IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.07.2019

C O R A M

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.P.No.697 of 2018
and
A.No.2803 of 2019

M/s.Tamil Nadu Newsprint and Papers Limited,
Kagithapuram,
Karur – 639 136. ... Petitioner

Vs.

M/s.Srikiran Biotech,
represented by its Managing Partner
Mr.K.Srinivas,
Having its office at Gopalapuram Village,
Tirumalayapalem (Mandal), Khammam District,
Telangana – 507 163. ... Respondent

PRAYER: The Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 28.02.2018 passed by the Arbitrators / Respondents in respect of Work Order No.80603 directing the petitioner to refund security deposit / retention money of Rs.50,82,370/- and EMD of Rs.5,65,000/- to the respondent granted by the Arbitral Tribunal in the Award.

For Petitioner : Mr.Shivakumar

For Respondent : Mr.K.Sankaran

O R D E R

The original petition has been filed to challenge the award dated 28.02.2018 passed by the Arbitrators in respect of the Work Order No.80603, directing the petitioner to refund security deposit / retention money of Rs.50,82,370/- and EMD of Rs.5,65,000/- to the respondent.

2. The brief facts, in a nutshell, are thus:-

2.1.The petitioner awarded a work order dated 23.09.2010 to the respondent/claimant for procuring pulpwood by raising the Eucalyptus pulpwood plantation to be used as a raw material for production of paper by the petitioner. The original extent of the work order is 452 Hectares. The minimum guaranteed yield to be produced at 50 MT/Ha of the work order is 22600 and the value is Rs.3,94,43,000/-.

2.2. It is the case of the respondent/claimant that the petitioner has not given the modified work order. There was no rains in the years 2011, 2012 and 2013 and that the planting activities was done with the help of water tankers. However, there was a good rainfall in the year 2014-2015 and due to which, the guaranteed period could be achieved at maturity, but, the contract was terminated prematurely and the claimant could not continue the maintenance till the maturity of the plants. The additional expenses incurred by the claimant for the water tankers was known to the petitioner and they were regularly supervised and inspected the plantation. However, the claimant had received the short closure of the work order vide letter No.TNPL/PLTN/2015 dated 12.6.2015.

2.3. It is further case of the respondent/claimant that premature termination of the contract is illegal and he has filed a claim petition, to issue a direction to pay the Security Deposit and EMD with interest. It is the case of the respondent that the tenderer was expected to raise the plantation by developing the land and planting in time and maintaining the plantation for the period of 5 years till its maturity to produce guaranteed yield of 50 MT/HA, after debarking wood having a diameter of 2 inches and above. The tenderer was also required to consider the site condition like soil vegetation, soil type, climatic factors including the temperature. Tender also provided incentives and if the contractor failed to produce the minimum guaranteed yield, the penalty for disincentive will be collected from the contractor at 70% of quoted rate for the short fall quantity against the minimum guaranteed yield of 50 MT/HA. The claimant has also received the advance payment for the first year maintenance of the land development and planting work. However, he has not achieved the minimum survival rate at the end of the second year, which is less than 50 per cent. At the end of the third year the third party technical expert team submitted a report, stating that the standing crop of 3 year old plantation was very poor mainly due to the poor maintenance of the claimant. The claimant after receiving 20 per cent of the work order amount has not done the first year work properly and the technical team was of the opinion that there was a failure on the technical issues and the extent of area is beyond the capacity of the claimant. Since the claimant has not maintained the plantation as per the agreement for survival of the plants and due to the delay or slackness in execution of the work, the contract was terminated. The petitioner has filed a counter claim against the respondent for a sum of Rs.17,02,979/- with interest.

3. Based on the above pleadings the following issues were framed :

1. Whether there is a binding contract between claimant and the respondent and whether the parties have discharged their obligation under the contract ?
2. Whether there is breach of contract and if so by whom?
3. Whether the short closure of the contract by the respondent is valid and justified and whether it was in accordance with the law and on the basis of the agreed terms and conditions of the contract?

4. Whether there is a severability of the contract?
5. Whether the claimant is entitled for the claims made?
6. Whether the claimant is entitled for any payment from the respondent after the short closure of the purchase order by the respondent for the period subsequent to date of short closure?
7. Whether the claimant has achieved the Minimum Guaranteed Yield and if not achieved, whether the claimant is entitled for any payment?
8. Whether the claimant is entitled for any payment for the bills which have not been raised during the pendency of the purchase order by the claimant on the respondent?
9. Whether the claimant has made any claim for damages and if so whether the claimant is entitled for damages?
10. Whether the claimant is entitled to claim interest and if so at what rate?
11. Whether the respondent is entitled to counter claims made and whether the counter claims by respondent is maintainable and if so to what extent?
12. To what other reliefs the parties are entitled?

4. The learned counsel for the petitioner submitted that at the request of both parties, Arbitrator tribunal consisted of two experts in plantation inspected the various sites on 27.09.2016, 28.9.2016, 6.11.2016, 26.11.2016 and 27.11.2016 and finally passed an award and directed the petitioner to refund the Security Deposit and EMD with interest and also rejected the counter claim of the petitioner. It is further stated that the petitioner challenges the award mainly on the ground that the award of the Arbitrators to return the Security Deposit and EMD is beyond the contract. The learned Arbitrators factually found that the entire issue has been breached by the respondent/claimant. That being the position, the learned Arbitrators ought not to have directed the petitioner to return the Security deposit and EMD, which is beyond the contract. It is also the case of the petitioner that the learned Arbitrators having found that the claimant has breached the contract erroneously dismissed the counter claim of the petitioner. Hence, it is the contention of the learned counsel for the petitioner that the award has to be interfered, since the breach of contract itself was made by the claimant. The petitioner has filed the counter claim for the losses sustained by them. The following work order has been placed, which reads as follows :

Sl. No	Work Order Number	Extent in ha	Minimum guaranteed yield average rate quoted per MT	Average rate quoted per MT	Total guaranteed yield in MT	Value of the work order
1.	80826	158.1	50	1832	7905	14478750
2.	80603	452.00	50	1754	22600	39443000
3.	80141	19.80	50	1516	990	1500840
4.	80822	405.00	50	1556	20250	3151000
5.	123151 1699	482.06	60	1565	28924	45263880
6.	80991	30.50	50	1803	1525	2750138
	Total	1547.46			82194	134955608

5. The learned counsel for the petitioner would submit that at the end of the first year, the land preparation and planting activity has to be carried out by the claimant. The work order has been placed for raising the capacity of pulpwood activities for production of pulpwood. What are all the nature of activities to be carried out in the years of the contract has been clearly mentioned in the work order. In the first year, the land development including Levelling, Disc ploughing, Compartmental bunding, Boundary trenching, Sub-soiler ploughing, Digging of pits, Trench work for drip irrigation, Transportation of plants, Transportation and application of manure, Planting and saucer formation, Life irrigation and Gap planting etc. have to be done by the contractor. Similarly, the maintenance

activities was also provided in the contract for the first year and the subsequent years. The period of contract would be five completing years from the date of contract.

6. It is further stated that Clause 4 of the agreement deals with the guaranteed yield and the minimum guaranteed yield per Hectare should be 50 MT at the end of the 5th year. Clause 5 deals with the incentives and disincentives and it stipulates that in case the guaranteed yield is less than 50 MT/HA, 70% of the cost per MT will be deducted from the retention money / Security Deposit for the shortfall quantity against the guaranteed yield. Clause 6 stipulates Security Deposit will be released only after satisfactory completion of contract. It is further stated that in case of unsatisfactory performance and eventual cancellation of contract, the Security Deposit amount will be forfeited. From the contract it is seen that the contractor has agreed to supply minimum guaranteed yield at the end of the 5th year from the date of contract. This Clause binds on the contractor and there is no dispute as per the above Clause.

7. The learned counsel for the petitioner further stated that the Arbitrators factually found on the physical verification of the sites that the contractor has not performed his part of the contract, even, from the first

year of the contract. Though, the contract is for the period of five years, he has not maintained the activities prescribed in the contract and the entire contract was breached by the claimant. Therefore, having held that the short closure of the contract is due to the fault of the petitioner and the contractor has committed breach of contract, the learned Arbitrators ought not to have granted award for returning of Security Deposit and EMD. It is the further contention that the counter claim also ought to have been allowed by the Arbitrators. Hence, the award passed by the learned Arbitrators to return the Security Deposit is beyond the scope of the contract.

8. Whereas it is the submission of learned counsel for the respondent that the learned Arbitrators found that the petitioner was also responsible for the delay and they have also not properly supervised the sites. Hence, the Arbitrators factually recorded the findings and passed the award. This findings cannot be interfered by re-appreciating the entire evidence. There is no patent illegality on the basis of the letter issued by the petitioner dated 12.06.2015. The short closure of the contract is mainly on the ground that the average productivity of the plantations will be less than the guaranteed yield at maturity and the average survival is 65 per cent only. The respondent may not be in a position to produce the minimum

guaranteed yield, the contract was terminated. The very letter preceding the short closure of the contract does not indicate the breach of contract. Similarly, based on the findings of the Arbitrators at the time of inspection, breach on the part of the contractor is inferred. It is the contention of the respondent/claimant that the Arbitrators have inspected the site only after termination of the contract. Therefore, the breach of contract cannot be interfered from the above visit. In any event the letter dated 12.06.2015 does not indicate the alleged breach on the part of the claimant. Hence, his contention is that the Arbitrators have passed the award based on the factual matrix, the same cannot be interfered.

9. Even in the counter statement and counter claim filed by the petitioner at paragraph No.14, they admitted that after receiving the work order the claimant/respondent started the land development and plantation activities from time to time from various sites. As per the terms of the work order, the clonal sapling planted by the claimant should have minimum guaranteed yield of 50 MT/Ha. Having admitted such aspect in the counter, now, it cannot be contended that there is no breach of the contract. Hence, the learned counsel for the respondent submitted that the award cannot be interfered as there is no violation of public policy and

patent illegality and none of the grounds set out in Section 34 of the Arbitration and Conciliation Act is made out to interfere.

10. In the light of the above submission as referred above, it is clear that the contract itself is for raising pulpwood plantation for a period of 5 years, though, the work orders issued for various sites, the tender condition stipulates that minimum guaranteed yield is to be given. However, the contract was terminated on 12.06.2015. The work orders relate to the year 2010-2012 and the contract was terminated on 12.06.2015. It is well settled that the award can be interfered if there is any patent illegality or in violation of public policy of India and it cannot be interfered merely on the ground that some other interpretation is possible by the Court. The nature of the contract entered between the parties not strictly based on their actions and also depends upon the nature force majeure etc. Though, the planting operation stipulated in the contract that the Site preparation and Leveling can be done well in advance; Pitting can be done before monsoon starts; the Trenches can be done before monsoon; and the planting can be done during monsoon the above works have also depends upon the nature of the monsoon and regular rains received for the particular year.

11. The learned Arbitrators also taken note of the force majeure conditions prevailed in the locality. Though, the learned Arbitrators have found that the respondent has not leveled the lands in time, thereby, they breached the contract. However, the learned Arbitrators have found that the short closure of the contract is justified, since the respondent has not executed the work in time and they have also noticed the several factors like weather conditions, soil conditions, drought conditions and other external conditions, during their inspection and come to conclusion that above factors might have contributed and prevented the claimant from giving the assured minimum guaranteed yield and factually found that the execution of the work was not carried out in time and the minimum guaranteed yield could not be possible due to external influence, such as nature and other. The learned Arbitrators factually found that the respondent alone cannot be found fault for the non supply of minimum guaranteed yield and rejected the counter claim.

12. This Court is of the view that the return of Security Deposit and EMD without interest awarded by the learned Arbitrators cannot be found fault. Admittedly, the contract was also closed and the minimum guaranteed yield could not be achieved after the end of the 5^{th} year, however, the contract was closed prior to 5 years of contract. As noted by

the Arbitrators various other factors are also reason for such quality and quantity. In view of the same the Arbitrators have factually arrived such conclusion, hence, this Court cannot act as an appellate Court to re-appreciate the entire findings. Though, the conditions in the tender itself states that when the performance is unsatisfactory the earnest money will be forfeited. It is to be noted that the nature of the contract not only depends upon the performance of the both sides, but, also influence of vagaries of nature. Therefore, merely such a Clause is in the agreement, this Court is of the view that the award of the Arbitrators to return of Security Deposit and EMD, taking into consideration the nature of the contract such award cannot be found fault. Hence, this Court found no grounds have been made out against the well reasoned award passed by the Arbitrators. Accordingly, the original petition is dismissed. No costs.

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Index:Yes/No
Internet:Yes/No
Speaking Order / Non Speaking Order
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N.SATHISH KUMAR, J.,

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