

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
10~06~2019	18~06~2019

CORAM

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.No.407 of 2013

M/s. Tamil Nadu Newsprint and Papers Limited
67, Mount Road,
Guindy, Channai 600032. .. Petitioner

.Vs.

1. URC Construction Pvt.Ltd.,
H-102, Periyar Nagar,
Erode – 638001. .. First Respondent/Claimant
2. Mr.K.Surendranath
Advocate, High Court, Madras,
Presiding Arbitrator,
No.256/3, Pioneer Colony
Anna Nagar West Extension
Chennai 600101. .. Second Respondent/
Presiding Arbitrator
3. Mr.V.P. Sengottuvel,
Advocate, High Court, Madras,
Arbitrator
"Sri Nivas"
No.77, 6th Avenue (Old No.8, S- Block)
Anna Nagar, Chennai 600040. .. Third Respondent/
Arbitrator

4. Mr.S.Venkatesan

Advocate, High Court, Madras,
Arbitrator

"Prashanthi" New No.2, (Old No.24)

3rd Avenue, Indira Nagar,

Adyar, Chennai 600020.

.. Fourth Respondent/
Arbitrator

Prayer: Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 20.03.2013 passed by the Arbitral Tribunal insofar as it had partially allowed the claims of the First Respondent and had directed the petitioner to pay the First Respondent a sum of Rs.15,23,486/- withheld towards LD together with interest of 12% p.a. from 01.07.2008 i.e., the date of approval of the final bill by the Petitioner until the date of Award, a sum of Rs.11,49,761/- towards loss of profit, a sum of Rs.9,46,479/- towards excess expenditure incurred during the extended period of contract and costs of the arbitration Award within three months from the date of the Award failing which the Petitioner shall be liable to pay interest at 18% p.a. on and after the expiry of three months.

For Petitioner : Mr. Shivakumar
for M/s.Shivakumar & Suresh

For Respondents : Mr. P.J. Rishikesh

ORDER

This Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Award dated 20.03.2013 passed by the Arbitral Tribunal.

2. The Claimant was awarded Contract dated 04.05.2006 and 31.07.2006 for a sum of Rs.1,59,67,440/- and Rs.1,39,37,119/- respectively. The work order was accepted by the Petitioner. Time for completion of the works 4 months and 6 months respectively. Tender document did not indicate that the site clearance would be handed over in parts on separate dates, hence the claimant had quoted the rates and programmed the work on the expectation that the entire site for the two works will be handed over at one stroke and the Claimant would have continuity of work. The Claimant also expected that all the detailed drawing will be handed over, at least at the time of handing over of the site. However, site has not been handed over and the drawings also not given in time. Therefore, delay in receiving drawings for machinery foundation works. Delay was not attributable to the Claimant. The Respondent had taken their own time to issue the raw materials which was also one of the reasons for delay. Therefore, levy

of liquidity damages even though the delay was attributable to the respondent is arbitrary that too without any notice. Therefore, levy and deduction of 5% Liquidity Damages even though the actual work value was radically reduced is contrary to the contract. Since the Respondent had arbitrarily levied the liquidated damages to the tune of Rs.15,24,486/-, the Claimant is entitled to the refund of the same.

3. Similarly, M25 Grade concrete for foundation works had exceeded more than the standard limited for variations, i.e., 25% above the Bill of Quantities (BOQ), the claimant is entitled to claim a sum of Rs.13,32,922/- as there was heavy increase in the cost of materials and wages for labour subsequent to July, August 2006 when the rates were quoted. As there was reduction in the contract value without prior intimation, the claimant is entitled to claim Rs.17,24,642/- towards the loss of profit. The next Claim was for the payment of 15% interest on the withheld amount of Rs.15,24,486/- from 01.04.2008 till the date of Award besides cost also claimed by the claimant and a sum of Rs.25,24,387/- towards the cost over run for the excess expenditure during the extended period of contract from 01.03.2007 till

01.09.2007.

4. The Respondent denied the claim and submitted that the Claimant attended the pre-bid meeting regarding the Chip Silo Projects on 06.06.06 and accepted all the terms and conditions including payment terms and the clause relating to liquidated damages. The contract was an item rate contract and the Claimant was paid for the actual work done. The Respondent had taken the last date of clearance for the performance period of four months. The Claimant is put to strict proof of the averment that there had been delay in providing detailed drawings. The Claimant cannot question the tender conditions. The liquidated damages had been levied in terms of tender conditions and work orders. The piecemeal handing over of the site by the Respondent is also denied. The Claimant is clearly estopped from raising the defences at a belated stage. The Claimant's conduct would amount to waiver of any breach of contract conditions. The Claimant has not applied for any extension. Therefore, it is the contention of the Respondent that the liquidated damages is not leviable has no force.

5. Based on the pleadings of the parties, the following issues were framed:

1. (a) Whether the levy of liquidated damages by the Respondent on the Claimant was in terms of the contractual conditions between them?

(b) Whether the Claimant is entitled to claim the sum of Rs.15,23,486/- that has been deducted from the bills by way of liquidated damages?

(c) Whether the Respondent is entitled to claim LD, then to what amount?

(d) Whether the claimant is entitled to claim interest on the amount deducted as LD at 15% p.a. or to what rate?

2. Whether the claims raised by the Claimant are arbitral and whether the Claimant is estopped from raising these disputes in the arbitration proceedings?

3. Whether the claimant's conduct in not having raised the disputes within the stipulated period prescribed under the contract would amount to waiver?

4. Whether the claims are barred by limitation?

5. Whether the claimant is justified in seeking to renegotiate and modify the tender conditions by seeking for period of performance beyond the agreed date?

6. Whether the claimant had applied for extension of time for any hindrance in terms of the contractual conditions?

7(a) Whether the Claimant was asked to do over and above the original BOQ quantity, whether the Claimant is entitled to claim the additional amount of Rs.13,32,921.17 for M25 grade of concrete works in foundations?

(b) To what amount the Claimant is entitled to claim under this head?

8(a) Whether the claimant is entitled to claim a sum of Rs.17,24,642/- towards the estimated loss of profit, due to the Respondent's reduction of the total quantum of work and the value of contract without prior notice?

(b) To what amount the claimant is entitled to claim under this head?

9.(a) Whether the claimant is entitled to claim a sum of Rs.17,24,642/- towards the excess expenditure incurred during the extended period of the work, which was forced

upon them for reason solely attributable to the Respondent's side i.e. from 01.03.2007 to 10.08.2007?

b) To what amount the Claimant is entitled to claim under this head?

10. (a) Whether the claimant is entitled to claim interest on the claim amounts?

(b) Whether the parties are entitled to claim costs of these arbitration proceedings?

6. The Arbitral Tribunal consisting of Three Members has passed an Award considering the entire issues and held that the claim is well within the period of limitation. It is also held that the damages for delay on the part of the Respondent is also permitted in view of the Judgment of the Apex Court and finally passed an Award allowing the claim. The above were put in challenge.

7. The learned counsel appearing for the Petitioner mainly contended that the contract is only item based contract. The Arbitrators have gone beyond the contract. Clause 7.2, 7.3, 7.6 and

8.5 clearly indicate that the account should have been given when the final Bill was presented. When the claimant was failed to comply to clause 7.2 learned Arbitral Tribunal passing an Award beyond the contract which is against the contract. Similarly, Clause 7.3 clearly indicates that interest cannot be awarded when there is specific provision in the contract. No Extension of time was given in writing by the Respondent. Clause 7.6 of the Contract is also violated in this case. Similarly, Clause 8.5 makes it clear that the dispute raised could be referred to arbitration. Whereas the Arbitral Tribunal passed an Award when the dispute has not claiming the notice. Since the price escalation is also beyond the terms of contract and submitted that the petitioner is entitled to levy the liquidated damages for delay in both of the petitioners. The Arbitrator has gone beyond the terms of contract. Hence, the Award is liable to be interfered.

8. Similarly, it is an item based contract any variation of bill of quantities will not make any issue of its claim or payment by the contractor. Clause 7.7 provides that there will be no compensation for alteration or restriction of work to be carried out. Clause 8.5 provides

that the party raising dispute should raise the dispute within one month of such dispute, but in this case the dispute has raised at a later point of time. Hence, it is the contention of the learned counsel for the petitioner that the Tribunal ought not to have adjudicated on the above claims. Contract does not permit any revised rates. The Award of the Tribunal for loss of profit and excess expenditure is not justified. There was no acknowledgment of liability. The commencement of Arbitration proceedings would be on 22.07.2010 being the date of receipt for reference to arbitration by the claimant. The claim for excess quantity the loss of profit and cost over run had been made by the claimant only in the claim statement dated 21.09.2011 which is beyond the period of limitation. Hence submitted that the Award has to be set aside.

9. In support of his submissions he relied upon the following judgments:

- 1. Union of India v. Master Construction Company**
[2011 (12) SCC 349]

2. MSK Projects India (JV) Vs. State of Rajasthan
[2011 (10) SCC 573]

3. ONGC Limited v. Offshore Enterprises Inc.
[2011 (14) SCC 246]

4. Harsha Construction v. Union of India **[2014 (9) SCC 246]**

5. National Insurance Company Ltd., v. Sujir Ganesh Nayak Co., **[1997 (4) SCC 366]**

6. H.P.State Forest Company Ltd., v. United India Insurance Co.Ltd.,**[2009 (2) SCC 252]**

7. Union of India v. Krafters Engineering and Leasing P. Ltd., **[2011 (7) SCC 279]**

8. J.C.Budhiraja v. Chairman Orissa Mining Corporation **[2008 (2) SCC 444]**

9. M/s.ONGC Mangalore Petrochemicals Ltd., v. M/s.ANS Constructions Ltd., and another **[CDJ 2018 SC 078]**

10. Gujaraj Urja Vikas Nigam Limited v.ACME

Solar Technologies (Gujarat) Private Limited and others.
[(2017) 11 SCC 801]

11. Oil and Natural Gas Corporation Ltd., v.
 western Geco International Limited **[(2014) 9 SCC
 263]**

12. Voltas Limited v. Rolta India Limited
[(2014) 4 SCC 516]

10. Whereas it is the contention of the learned counsel for the Respondent that Clause 7.3 cannot be pressed into service. Though four months time is originally granted it was extended by the Respondent and such extension was due to the delay caused by the Respondent in handing over the site and also supplying the raw materials and furnishing the drawings. This has been factually found by the Tribunal. Similarly when there was no delay on the part of contractor and the entire delay was attributable by the respondent viz., the petitioner herein, the petitioner cannot claim liquidated damages. Similarly Clause 7.3 cannot be pressed into service denying interest. Such clause applicable only with regard to the payment of final bills or in respect of any amount payable owing to any disputes

between the TNPL and the Contractor. Arbitral Tribunal has categorically found that the delay was attributed only by the petitioner and awarded. Hence submitted that the Award is well reasoned and the Arbitrator has reasonably interpreted the terms of contract and passed an order which is plausible and the same cannot be interfered under Section 34 of the Act.

11. In support of his contention he placed reliance of the following judgments:

1. Associates Builders v. Delhi Development Authority [2015 (3) SCC 49]

2. Sutej Construction Ltd., v. Union Territory of Chandigarh [2018 (1) SCC 718]

3. Navodaya Mass Entertainment Ltd., v. J.M.Combines [2015 (5) SCC 698]

4. Parsa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited [2019 SCC Online SC 741]

12. After the amendment of Act, the scope of interference is only when the circumstances enumerated under Section 34. The learned Tribunal consisting of three members has held that the claim is raised within limitation. Issuance of notice within one month after arising issue at difference for staying clause 8.5 would amount to restricting the time for importing the remedy and hence the same is void. To arrive such a conclusion the learned Arbitrators have relied upon the Judgments reported in **2011 (2) ARB LR 251 Punjab and Haryana [Sunil Soyal v. Haryana State Agriculture Marketing Board]** and **AIR 2001 Mad 481 [Oriental Insurance Co. Ltd., v. Karur Vysya Bank Ltd.,]** and also considered the vigor of the Section 28 of the Indian Contract Act and held that any such condition restricting the remedy is void.

13. Scope of interference under Section 34 of the Arbitration and Conciliation Act 1996 is discussed in **Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd., [2003 (5) SCC 705]**, wherein the Honorable Apex Court has held that an Award can be set aside if it is contrary to:

a) fundamental policy of Indian law; or

- b) the interest of India; or
- c) justice or morality; or
- d) if it is patently illegal

Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

14. The power of the Court to set aside the Award would be exercised only in cases where the Court finds that the Arbitral Award is on the face of it erroneous or patently illegal or in contravention of the provisions of the Act. In the case on hand, considering the entire findings of the Arbitrators this court do not find any materials to show that this case requires interference under Section 34 of the Act. In **Swan Gold Mining Ltd., v. Hindustan Copper Ltd reported in 2015(5) SCC 739** the Honourable Apex Court has held as follows:

"12. [Section 34](#) of the Arbitration and [Conciliation Act](#), 1996 corresponds to [Section 30](#) of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of [Section 34](#) of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the

power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal."

"13. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him."

"21. Mr. Sharan, learned senior counsel appearing for the appellant, also challenged the arbitral award on the ground that the same is in conflict with the public policy of India. We do not find any substance in the said submission. This Court, in the case of Oil and Natural Gas Corporation Ltd. (supra), observed that the term 'public policy of India' is required to be interpreted in the context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is contrary to fundamental policy of Indian law or the interest of India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have

entered into concluded contract, agreeing terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.

22. The words "public policy" or "opposed to public policy", find reference in [Section 23](#) of the Contract Act and also [Section 34 \(2\)\(b\)\(ii\)](#) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy."

15. The Honourable Apex Court in ***McDermott International Inc., v. Burn Standard Co., Ltd., [2006 (11) SCC 181]*** explained the term patent illegality and held that patent illegality must go to the root of the matter. Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under Section 34 is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of

natural justice, etc., If the Arbitrator has gone contrary to or beyond the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

16. A Division Bench of this Court in ***Puravankara Projects Limited v. Mrs.Ranjani Venkatraman Ganesh and Another [2018 (6) MLJ 588]*** also followed the above judgment of the Apex court and held that only in the circumstances envisaged under the decision of the Apex Court the Award can be interfered.

17. In a recent Division Bench Judgment of Delhi High Court reported in ***2018 (6) ArBiLR 478 : 2019 (256) DLT 42 : 2019 (1) R.A.J.66 [Wishwa Mittar Bajaj and Sons v. Shipra Estate Ltd and Jaikishan Estates Developers Pvt. Ltd.,]*** it is held that the Award cannot be interfered with unless it is patently illegal or opposed to the public policy of India.

18. Absolutely, there is no dispute with regard to the preposition

laid down by the judgments cited by the learned counsel for the Petitioner. However, the facts in the judgements cited by the Petitioner are entirely different from the facts of this case and hence those judgments will not help the Petitioner to set aside the Award.

19. In this case the learned Arbitrators have reasonably interpreted the clause 8.5 and held that Clause 8.5 will not apply to the claims made before the Arbitral Tribunal since such claims are beyond the scope of Engineer, since the Engineer could only certify monthly billing and not any extra payment. The claims made before the Arbitral Tribunal are not the differences or disputes that could be decided solely by the Engineer and also held that Clause 7.3 also cannot be pressed into service. When the learned Arbitrators had interpreted the terms of contract reasonably, merely such reasoning is capable of another view that cannot be a ground to interfere the Award. When the Award passed based on the factual aspects and considered the terms of contract and the delay found to be on the part of the petitioner, it cannot be stated that some other interpretation also possible, that may be a ground to set aside the award. When the

Arbitrators considered the entire materials and reasonably interpreted the contract and passed reasoned order, the same cannot be nullified merely on the ground that the Award is beyond the scope of contract. The entire Award on perusal makes it very clear that the reasoned order based on the facts and documents adduced before the Arbitrators and within the parameters of the contract. Hence I do not find any ground to interfere the well reasoned Award. Hence, the Petition is liable to be dismissed.

20. In the result, the Original Petition is dismissed. No costs.

18.06.2019

Index : Yes / No
Internet: Yes
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To

M/s.URC Construction Pvt.Ltd.,
H-102, Periyar Nagar,
Erode – 638001.

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N. SATHISH KUMAR, J.
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Pre-delivery order in:
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18.06.2019