

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on	30.10.2018
Orders pronounced on	27.02.2019

CORAM

THE HONOURABLE Mr.JUSTICE **D.KRISHNAKUMAR****O.P.No.707 of 2017**

M/s.Mohata Construction Company

By its General Power of Attorney

Mr.Sandeep Mohata,

No.25-B, Sadul Ganj,

Bikanur - 334 003,

Rajasthan.

... Petitioner

Vs.

1 The Chief Engineer,

Chennai Zone,

C/o 56 APO

Island Grounds,

Chennai 600 005.

2 Shri Narendra Saigal

Arbitrator,

Joint DG (Contracts), CE (QS & C),

South Western Command,

Pin 908 546.

... Respondents

Prayer:- Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the award in 170449/ARB/CE CZ/CHE/11/28E8, dated 5.4.2017 passed by the second respondent.

For Petitioner : Mr.T.V.Lakshmanan

For Respondent No.1 : Mr.N.Rajan,

Sr.Central Govt. Standing Counsel

O R D E R

Brief facts of the case is as follows:

The petitioner Mohata Construction Company was awarded contract in C.A.No.CECZ/CHE/11 of 2006-07 for construction of children school at Chennai at a cost of Rs.8,49,41,687.54 by agreement, dated 31.1.2007. The date of commencement of work was fixed as 24.2.2007 and the Phase I work shall be completed by 22.11.2007. In respect of the second Phase, the contractor was directed to complete the work on 22.8.2008. However, Phase II work was completed on 30.9.2009. As per the terms and conditions of the contract, the contractor/petitioner herein is bound to carry out Anti-Termite Treatment (ATT), through an approved specialist agency and the same should be effective for 10 years. The materials for ATT was purchased from and the work done through an approved specialized agency under the direct supervision of the department, the material was to be purchased directly from the approved agency and purchase voucher produced for verification and defacement. Paws Pest Aways Private Ltd. was the approved specialist for carrying out ATT. The approval was given by the Command Works Engineer and conveyed to Garrison Engineer. The persons who came for carrying out ATT were given passes and personally verified by the officers of the first respondent. The chemical was sample tested and laboratory tested by the first respondent before manufacture and taking delivery of particular consignments. Thus, the entire work was carried out by the first

respondent under its direct supervision and was executed by the approved agency. The first respondent raised a claim before the Arbitrator that Anti Termite Treatment given by the petitioner was found ineffective, as a result, the building as a whole infected with termite. Number of wooden joineries severely infested by termite. In spite of several communications issued to the petitioner, remaining the contractual obligations from 24.1.2014 onwards, the petitioner did not come forward to carry out Anti Termite Treatment for the remaining period. On 29.9.2019, the petitioner was called upon to rectify the defects, however, the petitioner did not rectify the said defects.

2. On perusal of the records produced before the Arbitrator, the Arbitrator passed the impugned award, allowed the Claim I in favour of the first respondent, by awarding Rs.5,83,110.23 towards damages payable by the petitioner herein to the first respondent and disallowed the claims II and III, viz., loss of reputation and cost of reference to arbitration. Challenging the aforesaid award, the petitioner has preferred the present original petition under Section 34 of the Arbitration and Conciliation Act to set aside the award.

3. According to the petitioner, M/s.Paws PestAways Pvt. Ltd. was the approved specialist agency for carrying out ATT as per the terms and conditions of the agreement entered into between the petitioner and the first respondent, after obtaining approval from the Command Works Engineer. The said

work done by the petitioner company by carrying out ATT done in the presence of Engineering-in-Charge and checked by the concerned officer and day today work was entered in concerned registers maintained by them. The aforesaid work was carried out under the first respondent direct supervision and was executed by the approved agency. The petitioner did not have any role, whatsoever except proposing M/s.Paws PestAways Private Ltd. The guarantee is valid only for wood work or joinery work. The petitioner furnished the guarantee for wood work on 16.11.2010. But the damage was caused to joinery work, not wood work. The wood work and joinery work are different. Therefore, the petitioner has not furnished any separate guarantee for the joinery work. Hence, the petitioner is not liable for damages caused to the joinery work. According to the petitioner, joinery work are separately treated. Windows, door frames and chowkats are comes under joinery work as per SSR specification, both under Part I and Part II. From the aforesaid specifications, guarantee was only for wood work or joinery work. But, admittedly, defects related to joinery work. After complaint made by the department, the petitioner offered to rectify the defects. The petitioner informed that as the carpenters and workmen were in short supply, they needed sometime. However, the risk and cost work was called for in a post haste manner and awarded in 2014, but was executed and completed only in 2016. Therefore, the Arbitrator rendered a specific finding that specification for Risk and Cost was

different from the original work as well as replacements were included when not required. However, the Arbitrator instead of excluding the amount of Rs.1,17,600/-, deducted only Rs.87,000/-. Further, item No.23 and 25 of the Risk & Cost work relates to joinery works which cannot be included as the guarantee was furnished only for wood work. Therefore, the award passed by the Arbitrator is liable to be set aside.

4. The learned counsel for the first respondent would submit that as per the terms and conditions of the contract, the petitioner is bound to carry out ATT through approved specialised agency and the same should be effective for 10 years. Under Clause 5.2.3.1, during the guarantee period of 10 years, the ATT should render the buildings free from termite infestation at his own expenses till expiry of the guarantee period of 10 years. As per Clause 2.8.4, the contractor shall submit a written guarantee for 10 years to the Government for the work against occurrence of termite infestation and the same shall be done only through approved specialised agency under Clause 2.8.2 of the agreement. On the request of the petitioner, specialist firm namely M/s.Paws Pest Aways Pvt. Ltd. was accorded approval by the first respondent by letter, dated 21.4.2007. The petitioner submitted a guarantee for ATT, dated 16.11.2010 for 10 years from the date of completion of the work i.e. 30.9.2009 which reads as follows:

"We hereby confirm we take guarantee for work of woodwork

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as per C.A. clause 5.2.3.1 of C.A. page 167 for 10 years from

the date of completion i.e. 30.9.2009 to 30.9.2019 against CANO....."

5. After completion of the contractual work, Phase I and II, on 30.9.2009, the first respondent found that the building as a whole was infected with Termite. Number of wooden joineries, built-in cupboards etc. were severely infested by Termite. The first respondent sent many letters to the petitioner to rectify the defects as per the agreement entered into between the parties. The petitioner did not come forward to carry out the Anti-Termite treatment for the remaining period ending on 29.9.2019. The Garrison Engineer sought for clarification from the specialist firm M/s.Paws Pest Aways Pvt. Ltd. by letter, dated 8.9.2014 (Ex.UOI-20). The specialist firm has intimated that they have not carried out the pre-construction Anti-Termite Treatment work and informed that the aforesaid firm's name was forged and fraudulently used with manipulated records/vouchers, by the petitioner, as per their letter, dated 19.9.2014 (Ex.UOI-21). But the petitioner failed to rectify the defects pointed out by the first respondent. The risk and cost contract was concluded with M/s.Pest Control Services of India for Rs.10,72,349/- on 01.12.2014 (Ex.UOI-23). The petitioner did not reimburse the expenses incurred by the first respondent.

5(i) The learned counsel for the first respondent would submit that the written guarantee was furnished by the petitioner only in pursuance of Clause 5.2.3.1 and Clause 2.8.4

of the agreement.

5(ii) **Clause 5.2.3.1** of the agreement reads as follows:

"The contractor shall submit a written guarantee, in favour of G.E., 10 (TEN) years from the certified date of completion to the government for woodwork/joinery work against the occurrence of termite infestation. Should the GE at any time during the currency of the contract or prior to the expiry of the said guarantee period, find that the timber work have been infested with termite, the contractor, on demand in writing from the GE, will forthwith undertake to carry out such work/treatment including replacement of infested timber work, which may be necessary to render the buildings from termite infestation at his own expenses till expiry of the guarantee period of 10 years."

5(iii) **Clause 2.8.4** of the agreement reads as follows:

"The defects liability period of anti-termite treatment shall be 10 years and the contractor shall be responsible to keep the entire buildings free from termite infestation for a period of 10 years after the date of taking over the completed buildings from the contractor. The contractor shall submit a written guarantee for 10 (ten) years to the Government for the work against occurrence of termite infestation."

5(iv) **Clause 2.8.2** of the agreement reads as follows:

"The termite treatment shall be got done through

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approved specialist agency which is a member of Indian Pest

Control Association holding valid licence as per Clause 13 of the Insecticide Act, 1968."

5(v) The first respondent by interpreting the meaning of wooden work, denied the contention of the petitioner that the guarantee executed by the petitioner for carrying out ATT, only in respect of wooden work and not joinery work and stated that when the entire work is mentioned as timber work, the words wood work/joinery work have to be understood as one and the same. It will become clear if the said clause is read in full. In the later part of the clause, a caution has been given, if during the relevant period, the timber work have been infested with termite, the contractor shall undertake to carry out such work / treatment including replacement of infested timber work. Therefore, said clause does not differentiate wood work and joinery work. When the entire work is mentioned as timber work, the words wood work/joinery work have to be understood as one and the same. According to Oxford Dictionary, wood work means wooden parts of a room or building such as window, frames or doors. The British meaning is given as the activity or skill or making things from wood. joinery means the wooden components of a building such as stairs, doors and window frames. According to concise Oxford Dictionary, wood work means the wooden parts of a building or other structure and also the activity or skill of making things from wood. From these meanings, it becomes clear that the first respondent while accepting the guarantee, was very well aware that the wood work and the joinery work are

one and the same. There cannot be different meaning for wood work and joinery work. Further, it is submitted that the petitioner has played a fraud by stating that they engaged the services of a specialised agency viz., Paws Pest Aways Pvt. Ltd. It is evident from the document marked as Ex.UOI-20 and Ex.UOI-21. The petitioner forged the name of the aforesaid company. The onus of proof would falls on the petitioner to prove that the petitioner has engaged the services of specialised agency. The respondent also relying upon the decision of the Hon'ble Supreme Court reported in **A.I.R. 1964 SC 880 (KALWA DEVADATTAM AND OTHERS Vs. UNION OF INDIA AND OTHERS)** and the decision of this Court reported in **(2008) 3 MLJ 1481 (Mad-NOC)** to contend that the burden is always with a person who got employment and he cannot shift the burden on to the authorities on the basis of his community certificate obtained under the respective quota. Therefore, the original petition is liable to be set aside.

6. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the first respondent and perused the materials available on record.

7. The grounds raised by the learned counsel for the petitioner to set aside the award passed by the Arbitrator is as follows:

(i) The main ground raised by the petitioner herein

is that the guarantee furnished by the petitioner is only for either wood work or joinery work. Clause 5.2.3.1 is not a

guarantee by itself but provides for a separate guarantee. Similarly, Clause 2.8.4 also provides only for furnishing a separate guarantee by the Contractor. "Guarantee for Wood work", dated 16.11.2010 was furnished by the petitioner and the same was accepted by the first respondent, whereas the damage as stated by the department relates to "Joinery work and not Wood work". Wood work and Joinery work are different. Therefore, the petitioner is not liable for damages caused to Joineries.

(ii) The Arbitrator grossly erred in not excluding the amount of Rs.1,17,600/- in full relating to paneled shutters and also the completion cost of Rs.2,50,811.00 on item No.23 to 25 in the risk and cost work which is related to joinery work.

(iii) The learned counsel for the petitioner relied on the decision of the Hon'ble Supreme Court in **SHANTI BUHIYA VESTA PATEL VS. NIRMALA JAYAPRAKASH TIWAR [(2010) 5 SCC 104]** to contend that in case of allegation of fraud, the burden lay on the person alleging it, such a burden is discharged and onus is on the other side, such onus can be discharged by producing direct or circumstantial evidence, including presumptions. The learned counsel for the petitioner also relied on the decision of the Hon'ble Supreme Court in **KUNDAN LAL RALLARAM VS. CUSTODIAN EVACUEE PROPERTY [AIR 1961 SC 1316]** to contend that if important documents are in possession of one of the parties, then it is for that party to produce it and if it fails to produce, an adverse presumption should be drawn against it.

8. **Clause 5.2.3.1** of the agreement reads as follows:

"The contractor shall submit a written guarantee, in favour of G.E., 10 (TEN) years from the certified date of completion to the government for woodwork/joinery work against the occurrence of termite infestation. Should the GE at any time during the currency of the contract or prior to the expiry of the said guarantee period, find that the timber work have been infested with termite, the contractor, on demand in writing from the GE, will forthwith undertake to carry out such work/treatment including replacement of infested timber work, which may be necessary to render the buildings from termite infestation at his own expenses till expiry of the guarantee period of 10 years."

Clause 2.8.4 of the agreement reads as follows:

"The defects liability period of anti-termite treatment shall be 10 years and the contractor shall be responsible to keep the entire buildings free from termite infestation for a period of 10 years after the date of taking over the completed buildings from the contractor. The contractor shall submit a written guarantee for 10 (ten) years to the Government for the work against occurrence of termite infestation."

9. A perusal of records would show that the

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petitioner company had submitted guarantee vide their letter

No.MCC/School/Chennai, dated 16.11.2010 stating that as per C.A. Clause 5.2.3.1 of C.A. page 167 for Ten years from the date of completion i.e. 30.9.2009 to 30.9.2019, whereby the petitioner company accepted the terms and conditions of the contract. As per Clause 5.2.3.1, it is the responsibility of the petitioner company to carry out Wood work as well as Joinery work against the occurrence of termite infestation. It is also clear from the aforesaid Clause that during the guarantee period of the contract, if any termite infestation is found, the petitioner company have to carry out such work or treatment including replacement of infested timber, which may be necessary to render the buildings free from termite infestation at their own expenses till expiry of the guarantee period of 10 years. Therefore, the petitioner company cannot take refuge behind the term "wood work/Joinery work", by stating that the petitioner had furnished guarantee only for wood work, not joineries.

10. Before interpreting the term, "wood work/Joinery work", one must read the Clause 5.2.3.1 of the agreement fully and along with Clause 2.8.4 of the agreement whereby, "the defects liability period of anti-termite treatment shall be 10 years and the contractor shall be responsible to keep the entire buildings free from termite infestation for a period of 10 years after the date of taking over the completed buildings from the contractor. Therefore, the term, "'Wood work/Joinery work'" should be interpreted as "Wood work and Joinery work and it

cannot be treated as separate, as claimed by the petitioner company.

11. Therefore, as per the agreed conditions of the contract, the Contractor/ petitioner herein is responsible to keep the building free from termite infestation upto and including 29.9.2019. But the building as a whole was found heavily infested with termite because of improper ATT work carried out by the Contractor/petitioner herein. The petitioner herein was called upon to rectify the defects, vide letters, dated 24.1.2014, 19.4.2014, 5.6.2014, 30.6.2014, 26.8.2014 and 30.8.2014 by the Garrison Engineer. But the Contractor/petitioner herein had failed to rectify the defects. As per condition 46 of IAFW 2249 of General Conditions of Contract and as per Clause 2.8.7 of the contract, since the contractor fails to rectify the defects, the first respondent had carried out such defective work through other agency at the risk and cost of the contractor, by awarding contract in favour of M/s.Pest Control Services of India for Rs.10,72,349.00 on 1.12.2014 to rectify the defects.

12. The petitioner herein claims that a sum of Rs.1,17,600/- ought to have been excluded towards replacement of panel shatter by flush shutters. The item No.7,10,11,12,13,14,15,16,17,19 and 22 requires only for taking out and fixing not for supply and fixing and the item No.5 alone replaced with flush shutter in the place of panel shutter. The

Arbitrator assessed the extra expenditure made by the claimant against these items, works out to Rs.87,000/-. The petitioner has not produced any materials in support of his claim that a sum of Rs.1,17,600/- ought to have been excluded towards replacement of panel shutter. Therefore, the Arbitrator has rightly determined the extra expenditure which according to him Rs.87,000/- made by the claimant. This Court in paragraph 10 of this order has held that the contract awarded to the petitioner for Wood and Joinery work, the claim of the petitioner towards completion cost of Rs.2,50,811/- on item No.23 to 25 is not sustainable.

13. The learned counsel for the petitioner has not produced any materials in support of his contention that the Arbitrator while passing the impugned award, demonstrated bias.

14. In so far as the allegation of the first respondent against the petitioner that the name of the specialist firm namely, Paws Pest Aways Pvt. Ltd. was forged and fraudulently used by the petitioner's company with manipulated records/vouchers is concerned, it is open to the first respondent to prosecute the petitioner company before the criminal Court in accordance with law.

15. The scope of interference by this Court under Section 34 of the Arbitration and Conciliation Act, in the award passed by the Arbitrator is very limited. The Division Bench of

Sector Project II Vs. M/s.RNS Infrastructure Ltd- GPL (JC) and Others (O.S.A No.301 of 2017 and C.M.P. No.18730 of 2017) held as follows:

"20. The scope for interference to an Arbitration award is very limited. Unless and until the applicant satisfies the requirements of Section 34 of the Act, the Arbitration Award cannot be set aside by this Court.

21. The scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996, to an Arbitral Award is covered by the decision of Hon'ble Supreme Court in

(a) Oil & Natural Gas Corporation Ltd., Vs. Saw Pipes Limited reported in (2003) 5 SCC 705, wherein it was held that the Court can set aside the award, if -

1) It is contrary to:-

(a) fundamental policy of Indian Law;

(or)

(b) Interest of India; (or)

(c) Justice and morality.

2) It is patently illegal

3) It is so unfair and unreasonable that it shocks the conscience of the Court.

16. The Division Bench of the Delhi High Court in its recent decision dated 25.09.2017 in the case of **OGENE SYSTEMS INDIA PVT., LTD., VS. TECHNOLOGY DEVELOPMENT BOARD REPORTED IN**

2017 SCC ON-LINE DL 11136 delineated the following propositions

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after considering all the decisions of the Hon'ble Supreme Court

relating to the scope of Section 34 of Arbitration and Conciliation Act right from **RENUSAGAR POWER COMPANY 1994 SUPP(1) SCC 644 TO THE RECENT ASSOCIATED BUILDERS VS. DDA (2015) 3 SCC 49.**

(i) The four reasons motivating the legislation of the Act, in 1996 were:-

(a) to provide for a fair and efficient arbitral procedure,

(b) to provide for the passing of reasoned awards

(c) to ensure that the arbitrator does not transgress his jurisdiction, and

(d) to minimize supervision, by Courts, in the arbitral process.

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if:-

(a) It is contrary to the fundamental policy of Indian Law

(b) It is contrary to the interest of India

(c) It is contrary to justice or illegal, or

(d) It is patently illegal, or

(e) It is so perverse, irrational, unfair, or unreasonable that it shocks the conscience of the Court.

On the facts of the present case, petitioner has not satisfied the grounds to interfere by this Court under Section 34 of the Arbitration and Conciliation Act.

17. For the reasons stated above and in the light of the decisions cited supra, this Court is not inclined to interfere with the award passed by the Arbitrator/second respondent herein. Consequently, the original petition is dismissed. No costs.

Sd/-D.K.K.J

27/02/2019

//Certified to be true copy//

Dated at Madras this the day of 2019.
JJ 25/06/2019

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