

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	05.11.2019
Judgment pronounced on	14.11.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.911 of 2017

M/s.Oil and Natural Gas Corporation Ltd,
Thalamuthu Natarajan Building,
8th Floor, Tower-1,
MM Department, Gandhi Irwin Road,
Egmore, Chennai – 600 008.

... Petitioner

VS

1.M/s.A.P. Enterprises
Rep. by its Partner Mr.Mohabir Paul,
6/1, Dum Dum Road,
Kolkatta – 700 074.

2.Hon'ble Mr.Justice N.V.Balasubramanian(Retd)
Sole Proprietor,
No.40, Sankarapuram,
Alemelumangapuram,
Mylapore, Chennai – 600 004.

.... Respondents

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 06.07.2017

passed by the 2nd Respondent which had arisen out of the dispute between the Petitioner and the first Respondent in contract dated 16.04.2010 and direct the first Respondent to pay the costs of the Petition.

For Petitioner : Mr.A.Abdul Hameed for
M/s.AAV Partners

For Respondent : Mr.M.Sriram for
M/s.Ramesh Venkatachalapathy
for R-1

ORDER

The respondent before the Arbitral Tribunal is the Petitioner herein. The dispute arises out of a tender for integrated shot hole drilling and seismic job services in Palar area of Cauvery Basin. The first Respondent submitted a bid by letter dated 28.10.2009 and the said bid was accepted by the Petitioner by letter dated 05.02.2010, whereby a Notification of Award(NOA) (Ex.C-1) was issued in favour of the first Respondent. Thereafter, by letter dated 08.04.2010 (Ex.C-7), a Work Order was issued to the first Respondent and the first Respondent was called upon to mobilize men and

material, within 20 days, to carry out the work awarded under the NOA. The total contract price was a sum of Rs.10,25,57,160.60 and the work was required to be executed within a period of two months. On 16.04.2010, the Petitioner and the first Respondent signed a contract (the Contract) in respect of the above work. In view of the alleged failure of the first Respondent to mobilise men and material within the stipulated period of 20 days from the date of the Work Order, the Petitioner levied liquidated damages on the first Respondent by relying upon clause 20.0 of the General Conditions of Contract(GCC). According to the Petitioner, the first Respondent did not mobilise men and material even thereafter, whereas, according to the first Respondent, operational difficulties were encountered and this was conveyed to the Petitioner. In these facts and circumstances, by communication dated 03.06.2010, the Petitioner terminated the Contract. After such termination, arbitration proceedings were initiated by the first Respondent herein. By statement of claim dated 20.02.2011, the first Respondent made 9 claims for an aggregate sum of Rs.2,76,17,309/- and by reply and counter claim dated 21.05.2011, the Petitioner prayed for rejection of the claims of the first Respondent and instead made 8 counter claims for an aggregate sum of

Rs.4,13,39,524/-. Both parties adduced oral and documentary evidence. Upon consideration of the pleadings, the Arbitral Tribunal framed 10 issues(paragraph 8 of the Award). Thereafter, the Arbitral Tribunal pronounced the Arbitral Award dated 06.07.2017(the Award). By the Award, Claim Nos.3,6 and 7 were partly allowed. As regards the counter claims, counter claim No.8 was allowed for a sum of Rs.5,12,789/- and all other counter claims were rejected. The Award is impugned herein.

2.I heard the learned counsel for the Petitioner and the learned counsel for the first Respondent.

3.The learned counsel for the Petitioner opened his submissions by providing an outline of the nature of the Contract. With regard to the execution of work, he pointed out that the first Respondent was required to carry out preparatory work by establishing a camp and that the first Respondent failed in his obligation to do so within the stipulated time. He further submitted that the first Respondent was required to drill shot holes of a depth ranging from 45 to 60 meters but failed to do so on account of deploying normal rigs

instead of using pneumatic rigs. In these circumstances, he submitted that the Contract was terminated and liquidated damages were imposed and in order to enforce the claim for damages, a call was made on the performance guarantee. He further submitted that the main focus of the challenge to the Arbitral Award is the rejection of the counter claim for risk and costs, namely, counter claim No.1 for a sum of Rs.2,72,80,322/-. The learned counsel further submitted that this represents the difference between the contract price in the contract issued to the third party contractor, namely, M/s.Dynatech Industries Private Limited, Hyderabad (Dynatech), i.e. an aggregate sum of Rs.12,98,37,483/-, and the price at which the contract was awarded to the first Respondent herein, i.e. an aggregate sum of Rs.10,25,57,116/-.

4.In order to establish his case, the learned counsel referred to the Award of the learned Arbitrator at Paragraph 26. By referring to the said paragraph, the learned counsel pointed out that the Arbitral Tribunal concluded that the first Respondent herein was not in a position to drill shot holes up to the optimum level of 60 meters. After concluding that the first Respondent was unable to drill

shot holes of a depth of 60 metres, the learned counsel contended that the said Tribunal committed a patent illegality in holding that the Petitioner was not put to a loss merely because a sum of Rs.7,30,05,850/- was paid to Dynatech and the said sum is less than the aggregate contract price of Rs.10,25,57,160.60 of the first Respondent. In order to substantiate that this finding is patently erroneous, the learned counsel pointed out that, on a per shot hole basis, the amount paid to Dynatech is much higher than that payable under the Contract with the first Respondent. In specific, it is the contention of the learned counsel for the Petitioner that the amount paid to Dynatech would have been about Rs.13 crores, if the said party had drilled the same number of shot holes as that envisaged under the Contract with the first Respondent. In other words, the payment of Rs.7,30,05,850/- was towards the drilling of only 5 shot holes although the amount paid per shot hole was much higher. The learned counsel, thereafter, referred to paragraph 33 of the Award, which deals specifically with counter claim 1 for the differential risk and cost claim of Rs.2,72,80,322/-. By referring to the said paragraph, the learned counsel pointed out that the Arbitral Tribunal erroneously concluded that the Petitioner did not suffer any loss on account of awarding the

contract to Dynatech because the Petitioner paid only Rs.7,30,05,850/- to Dynatech. He, thereafter, referred to the fact that the pleadings of the Petitioner in respect of the risk and cost counter claim were not denied by the first Respondent in the rejoinder to the reply and counter claim. The learned counsel further submitted that the Arbitral Tribunal applied a strict and high standard of proof with regard to the Petitioner's risk and cost claim whereas the first Respondent's claims, and, in particular, Claim No.7 was awarded to the extent of Rs.1 lakh although the Arbitral Tribunal noted the insufficiency of evidence. In particular, he pointed out that the Arbitral Tribunal concluded that there is no proof for payment of Rs.8,92,453/- but awarded a sum of Rs.1 lakh because the first Respondent herein had carried out some work. By referring to the said findings, the learned counsel submitted that the Petitioner would have been entitled to its risk and cost claim, if a similar standard had been applied in respect of the risk and cost claim.

5. In response and to the contrary, the learned counsel for the first Respondent pointed out that the risk and cost claim was denied in the rejoinder. In this regard, he referred to Paragraphs 2

and 3 of the rejoinder, wherein the first Respondent herein stated that the Petitioner had not furnished the contract document and tender documents with the scope of work of the third party contractor and that only if all the relevant information is provided, the first Respondent/claimant would be in a position to reply thereto. He further pointed out that the said documents were only provided during the evidence stage and that, therefore, the first Respondent was not in a position to examine the said documents and effectively refute the claim. He further submitted that the reason why the first Respondent was unable to drill shot holes to the depth of 60 metres was because the soil conditions were adverse and that there was no reply to the letters from the first Respondent citing adverse soil conditions. In support of his submissions, the learned counsel for the first Respondent referred to and relied upon the judgment of the Hon'ble Supreme Court in **ASSOCIATE BUILDERS Vs. DELHI DEVELOPMENT AUTHORITY, (2015) 3 SCC 49** with specific reference to the limited scope of interference with an arbitral award.

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6.By way of rejoinder submissions, the learned counsel for the Petitioner referred to the cross examination of the first

Respondent's witness and, in particular, to the answers to questions 250 to 253, 268, 269, 276, 311 and 312 in order to establish that the Petitioner had adduced evidence in respect of the payments to Dynatech.

7.The records were examined and the oral submissions of both sides were considered carefully. The main question that is required to be examined is whether the Award is liable to be set aside in respect of the rejection of the risk and cost counter claim of the Petitioner. As stated earlier, the said counter claim is for the differential cost of Rs.2,72,80,322/- as between the over all contract price of Rs.12,98,37,483/- of the contract awarded to Dynatech as compared to the aggregate contract price of Rs.10,25,57,160/- of the contract awarded to the first Respondent. In effect, the case of the Petitioner is that the Petitioner would be required to pay an additional sum of Rs.2,72,80,322/- to Dynatech and that this additional cost would not have been incurred but for the breach of contract by the first Respondent herein thereby entailing the termination of the Contract. In principle, this is a valid basis on which to make a claim for damages on a risk and cost basis. However, in order to succeed in

such a claim it would be necessary for the Petitioner to establish that it actually incurred the expenditure of Rs.12,98,37,483/-. To put it differently, the Petitioner would have to adduce evidence that it made the aggregate payment of Rs.12,98,37,483/- to Dynatech so as to sustain its counter claim. It is the admitted position that the Petitioner did not pay Dynatech the sum of Rs.12,98,37,483/-. Instead, it appears that a sum of Rs.7,30,14,558.12 was paid after making various deductions thereto. Therefore, as a matter of fact, the Petitioner paid a lower aggregate amount to Dynatech than the amount it would have paid the first Respondent herein, if the contract with the first Respondent had been fully executed.

8.The learned counsel for the Petitioner, however, contended that on a per shot hole basis, the Petitioner paid more to Dynatech than the amount payable to the first Respondent as per the Contract with the first Respondent. On that basis, the learned counsel for the Petitioner contended that the Petitioner was put to a loss and that the learned Arbitrator committed a patent error in not awarding compensation for such loss. In order to sustain the counter claim on this alternative basis, the Petitioner should have pleaded the relevant

facts and adduced evidence as to the unit rate per shot hole under the two contracts and provided a break-up, on that basis, of amounts paid to Dynatech. In this connection, on perusal of the relevant portion of the Award, I find that the learned Arbitrator has expressly recorded, in relevant part, as follows in Paragraph 33:

"...Further there is also no evidence to the effect from the respondent of the number of shot hole drilled by M/s.Dynatech Industries P Ltd. and the amount paid to the said concern for the shot hole drilling done by the said concern is higher than the unit rate agreed to be given to the claimant. In the absence of the pleadings or evidence from the side of the respondent and particularly the counter claim is based only on the difference between the contract amount awarded to the claimant and the contract amount awarded to M/s.Dynatech Industries P. Ltd., I hold that the respondent has not proved that it has suffered any actual loss by engaging a third party concern due to the termination of the contract with the claimant. In the absence of actual loss suffered by the respondent, I reject the counter claim No.1."

9.From the above findings, it is abundantly clear that the learned Arbitrator fairly and reasonably appraised the evidence on

record and concluded that the Petitioner herein did not lead evidence as to the number of shot holes that were drilled by Dynatech and as to the amount paid on a per shot hole basis. Therefore, the learned Arbitrator concluded that in the absence of pleadings or evidence with regard to the difference on a per shot hole or unit rate basis, a claim on that basis cannot be countenanced, especially when the counter claim is actually made only on the difference between the aggregate contract prices. I do not find any reason to interfere with the said findings. Therefore, the Petitioner has failed to make out a case for interference with the Award.

10. In the result, the Petition to set aside the Arbitral Award is dismissed.

14.11.2019

Speaking/Non Speaking Order

Index : Yes/No

Internet : Yes/No

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SENTHILKUMAR RAMAMOORTHY,J.

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