

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.02.2019

C O R A M

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

CMA.No.38 of 2017
and CMP.No.333 of 2017

1. The Union of India
rep.by Chief Secretary,
Chief Secretariat, Goubert Avenue,
Government of Puducherry,
Puducherry.
2. The Executive Engineer,
Thirunallar Temple Town,
Development project,
Karaikal. Appellants/Petitioners

Vs.

M/s.T.K.Constructions,
Civil Engineers and Contractors,
No.142 Anna Salai,
Puducherry. Respondent/Respondent

PRAYER:

Civil Miscellaneous Appeal filed under Section 37 (1)(b) of the Arbitration and Conciliation Act, 1996, to set aside the orders dated 04.03.2016 in Arbitration O.P.No.6 of 2012 on the file of District Judge at Karaikal.

For Appellants : Mr.J.Kumaran
Additional Government Pleader
(Puducherry)

For Respondent : Mr.N.Thiagarajan

JUDGMENT

The appeal has been filed under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996, to set aside the order passed by the District Judge, Karaikal in Arbitration O.P.No.6 of 2012 dated 04.03.2016.

2. Mr.J.Kumaran, learned Additional Government Pleader (Puducherry) appearing for the appellants contended that the entire issue revolve around the dispute based on Clause 13 of the tender condition.

3. According to the learned Government Pleader once the vendor decided to abandon the work, there cannot be any claim of compensation on account of profit or advantage derived by the contractor from the execution of works. Accordingly, the award is in violation of Sub-contract. Secondly the Arbitrator has exceeded his jurisdiction by awarding compensation under loss on profit expected at the rate of 15% without there being any material for the same. Since the Arbitrator has decided the percentage of loss of profit only, the award is liable to be set aside. The Lower Court has also not applied its mind to this point and the order passed by the District Judge becomes illegal. In support of the contention, the learned Additional Government Pleader relied on the judgment of High Court of Bombay in Appeal No.11 of 2012 dated 03.01.2013 wherein it has been held as here under:-

"12. The Arbitrator, as noted earlier, also awarded claims in respect of loss of profit, for under utilized plant and equipment and for reimbursement of infrastructure expenses. In respect of loss of profits, the Arbitrator merely held that a measure of 10% on the value of the remaining part of the works contract cannot be said to be unreasonable. The Arbitrator observed that a percentage representing 10% of the rate of profit is invariably accepted in the construction industry. Evidently save and except for an priori assumption, no evidence whatsoever was led before the Arbitrator in that regard. In P.R.Shah, Shares and Stock Brokers Private Limited V. B.H.H. Securities Private Limited 4th Supreme Court has held that while an Arbitral Tribunal cannot make use of its personal knowledge of the facts of the dispute, which is not a part of the record, 4 (2012) 1 SCC 594....."

Since the Arbitrator had passed an award on the basis of percentage only the award is liable to be set aside.

4. Per contra, the learned counsel appearing for the respondent would contend that Clause 13 of the tender condition clearly specifies that when it is decided to abandon or reduce the scope of work the Engineer shall issue notice in writing to the contractor, whereas no such notice was issued to the contractor setting out the reasons. The very point was framed as an issue before the Arbitrator and the Arbitrator after considering the evidence of both sides has set out the reasons

in deciding the issue. Once the issue is decided on merits, unless it is patently illegal, it cannot be interfered by Courts of law. Secondly, the learned counsel submits that the quantum of loss of profit is decided on the basis of instruction given by CPWD manual. The learned Arbitrator referring to the very office memorandum No.DGW/MAN/150 dated 14.12.2007 issued by the authority of Director General of Works, CPWD wherein the percentage of loss of profit and overhead adopted is only 15%, granted compensation in adherence to the office memorandum. The percentage adopted by the Arbitrator is not from his personal knowledge but based on the guidelines. Therefore, the award may not be interfered.

5. Aggrieved over the award, the appellants preferred the Original Petition before the District Court, Karaikal.

6. The District Court has given a categorical finding that there is no dispute regarding the procedure adopted for conducting the arbitration proceedings and there is no allegation of bias against the Arbitrator. In such circumstances, District Court, relying on the judgment of this Court in Gayatri Balaswamy Vs. ISG Novasoft Technologies Ltd., has dismissed the Original Petition. Against the above order passed by the District Judge, the Government has preferred this appeal.

7. After going through the order passed by the learned District Judge, it is seen that the petitioners have not made out any case for interference. The award came to be passed in accordance with law setting out the reasons. Even if the award passed is not correct in the view of one party, it cannot be interfered on merits when it is supported by reasons. Only when the award is passed without jurisdiction, beyond the scope of reference, patently illegal, it can be interfered. The ground raised by the learned Additional Government Pleader with regard to Clause 13 of the tender condition is contrary to the contract is concerned, Clause 13 applies in case of "Foreclosure of work due abandonment reduction in scope of work". Clause 13 of the tender condition is as follows:-

"It at any time after acceptance of the tender Government shall decide to abandon or reduce the scope of the works for any reason whatsoever and hence not require the whole or any part of the works to be carried out, the Engineer-in-Charge shall give notice in writing to that effect to the contractor and the contractor shall act accordingly in the matter. The contractor shall have no claim to any payment of compensation or otherwise whatsoever, on account of any profit or advantage which he might have derived from the execution of the works in full

but which he did not derive in consequence of the foreclosure of the whole or part of the works.

The contractor shall be paid at contract rates full amount for works executed at site and in addition, a reasonable amount as certified by the Engineer-in-Charge for the items hereunder mentioned which could not be utilised on the work to the full extent in view of the foreclosure.

(i) Any expenditure incurred on preliminary site work, e.g., Temporary access roads, temporary labour huts, staff quarters and site office; storage accommodation and water storage tanks.

(ii) Government shall have the option to take over contractor's materials or any part thereof either brought to site or of which the contractor is legally bound to accept delivery from suppliers (for incorporation in or incidental to the work) provided, however, Government shall be bound to take over the materials or such portions thereof as the contractor does not desire to retain. For materials taken over or to be taken over by Government cost of such materials as detailed by Engineer-in-Charge shall be paid. The cost shall however, take into account purchase price, cost of transportation and deterioration or damage which may have been caused to materials whilst in the custody of the contractor.

(iii) If any materials supplied by Government are rendered surplus, the same except normal wastage shall be returned by the contractor to Government at rates not exceeding those at which these were originally issued less allowance for any deterioration or damage which may have been caused whilst the materials were in the custody of the contractor. In addition, cost of transporting such materials from site to Government stores, if so required by Government, shall be paid.

(iv) Reasonable compensation for transfer of T & P from site to contractor's permanent stores or to his other works, whichever is less. If T & P are not transported to either of the said places, no cost of transportation shall be payable.

(v) Reasonable compensation for repatriation of contractor's site staff and imported labour to the extent necessary.

The contractor shall, if required by the Engineer-in-Charge furnish to him books of account wage books time sheets and other relevant documents and evidence as may be necessary to enable him to certify the reasonable amount payable under this condition.

The reasonable amount of items on (i), (iv) and (v) above shall not, be in excess of 2% of the cost of the work remaining incomplete on the date of closure, i.e., total stipulated cost of the works per accepted tender less the cost of work actually executed under the contractor and less the cost of contractor's materials at site taken over by the Government as per item (ii) above. Provided always that against any payments due to the contractor on this account or otherwise, the Engineer-in-Charge shall be entitled to recover or be credited with any outstanding balances due from the contractor for advance paid in respect of any tool, plants and materials and any other sums which at the date of termination were recoverable by the Government from the contractor under the terms of the contract."

8. The said clause lays down certain pre conditions which are mandatory to prove the exercise by the authority concerned. The words "for any reason", "whatsoever" and "shall give notice is waiting to that effect" bonafide exercise of power and adhere of principles of natural justice. The Government connotes has power to take a decision to abandon or reduce the scope of work for "any reason". The words "any reason" emphasise the existence of that reason. That reason shall exist in exigencies of the administration and it is bonafide, further not actuated by malafides. In the instant case, though the contract was said to have been abandoned, tender was re-issued within a short span of time and the very same respondent has become a successful bidder. Therefore it can be easily inferred that the exercise of power under Clause 13 of the agreement is not for any valid reason and not bonafide. Be that as it may for exercising the above said power, the authority shall adhere to the mandatory condition of putting the contractor on notice in terms of conditions of contract. The word "shall give notice in writing to that effect to the contractor" means that the reason shall be assigned to the contractor. The words "to that effect" not only denote the decision taken to abandon or reduce the work but includes the reason whatsoever shall also be communicated in writing. A conjoint reading of the sentences would reveal the legislative intention. The power of the government to abandon or to reduce work for any reason shall be in writing to that effect. But the appellant has not only failed to assign any reasons for abandoning the work but also failed to give a notice in writing. After breaching the terms of contract, the appellant cannot take shelter under the same terms. In this case, as per Clause 13 of the contract, requirement of issuing notice in writing was not adhered to by the appellants. Secondly, the award came to be passed as per the norms prescribed by CPWD Manual and instruction issued therein. The decision of the

arbitrator is based on Office Memorandum in O.P.No.6 of 2012 dated 04.03.2016 and it is not from the personal knowledge of the Arbitrator. Moreover, the appeal filed under Section 37(1) (b) of the Arbitration and Conciliation Act, 1996, cannot be entertained unless this Court finds any patent illegality or infirmity in the order passed by the District Court, Karaikal. I do not find any illegality warranting interference.

9. Accordingly, the Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

The District Judge,
Karaikal.

+1cc to Mr.N.Thiagarajan, Advocate, S.R.No.17939
+1cc to the Government Pleader, S.R.No.18446

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and
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RJI (CO)
CS/27/04/2019

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