no.1 is concerned, the termination of the contract by the Railways is not correct, the mandatory provision of 7 days clear notice and 48 hours notice has not been complied with. Hence, submitted that the Award is liable to be set aside.

5. Whereas the learned counsel for the first respondent submitted that the learned Arbitrators had considered the entire aspects and accordingly, the award has been passed on various claims and counter claims. He further submitted that the award is well reasoned one and hence, prayed for dismissal of these Petitions.

6. Heard the learned counsel for the petitioner and the learned counsel for the first respondent. I have also perused the arbitral award passed by the learned Arbitrators.

7. The main challenge in these Petitions is with regard to the counter claim no.1 on the ground that 7 days notice and 48 hours notice have not been given, therefore the termination is not according to law. Now, it is to see whether the findings of the learned Arbitrators in respect of counter claim no.1 in these Petitions is correct? The learned Arbitrators in their findings (in O.P.No.351 of 2013) had held as follows;

> "The claimant did not give any remarks, to the counter claim in the 'rejoinder to the counter reply' dt.21.6.10, submitted by them. Later, on demand, the claimant have given their remarks on the item vide their letter dt.11.7.11. They have pointed out that they are not accepting the risk and cost portion. They refer to their claim at item no.1 wherein they have pointed out that the delay in the work cannot be attributed to them. They add that substantial works were completed by them and the building was inaugurated in 19.10.97. Railways should not have terminated the work for the balance finishing works but should only have foreclosed.
>
> Later, the claimant, vide their letter dt.28.11.11, have submitted that the Railway's 48 hours notice (which is issued prior to the termination notice dt.01.12.97) was dispatched only on 01.12.97, even though it is dated 28.11.97. They contended that it is not probable that the notice

would have been served to them even on 01.12.97 and hence the risk and cost termination proceedings are vitiated by procedural irregularities and are in violation to clause 62 of GCC. The claimant have depended on the noting on the copy of the 48 hours notice, submitted by the respondent (along with their counter), for making this argument. The Arbitrators note that it is not the case of the claimant that they have not received the notice. Their contention is that the late dispatch would have resulted in a belated delivery. It is clear that the claimants are only trying to hang on to the fine aspects of legality. The Arbitrators consider that the claimants were well aware about the situation developing and should have taken action to avoid the same by taking positive action in the work front. Hence, the termination done is considered valid in this case.

Arbitrators note that a 'nil' award has been made for claim no.1 where the claimant have demanded for extra rates indicating that the market rates were higher at the time of execution. The reasons for the delay of work are generally attributable to the claimant. However it is also noted that the section could be opened by 19.10.97 (ref:Dy.CE/I/MTP(R) MTMY letter no.MTP/Dy.CE/Arb/RPNN dt.10.11.11) whereas the agreement was terminated on 01.12.97 i.e. roughly one and half months after opening.

It is a tendency amongst contractors to avoid finishing works which are less profitable. In this case also the finishing works were pending as is indicated by the claimant himself.

Keeping in view the various aspects, it is considered that the substantial portion of the risk and cost element should be borne by the claimant. However having completed major portion of the work and the section having been commissioned before termination, it is considered that the claimant should be relieved of atleast a portion of the risk and cost element. Accordingly Arbitrators consider that the claimant should be charged with 80% of the risk and cost element.

The respondents have calculated the risk and cost portion as Rs.9,81,207/- and have submitted the details. The claimants were asked during the proceedings whether they have any objection to the calculation including the method of calculation. They raised no such objection. Thus the amount due to the respondent from the claimant is worked out as Rs.7,84,966/- (=0.8 x 981207).

Thus the award under this counter claim is Rs.7,84,966/- which has to be paid by the claimant to the respondent.

(Respondents have pointed out in the details to the counter claim that Rs.16,57,117/- due to the claimant on account of final bill and price variation is available with them. Later, on submission by the claimant, the respondent have confirmed vide their letter dt.19.10.11 that in addition, an amount of Rs.1.0 lakhs due to the claimant contractor is also available with the respondent Railways (which is the amount recovered towards security deposit). Thus, totally Rs.17,57,117/- due to the claimant is available with the respondent. These aspects will be considered while discussing the 'summary of award' in the later paras)."

8. Likewise, the learned Arbitrators in their findings (in O.P.No.343 of 2013) had held as follows;

"The claimant vide their letter dt.28.11.11, have submitted that the Railway's 48 hours notice (which is issued prior to the termination notice) was dispatched only on 01.12.97, even though it is dated 28.11.97. They contended that it is not probable that the notice would have been served to them even on 01.12.97. The claimant have depended on the noting on the copy of the 48 hours notice, submitted by the respondent (along with their counter), for making this argument. The Arbitrators note that it is not the case of the claimant that they have not received the notice. Their contention is that the late dispatch would have resulted in a belated delivery. It is clear that the claimants are only trying to hang on to the fine aspects of legality. The Arbitrators consider that the claimants were well aware about the situation developing and should have taken action to avoid the same by taking positive action in the work front. Hence, the termination done is considered valid in this case.

Arbitrators note that a 'nil' award has been made for claim no.1 where the claimant have demanded for extra rates indicating that the market rates were higher at the time of execution. The reasons for the delay of work are generally attributable to the claimant. However it is also noted that the section could be commissioned by 19.10.97 (ref:Dy.CE/I/MTP(R) MTMY letter no.MTP/Dy.CE/Arb/RPNN dt.10.11.11) whereas the agreement was terminated on 01.12.97 i.e. roughly one and half months after opening.

It is a tendency amongst contractors to avoid finishing works which are less profitable. In this case also the finishing works were pending as is indicated by the claimant himself.

Keeping in view the various aspects, it is considered that the substantial portion of the risk and cost element should be borne by the claimant. However having completed major portion of the work and the section having been commissioned before termination, it is considered that the claimant should be relieved of atleast a portion of the risk and cost element. Accordingly Arbitrators consider that the claimant should be charged with 80% of the risk and cost element.

The respondents have calculated the risk and cost portion as Rs.12,92,632/- and have submitted the details. The claimants were asked during the proceedings whether they have any objection to the calculation including the method of calculation. They raised no such objection. Thus the amount due to the respondent from the claimant is worked out as Rs.10,34,106/- (=0.8 x 12,92,632).

Thus the award under this counter claim is Rs.10,34,106/- which has to be paid by the claimant to the respondent.

(Respondents have pointed out in the details to the counter claim that Rs.24,89,137/- due to the claimant on account of final bill and price variation is available with them. Later, on submission by the claimant, the respondent have confirmed vide their letter dt.19.10.11 that in addition, an amount of Rs.1.0 lakhs due to the claimant contractor is also available with the respondent Railways (which is the amount recovered towards security deposit). Thus, totally Rs.25,89,137/- due to the claimant is available with the respondent. These aspects will be considered while discussing the 'summary of award' in the later paras)."

9. In fact, the learned Arbitrators had discussed about the notice sent and found that the claimant has received the notice and trying to hang on to the fine aspects of legality and held that when claimant is well aware about the situation developing and should have taken action to avoid the same by taking positive action in the work front. The learned Arbitrators had considered the entire aspects and arrived at a finding and hence, this Court cannot re-appreciate the entire aspect under Section 34 of the Arbitration and

Conciliation Act, 1996. Further, the termination has not challenged in the claim petition. Such being a position, now, the petitioner cannot take such plea under Section 34 of the Arbitration and Conciliation Act, 1996 to challenge the termination without the same being raised in the claim petition.

10. In view of these facts, I do not find any infirmity in the order of the learned Arbitrators. Hence, the Petitions filed by the petitioner is liable to be dismissed. Accordingly, these Original Petitions stand dismissed. However, there is no order as to costs.

19.08.2019

Speaking Order/Non Speaking Order
Index : Yes / No
Internet : Yes

sri

N.SATHISH KUMAR, J.,
sri

O.P.Nos.351 and 343 of 2013

19.08.2019