

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	21.11.2019
Judgment pronounced on	04.12.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.309 of 2014

M/s.Hindustan Steel Works Construction Limited
rep. by its General Manager,
Mr.V.S.Prasad,
No.24, Garment Complex,
Sidco Industrial Estate,
Guindy, Chennai – 600 032.

... Petitioner

Vs.

1.Government of Tamil Nadu
Rep. by its Project Director,
Tamil Nadu Road Sector Project,
No.48, Dr.Muthulakshmi Salai,
Adyar, Chennai – 600 020.

2.P.Sridharan, B.E.,
No.50, U.R. Nagar Extension,
Anna Nagar West Extension,
Chennai – 600 101.

3.K.G.Sukumaran, B.E.,
Chief Engineer (H) Retd.,
D5, Jaina Eiffel Garden,
No.90, Arcot Road,
Chennai – 600 026.

4.D.S.Dharmaseelan, B.E.,
Superintending Engineer (H) Rtd.,
No.11/14, Hamsons Flat, 3rd Cross Street,
V.P. Colony, Ayanavaram, Chennai – 600 023.

... Respondents

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 28.08.2009 passed by the Arbitrator.

For Petitioner : Mr.N.C.Ramesh, Senior Counsel,
for M/s.C.Ramesh

For Respondents : Mr.M.Sricharan Rangarajan
Spl.GP(CS) for R1

ORDER

The claimant in the Arbitration is the Petitioner herein. The dispute arises out of a contract for the Enhanced Periodical Maintenance of Government Roads in Tuticorin District. Pursuant to the tender floated by the first Respondent, the work was awarded to the Petitioner. The Agreement No.10/2004-05 was executed on 21.07.2004 (the Agreement) and the scheduled date of completion of work was 23.09.2005. However, the admitted position is that the work was actually completed on 30.10.2006. In these facts and circumstances, claims were made with regard to escalation, idling etc. and the said dispute was referred to Arbitration. In the Arbitration, the Petitioner made 6 claims. The said claims were in respect of the following: a sum of Rs.2,17,23,456/- towards escalation in costs of materials and labour; a sum of Rs.1,86,38,923/- towards loss of profits and overheads; a sum of Rs.70,28,640 towards compensation for costs incurred on idle men and

machinery; interest on overdue payments; costs of the Arbitration Proceedings; and compensation due to delay in issuance of the Project Authority Certificate. Based on the pleadings and documentary evidence, the Arbitral Tribunal pronounced the Arbitral Award dated 28.08.2009(the Award) and rejected all the claims except claim No.4. With regard to claim No.4, a sum of Rs.13,25,994/- was awarded with interest thereon at 8% per annum from the date of the Award till the date of payment. The said Award is challenged by the Petitioner.

2. I heard the learned counsel for the Petitioner and the learned counsel for the Respondents. The learned counsel for the Petitioner submitted that the delay in completion of work was on account of delay in approving revised proposals and that this delayed the performance of work from 09.04.2005 to 09.01.2006. The other reasons for delay were the monsoon rains in October and November 2004 and October and November 2005, the delay in approval of the deletion proposal in August and September 2006 and the delay in issuing the Project Authority Certificate. Consequently, he submitted that the reasons for delay are not attributable to the Petitioner and that, therefore, the Petitioner was entitled to its escalation claim. He further submitted that the Petitioner had reported the deterioration in the road surface within a reasonable time as per Clause 31.5 of the Agreement.

3. As regards idling of men and machinery, the learned counsel submitted that the men and machinery of the Petitioner were kept idle from 09.04.2005 to 09.01.2006, which is the time taken for approval of the revised estimate by the first Respondent, and, therefore, the Petitioner is entitled to claim No.2 towards idling. In this connection, it was further submitted that the Arbitral Tribunal misconstrued Clause 28.5 of the Agreement so as to hold that the Petitioner had admitted that it would not make any claim for increase in costs. It was further submitted that the first Respondent delayed the issuance of the Project Authority Certificate for the purpose of enabling a waiver of excise duty and that the Petitioner incurred losses on that account. The learned counsel also submitted that the rejection of the claim of loss of profits and overheads is arbitrary and perverse and that the Arbitral Tribunal should have been adopted Hudson's formula or any other accepted formula so as to determine the overheads and loss of profits claim. For all these reasons, the learned counsel submitted that the Arbitral Award is liable to be set aside.

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4. In response and to the contrary, the learned counsel for the first Respondent submitted that the Agreement admittedly does not contain a price escalation clause. Instead, clause 47.2 stipulates that the prices included in the contract shall be deemed to include any increase or

reduction in prices. Moreover, as per clause 13.4, the rates and prices are firm during the duration of the contract and shall not be subject to adjustment. He further submitted that the Petitioner had failed to give an early warning with regard to the deterioration of roads between 21.07.2004 and 25.09.2004 and that such notification was given only on 09.04.2005. The learned counsel pointed out that the Arbitral Tribunal had taken note of the fact that enhancement of cost is permissible only if the actual quantity exceeds the contractual or BOQ quantity by more than 25%, whereas this criterion was not satisfied in this case. He also pointed out that the Arbitral Tribunal had taken into consideration the fact that the Petitioner had requested for extension of time under clause 28.1 of the GCC without financial loss.

5. As regards the claim for compensation for alleged idle men and machinery, he pointed out that the Arbitral Tribunal had recorded factual findings that about 9175 m³ bituminous macadam (BM) was executed during the alleged idle period between 09.04.2005 and 09.01.2006 and that, therefore, the Petitioner is not entitled to idle charges especially because the Petitioner had agreed to the extension without any increase and costs. As regards the failure of the Petitioner to avail interest free mobilisation advance, he pointed out that the Arbitral Tribunal had recorded the finding that if such interest free mobilization

advance had been availed of by the Petitioner, it would have effectively neutralised the impact of rise in prices.

6. With regard to the delay in issuance of the Project Authority Certificate, he submitted that the Petitioner had furnished a nil entry in the bid document, thereby indicating its intention not to avail excise duty exemption. As regards the claim for over heads and loss of profits, he pointed out that the Arbitral Tribunal had taken into account the fact that the pricing schedule includes overheads and profits. After pointing out the aforesaid factual findings of the Arbitral Tribunal, the learned counsel contended that the scope for interference with an Arbitral Award is extremely limited as per the law laid down by the Hon'ble Supreme Court in several judgments, including **ASSOCIATE BUILDERS vs. DDA (2015) 3 SCC 49**, which was followed by the subsequent judgment in **THE STATE OF JHARKAND AND OTHERS vs. M/S.HSS INTEGRATED SDN AND ANOTHER**, Order dated 18.10.2019, at Paragraphs 6.1 and 6.4, wherein it was held that when the findings are based on appreciation of evidence and by considering the relevant provisions and material on record, and such findings are neither perverse nor contrary to the evidence on record, no interference is warranted. In this regard, he also relied upon the recent judgment of the Delhi High Court in **WISHWA MITTAR BAJAJI AND SONS vs. SHIPRA ESTATE LTD AND ANOTHER 2018 SCC Online Del 12918**.

7. The records were examined and the oral submissions of both sides were considered carefully. The main issue to be decided is whether the Arbitral Award is liable to be interfered with and set aside either partly or wholly. In this case, as discussed above, except claim No.4, all the other claims of the Petitioner were rejected. The rejection of the escalation claim is based on an interpretation of clause 47.2 and 13.4 of the GCC, which stipulate that the prices included in the Agreement shall be deemed to include any rise or fall in prices, that the rates and prices quoted by the contractor shall be fixed for the duration of the Agreement and that it shall not be subject to adjustment on any account. It is also evident that the Arbitral Tribunal recorded a factual finding that the Petitioner issued the warning with regard to the deterioration in the road on 09.04.2005, which is more than six months after taking over the site. On that basis, the Arbitral Tribunal held that the Petitioner is not entitled to compensation for costs, which could have been avoided by giving an early warning. For this purpose, the Arbitral Tribunal relied upon clause 32.1 and 40.5 of the GCC. The Arbitral Tribunal also referred to the fact that the items in respect of which the Petitioner claimed escalation are BOQ items and that, as per clause 38.1 of the GCC, unless there is an increase of not less than 25%, the Petitioner is not entitled to make a claim. The Arbitral Tribunal also took note of the fact that each extension of time was granted on the basis that there would not be an

increase in cost. Thus, the decision of the Arbitral Tribunal was based on a reasonable interpretation of the relevant contractual clauses and by appraising the evidence; therefore, no case is made out for interference.

8. As regards the idle claim, the Arbitral Tribunal examined the contractual requirements with regard to the execution of work during the alleged idle claim period. On that basis, the Arbitral Tribunal concluded that the claim could be sustained only if the Petitioner established on the basis of dependable data that no work was executed during the alleged idle period between 09.04.2005 and 09.01.2006. By examining the relevant evidence, the Arbitral Tribunal entered the finding that the Petitioner had carried out work during the relevant period and that the Petitioner did not contest the data, in that regard, as set out in page No.12 of the Award. On that basis, the Arbitral Tribunal rejected the claim. Such rejection is based on a reasonable appreciation of evidence and, therefore, does not warrant interference.

9. With regard to claim No.3, namely, the claim for loss of profits and overheads, the Arbitral Tribunal took into account the lapses on the part of the Petitioner with regard to commencement of work, issuance of early warning, want of materials and the fact that the Petitioner agreed to each extension on "a without financial loss" basis.

After advertng to the lapses of the Petitioner, the Arbitral Tribunal also considered the delay that is attributable to the employer/first Respondent herein. By apportioning responsibility as between the employer and the contractor for delay, the Arbitral Tribunal concluded that the Petitioner is entitled to compensation for a quantity of 6424 m³ of BM, which translates into a time over run of 17 weeks. For the 17 week period, the Arbitral Tribunal concluded that the Petitioner would be entitled to a sum of Rs.13,25,944/-, which was awarded with interest thereon at 8% per annum. Once again, these findings are based on an appreciation of evidence and no perversity is discernible on the face of the Award.

10. For the foregoing reasons, the Petitioner has failed to make out any case for interference with the Arbitral Award as per applicable principles, in this regard, as laid down in cases such as **McDermott International Inc. v. Burn standard Co. Ltd and others, (2006) 11 SCC 181** and **Associate Builders vs. DDA, (2015) 3 SCC 49.**

11. In the result, the Petition to set aside the Award is dismissed. No costs.

04.12.2019

Speaking order
Index : Yes
Internet: Yes

SENTHILKUMAR RAMAMOORTHY, J.
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