

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.08.2019

CORAM :

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

O.P. No.1051 of 2017

M/s. Anand Citi Centre Holdings Private Ltd.,
No.10 & 11, Chennai Citi Centre,
Radhakrishnan Salai,
Mylapore,
Chennai – 600 004.

... Petitioner

Vs.

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

... Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 27.09.2017 passed by Mr. Justice K.Venkataraman (Retd.), Madras High Court, in the Arbitral proceedings between the petitioner and the respondent herein, and allow the counter claim of the petitioner.

For Petitioner : Mr. Srinath Sridevan

For Respondent : Mr. ARL. Sundaresan
Senior Counsel
for M/s. S.Karthikai Balan

ORDER

An Arbitral award dated 27.09.2017, passed by sole Arbitrator in favour of the respondent, dismissing the counter claim of the petitioner, is under challenge in the present Original Petition.

2. Brief facts leading to the filing of this Original Petition are as follows:

2.1. The respondent entered into an agreement with the petitioner on 01.09.2010, by which, the respondent agreed to construct a mixed commercial development in the name and style of "ETA Mount Central" at Anna Salai, Chennai. The value of the work as per the contract was Rs.31,25,00,000/-. The petitioner originally appointed M/s. Builtee Engineers and Consultants as Project Management Consultant ('PMC' for brevity) and later replaced them with M/s. Fusion consulting.

2.2. It is the case of the respondent that the above agreement was amended five times. Every time, the petitioner made several additions to the original scope of the contract. The petitioner was not prompt in issuing drawings on time, which caused delay in construction. Further, the petitioner was also not effecting payments in time, as agreed. The respondent, after completion of the work, submitted the final bill. However, the petitioner had effected deductions. In order to settle the matter amicably, the respondent

approached the petitioner many times and the petitioner agreed to settle the matter for a sum of Rs.215.66 lakhs, after deduction of Rs.22.23 lakhs. However, since the petitioner did not settle the amount as agreed, the respondent sent a letter dated 01.04.2015 to the petitioner, whereas, the petitioner by a communication dated 12.04.2015 disputed the claim of the respondent and further, claimed a sum of Rs.4,55,48,120/- towards liquidated damages. Therefore, the respondent referred the matter for Arbitration before sole Arbitrator.

2.3.It is the case of the petitioner that, some minor changes were made in the specifications, but the changes were never of a scale to disrupt the progress of the ongoing project. All changes were mutually discussed and the value of the contract was increased and amendments were incorporated in the original contract agreement, as and when required. In the mid of 2012, the respondent complained about delay in payment and changes in drawings and sought extension of time. Therefore, by an agreement dated 22.06.2012, time for completion of work was extended upto 15.03.2013. The said agreement contemplates levy of liquidated damages for any delay beyond 15.03.2013. While so, due to minor increase in the respondent's scope, the respondent wanted compensation to be increased from Rs.3660 lakhs to Rs.3777 lakhs and accepted to complete the work within the contracted time. The petitioner accepted the same and an amendment deed

dated 23.11.2012 was entered into by the parties. However, the respondent did not complete the work. Even thereafter, certain rectifications in the works already done by the respondent were required, hence, amendment agreement dated 02.04.2013 was entered into between the parties. While so, the respondent wound up the work and abandoned the site on 09.12.2013, leaving many works incomplete. The respondent, contrary to the provisions of the agreement, raised a bill dated 26.12.2013. The third amendment expressly states that the respondent has to pay liquidated damages for delay beyond 15.03.2013. Further, there was no delay in submitting the drawings. The so called final bill was submitted by the respondent without completing the work and without getting PMC certification. The PMC was unable to certify the final bill for want of particulars and the same was communicated to the respondent by e-mails dated 20.01.2016 and 28.01.2016. The petitioner replied to the final bill on 19.08.2014 with a statement setting out the correct position. Hence, the petitioner raised a counter claim of Rs.9,31,39,385/- as against the petitioner.

2.4. On the basis of pleadings of the parties, the learned Arbitrator framed the following issues :

(a) Whether the claimant/respondent breach any of the terms and conditions of the Agreement/Amended agreement ?

(b) Whether the claimant is entitled to the amount claimed in its claim statement ?

(c) Whether the respondent is entitled to the amount claimed in the counter-claim ?

(d) Whether the counter-claim made by the respondent is barred by Limitations ?

(e) Whether the claimant/respondent is entitled to any interest for the amount to be awarded and if so, what is the rate of interest ?

(f) Whether the claimant/respondent is entitled to any cost and if so what is the cost ?

2.5.The learned Arbitrator, upon hearing both sides and considering the oral and documentary evidence, factually found that, only the petitioner has breached the contract and accordingly, passed the award dated 27.09.2017 in favour of the respondent and dismissed the counter claim of the petitioner.

3.Challenging the award, the petitioner has filed the present Original Petition to set aside the award.

4.Though, this Original Petition has been filed, assailing the entire award impugned in this petition, submissions of learned counsel for the petitioner were mainly focussing the counter claim of the petitioner with regard to liquidated damages. The learned counsel for the petitioner

submitted that the learned Arbitrator had totally ignored the documents marked on the side of the petitioner, but had relied upon the documents which were not marked at all. It is his further contention that the entire award is beyond the terms of the contract and the amendment agreement dated 22.06.2012. The pleadings were not circulated to the other side. The learned Arbitrator has not considered the pleadings on the side of the petitioner and has simply rejected their counter claim. The learned counsel contended that though, the contract stipulates liquidated damages in the event of delay in completing the work, the learned Arbitrator has disagreed to the levy of liquidated damages without any basis. The document "Annexure-1" was not marked during the Arbitral proceedings, but, the same has been relied upon by the learned Arbitrator.

5.The learned counsel for the petitioner further contended that, though, the respondent's side documents Exs.C7 and C8 were not admitted, the learned Arbitrator had relied upon the same to arrive at a finding in favour of the respondent. It is his further contention that, date for completion of work was fixed as 15.03.2013. Though, the contract was open upto 15.03.2013, the letter and e-mails, marked as Exs.R1 to R39 clearly indicate the default committed by the respondent. After the due date of completion, the petitioner pointed out the delay to the respondent, since, time was stipulated as an essence of the contract, and stated that liquidated damages

will be imposed. Exs.R41 to R101 marked on the side of the petitioner were not relied upon by the learned Arbitrator. There were several pending works which were recorded under Exs.R102 to R109. Those documents clearly indicate that the delay was on the part of the respondent. However, the learned Arbitrator has ignored the material documents filed by the petitioner and has relied upon the respondent's documents alone. Therefore, it is the contention of the learned counsel that the entire award is liable to be interfered with and the petitioner is entitled to receive liquidated damages as per the contract for the delay in completion of work. In support of his submissions, the learned counsel mainly relied upon the following judgments:

(i) *V.Gnanarajapushpam v. M/s.BBC Foundation Private Limited*

[2019 (3) LW 850]

(ii) *Asian Peroxide Ltd. v. Linde India Ltd.* **[O.P.No.1112 of 2018**

dated 18.06.2019]

(iii) *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.* **[2003**

(5) SCC 705]

(iv) *K.P.Poulose v. State of Kerala and another* **[(1975) 2 SCC**

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(v) *Sumitomo Heavy Industries Limited v. Oil & Natural Gas*

Corporation Ltd. **[(2010) 11 SCC 296]**

6.Per contra, learned counsel for the respondent contended that the contract, amendment agreements and various other correspondences exchanged between the parties clearly indicate that, time is not an essence of the contract. The learned counsel submitted that the work was completed on 23.12.2013. The learned Arbitrator has considered the entire factual aspects of the case and has found that the delay was on the part of the petitioner. Since the learned Arbitrator has given such a finding on factual basis, this Court cannot re-appreciate the entire evidence. The learned counsel submitted that the documents filed on the side of the petitioner are only correspondences between the parties, while the work was in progress. Those documents are of no relevance at all. The learned Arbitrator has factually considered the oral and documentary evidence placed before him and has passed the award as a result of factual findings and therefore, the award cannot be interfered with, by this Court. In support of his contentions, the learned counsel relied upon the following judgments :

(i) *Arosan Enterprises Ltd. v. Union of India and another* **[1999**

(9) SCC 449]

(ii) *Delhi Development Authority v. M/s.Bhardwaj Brothers* **[FAO**

(OS) No.285 of 2014 dated 01.08.2014]

(iii) *S.Malliga v. Chief Regional Manager and another*

[O.S.A.No.84 of 2012 dated 31.03.2016]

7.Heard the learned counsel on either side and perused the award and other materials available on record.

8.It is well settled that the scope of Section 34 of the 'Arbitration and Conciliation Act, 1996', ('the Act' for brevity) to interfere with an award is very limited. Unless an award is contrary to the fundamental policy of India or suffers from patent illegality or from any other ground(s) set out under Section 34 of the Act, it cannot be interfered with, merely on the ground that the learned Arbitrator is capable of making some other interpretation or inference, which alone is not enough to interfere with the award.

9.The learned Arbitrator has identified specific issues and points raised by both sides relating to the issue of delay. The learned Arbitrator, in Para No.12 of the impugned award, has pointed out the main allegations of the respondent as against the petitioner, which are extracted hereunder :

- (i) The respondent did not issue the drawings in time, so as to enable the claimant to carry out the work without delay.*
- (ii) Delay in making ad hoc payments and running bill.*
- (iii)Failed to make payment even after the works were completed.*
- (iv)Failed to return the retention amount even after the expiry of the defects liability period.*

The learned Arbitrator has also identified and pointed out the main grievances of the petitioner as against the respondent, which are as follows :

- (i) It has delayed the work*
- (ii) It has not completed all items of work*
- (iii) Defective works were not rectified before submission of final bill.*
- (iv) The final bill was not accompanied by PMC.*

10. Though, as per the last amendment, time for completion of work was extended upto 15.03.2013, even after that date, the parties never intended to see the time as an essence of the contract and the respondent continued the work beyond 15.03.2013. When looked into by this Court, in Amendment order dated 22.06.2012 (Ex.C4), it is stated that the contract duration is extended upto 15.03.2013 and on default, liquidated damages will be imposed. It is further to be noted that, again vide amendment dated 23.11.2012 (Ex.C5), the contract was amended and the amount was increased to Rs.37,77,26,437/-, where, the amendment order is totally silent about the extension of time. Similarly, vide letter dated 02.04.2013 (Ex.C-6), again the amount has been revised to Rs.3,72,477,247/- wherein also, there is no mention with regard to extension of time for completion of work. Though, the amendment dated 22.06.2012 (Ex.C4) specifically mentions about the extension of time upto 15.03.2013, the subsequent amendments viz., Exs.C5 and C6, where, amounts have been revised, are totally silent

about the extension of time for completion of work. Such act of the parties clearly indicates that the parties are in fact not intended to make time as an essence of contract.

11. Much emphasis has been made on the aspect that the learned Arbitrator has relied upon the document "Annexure-1", which was not marked as a document itself, before the learned Arbitrator. It is to be noted that, it is clearly stated in the claim statement that, "Annexure-1" is a part of the pleadings. Therefore, the contention of the learned counsel for the petitioner in this regard cannot be countenanced by this Court.

12. The learned Arbitrator has considered the oral and documentary evidence and has factually found that the delay in completion of work was due to the fact that the petitioner issued the drawings only on 31.12.2013. On a perusal of the defence statement filed by the petitioner during Arbitral proceedings, it is seen that the petitioner, in Para No.16, has not disputed the above fact that the drawings were belatedly sent, but, they sought to plead that the drawings were only re-sent, as per the request of the respondent for various other reasons, viz., the respondent requested the petitioner to resend the drawings and some of those drawings were only required by the respondent on completion of a particular work, which the respondent had not completed at the time of making request and some of those works detailed in

Annexure were not even in the scope of the respondent. Nevertheless, the learned Arbitrator has factually found in Para No.12(f) of the impugned award that the petitioner has not established that the drawings were re-sent at the request of the respondent. Moreover, the learned Arbitrator has considered the entire oral and documentary evidence of both parties and has recorded a specific finding on facts that the drawings were sent by the petitioner to the respondent from January 2013 to December 2013, which not only falsifies the case of the petitioner, but also proves the case of the respondent that the drawings were issued by the petitioner, even beyond the extended time frame for completion of work, i.e., 15.03.2013.

13.The final bill (Ex.C7) was submitted by the respondent on 26.12.2013 and the same has been certified by the petitioner under Ex.C8 and further, the petitioner has made some deductions in the final bill, which have not been agreed by the respondent. At the relevant point of time, only the snag works remained incomplete. The learned Arbitrator has found that the said works were completed in April 2013. The learned Arbitrator has also taken note of the fact that the petitioner has not sent any communication in the year 2014, alleging non-completion of work or non-completion of snag list of works. Even in Ex.C8 issued by the petitioner on 19.08.2014, there is no whisper about the non-completion of original/snag works. It is seen that the nature of the snag works was also factually considered by the learned

Arbitrator based on oral and documentary evidence of the parties. As far as counter claim is concerned, it is the case of the petitioner that the respondent has abandoned the work on 09.12.2013 and hence, the petitioner has spent considerable amount towards completion of the work. The learned Arbitrator has specifically recorded a finding that there is no evidence to show that the petitioner has completed the snag works or has done rectification work and has incurred expenditure towards the same. Hence, the learned Arbitrator has ultimately negated the counter claim of the petitioner.

14.The findings of the learned Arbitrator entirely revolve around factual aspects of the case. Merely on the ground that each document filed by the petitioner has not been discussed in detail, it cannot be construed that the learned Arbitrator has ignored the entire documents on the side of the petitioner. On a perusal of the documents marked on the side of the petitioner before the learned Arbitrator, it is seen that, most of the documents are only correspondences between the parties right from the year 2012. Ex.R25 is a mail correspondence dated 08.01.2013, wherein, some complaint has been made by the petitioner about the non-completion of certain works in the month of January 2013. Similarly, Ex.R26 is also with regard to non-completion of certain works. It is pertinent to note that, admittedly, the work was completed in the month of December 2013. Therefore, these documents marked on the side of the petitioner, complaining some defects in the work

during the course of construction, have no relevance at all. The learned counsel for the petitioner pointed out Ex.R73 dated 11.06.2013, complaining that certain snag works have not been completed and therefore, they are entitled to invoke liquidated damages as per the contract. Though, the said letter was sent in June 2013, it is to be noted that, as indicated in earlier part of this order that, the learned Arbitrator has clearly found that there was a delay in submitting the drawings by the petitioner and the delay continued till December 2013. Therefore, the letter dated 11.06.2013 (Ex.R73) and other documents are not sufficient to show that the petitioner is entitled to get liquidated damages. Merely because some documents marked on the side of the petitioner have not been discussed in detail, it cannot be said that the entire award is liable to be set aside. It is the sole jurisdiction of the learned Arbitrator to discuss the relevant documents of the case. There need not be minute details or discussions with regard to all documents relied upon. On a perusal of the award, it is noticed that the learned Arbitrator, on his wisdom, has identified the actual dispute and issues between the parties and has specifically discussed the documents that are relevant to resolve the dispute. Lack of detailed discussion of certain documents, which are nothing but mere exchange of correspondence complaining certain defects much prior to the completion of the work, in my view, cannot be a ground to interfere with a well reasoned award based on factual aspects.

15. Admittedly, the work was completed in the month of December, 2013 and snag works were completed later. The learned Arbitrator has recorded a factual finding to that effect. While the delay being only on the part of the petitioner, liquidated damages cannot be invoked by them, particularly when the parties have never indicated time as an essence of contract. Further, when a firm claims liquidated damages, they have to prove the loss or expenditure incurred by them. However, the learned Arbitrator has made a finding to the effect that there was no evidence placed before him to show that the petitioner has incurred expenditure for completion of remaining work. Therefore, in the absence of any such evidence in this regard, now, the same cannot be canvassed before this Court. This Court cannot sit as an Appellate court and re-appreciate the entire evidence. The learned Arbitrator has recorded a finding that the work was completed on 23.12.2013 on factual basis and PMC was relieved in the year 2014. The learned Arbitrator has also relied upon various judgments of the Hon'ble Supreme Court and rejected the counter claim of the petitioner seeking liquidated damages, as there was no evidence to prove the alleged loss sustained by the petitioner.

16. In the light of the narrative *supra*, this Court is of the opinion that the impugned award requires no interference. However, taking note of economic conditions and change in interest patterns and reduction in bank

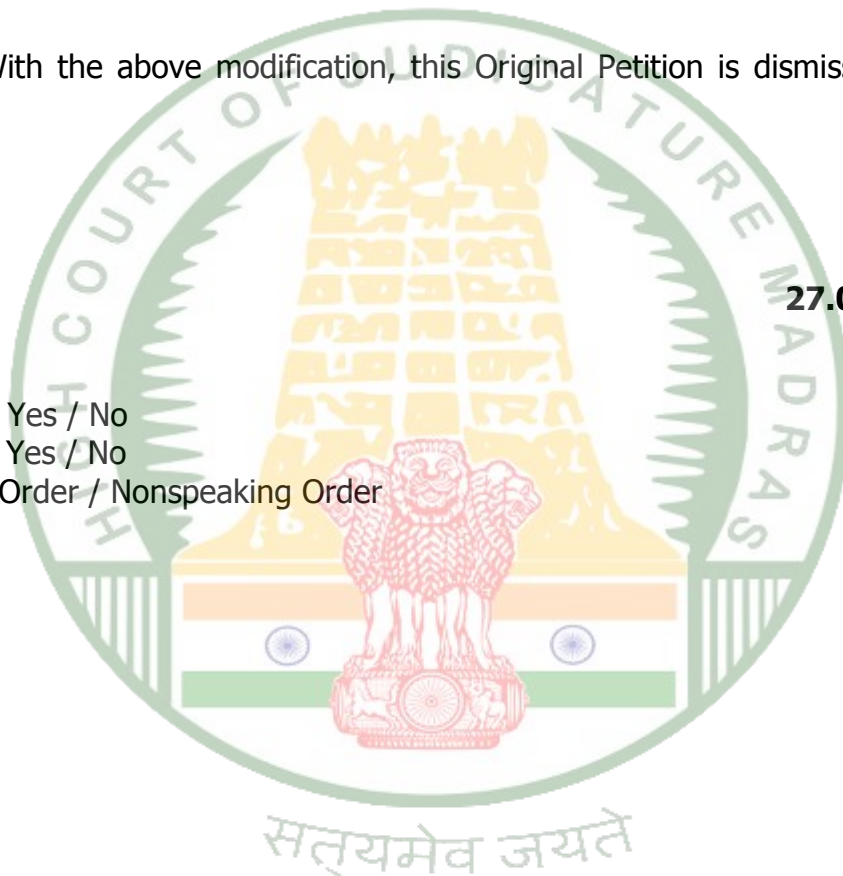
interest, this Court is of the view that the interest awarded @ 12% p.a. by the learned Arbitrator is highly excessive and the same is therefore, reduced to 9% p.a. Accordingly, the interest component of the impugned award alone is modified and the rest of the impugned award stands confirmed.

With the above modification, this Original Petition is dismissed. No costs.

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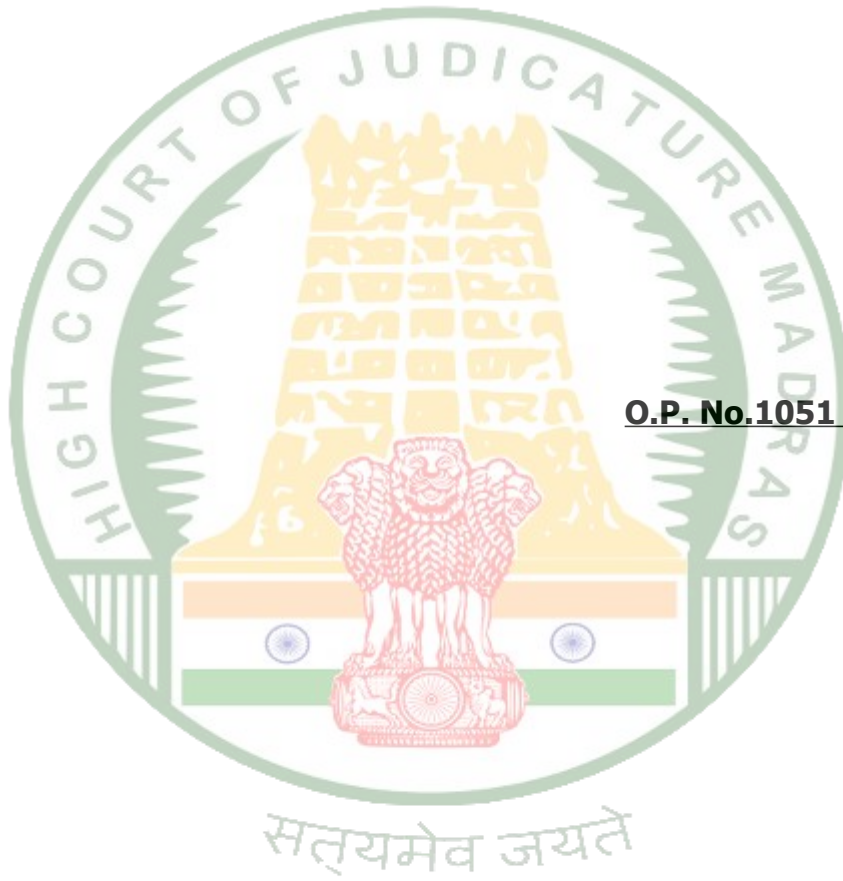
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