

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	28.11.2019
Judgment pronounced on	21.01.2020

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.16 of 2015

The Indian Officer's Association,
No.69, Thiru Vi Ka High Road,
Royapettah, Chennai – 600 014.
Rep. by its General Secretary
S.Nagalsamy

... Petitioner

Vs.

1.M/s.Swaruba Engineering Construction
Company Private Limited,
Rep. by its Director, Mrs.K.S.Renuka Raja,
No.91/3 C & D, 5th Floor, Hardevi Chambers,
Pantheon Road, Egmore, Chennai – 600 008.

2.Thiru.C.H.Gopinatha Rao,
Presiding Arbitrator,
No.51, Oliver Road, Mylapore,
Chennai – 600 004.

3.Thiru.C.Thangaraju, IAS(Retd.),
Joint Arbitrator,
4/19, III Main Road, Indira Nagar,
Chennai – 600 020.

4.Thiru.K.V.Kuppusamy,
Joint Arbitrator,
No.382, Lloyds Road,
Gopalapuram, Chennai – 600 086.

... Respondents

PRAYER: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 23.06.2014 of the 2nd and 4th Respondents herein in relation to the dispute arising out of the agreement dated 13.01.2010 between the Petitioner and the first Respondent.

For Petitioner : Mr.G.Masilamani, senior counsel
for Mr.M.Sekar

For Respondent : Mr.Ramakrishnan Viraraghavan,
senior counsel for
for Mr.G.Sivashankaran

ORDER

A contract was awarded by the Petitioner to the Respondent for the construction of a centenary building for the Petitioner consisting of a basement, stilt and 4 upper floors. The contract price was a sum of Rs.5,83,20,682/-, the work was awarded on 26.12.2009 by a Letter of Intent and was required to be completed within 546 days from the date of hand over. Thereafter, an Agreement dated 13.01.2010 was executed (the Agreement). Specific payment terms were also agreed upon whereby

payment was to be made on fortnightly basis. While work was in progress, the Petitioner issued an order of termination of the Agreement on 06.12.2010 after issuing a prior show cause notice stating that there was poor progress and that the quality was unsatisfactory. This resulted in a dispute between the parties which was referred to a three member Arbitral Tribunal. In the statement of claim, the first Respondent herein made seven claims for an aggregate net sum of Rs.4,42,51,796/- with interest thereon at 18% per annum from the date of the claim statement till the date of payment. By counter statement and counter claim, the Petitioner made 10 counter claims for an aggregate sum of Rs.4,57,12,630/-. By a majority of two, the Arbitral Tribunal, by Award dated 23.06.2014(the Award), awarded an aggregate sum of Rs.2,66,17,808/- to the first Respondent herein. In specific, Claim No.1 towards the amount realized by invoking the bank guarantee; Claim No.2 towards payment of RA bills 1 & 2 and water proofing bill; Claim No.6 towards overheads and mobilization expenses; and Claim No.7 towards loss of profit were allowed in part and interest and service tax was applied thereon to arrive at the aggregate sum of Rs.2,66,17,808/-. As regards the counter claims, except for Counter Claim No.4, which is for interest on the mobilization advance, all the other counter claims were rejected. In respect of counter claim No.4, a sum of Rs.3,83,272/- was allowed. As a result, the Petitioner was directed to pay the net aggregate sum of

Rs.2,62,34,536/- to the first Respondent on or before 31.07.2014, failing which interest was directed to be paid at 10% per annum until the date of payment. The Award is challenged herein by the Petitioner under Section 34 of the Arbitration and Conciliation Act,1996(the Arbitration Act).

2. I heard Mr.G.Masilamani, the learned senior counsel for the Petitioner and Mr.Ramakrishnan Viraraghavan, the learned senior counsel for the first Respondent.

3. Mr.G.Masilamani, the learned senior counsel, commenced his submissions by providing an overview of the scope of work under the Agreement. As against the contractual requirement of constructing a basement, stilt and 4 floors, he pointed out that the first Respondent herein carried out work only on the basement. Even as regards the basement, he pointed out that basement roof work was not done until the date of termination of the Agreement. He referred to a detailed list of dates and events so as to address all the relevant events that led to the dispute. For example, he referred to the Agreement and pointed out as to how the time schedule for various items of work was shown in a bar chart(Ex.R-27), Volume VI, page 112. He also referred to the fact that a clear site was handed over by the Petitioner to the first Respondent on 03.02.2010 and that this was confirmed by the first Respondent under

communication dated 08.02.2010(Ex.R-29 and Ex.R-32, respectively, Volume VI, pages 114 and 117).

4. One of the contentious issues during the execution of work was the payment of mobilization advance: as regards such payment, he pointed out that the tender conditions did not provide for payment of mobilization advance at all. Subsequently, he submitted that it was agreed at the pre-bid meeting that mobilization advance would be paid but it was not specified that such mobilization advance would be paid in a single lump sum. Therefore, he pointed out that the mobilization advance was paid in installments commensurate with the progress of work. In this regard, he submitted that the bank guarantee in respect of the mobilization advance was provided by the first Respondent only on 13.01.2010. Accordingly, he submitted that the first installment of mobilization advance was released on 23.03.2010(Ex.R-36, Volume VI, page 121), the second installment on 03.04.2010(Ex.C-99, Volume V, page 19) and the third and last installment on 07.05.2010(Ex.C-100, Volume V, page 20). As of the date of payment of all three installments of the mobilization advance, the learned senior counsel pointed out that the first Respondent had not procured steel for the project and that the first batch of steel arrived at site on 24.06.2010. In support of this submission, he referred to the minutes of meeting held on 07.05.2010, wherein it was

stated that raft work would be done next week after procuring steel(Ex.R-42 Volume VI page 128).

5. He also pointed out as to how work was stopped at site for more than one month from 20.05.2010, as evidenced by Ex.R-53, Volume VI, page 146. As regards basement water proofing, he submitted that the first proposal was submitted on 05.06.2010 and that such proposal was not in conformity with the tender specifications. Therefore, the second and third proposals, in that regard, were submitted on 16.06.2010 and 30.06.2010, respectively. He also pointed out that only the third proposal was in line with tender specifications and, therefore, such proposal was accepted by the Petitioner. This delayed water proofing work, which could be completed only in the first week of July 2010(proof affidavit of RW-1, Volume VII, page 83). The learned senior counsel also referred to the fact that the second batch of steel arrived at site on 26.06.2010 and the third batch on 03.07.2010. Therefore, he pointed out that the progress of work was substantially behind the construction schedule. In this connection, he referred to the minutes of meeting held on 23.07.2010 and 31.07.2010(Ex.R-114 and Ex.R-62, respectively, at Volume VI, pages 295 and 164 respectively). In these facts and circumstances, he submitted that the Petitioner was constrained to issue a show cause notice dated 14.08.2010 to the Petitioner as to why the Agreement should not be

terminated on account of poor progress. He also referred to the abandonment of the work site by the first Respondent for a period of 9 weeks starting from 05.10.2010 and as to how the first Respondent projected the false picture that the slab design had not been finalized so as to justify such abandonment of work. Eventually, he pointed out as to how the Agreement was terminated by notice dated 06.12.2010(Ex.R-88 Volume VI page 209) and that the bank guarantee was invoked on 09.12.2010(Ex.C-27, Volume II, page 40). Upon such termination, he pointed out that the work was entrusted to a new contractor, namely, M/s.P.Manickam and Company, and that the counter claims were filed on the basis of the final bill dated 15.11.2012 of the new contractor(Ex.R-115, Volume VI, page 298).

6. The next contention of the learned senior counsel was that the Arbitral Tribunal put a large number of questions to RW-1 and RW-2 and, in fact, effectively cross-examined the said witnesses of the Petitioner. Indeed, the learned senior counsel pointed out that even suggestions were put to the said witnesses. He also referred to a few questions and answers to substantiate this contention.

7. The learned senior counsel, thereafter, referred to the Award. In specific, he referred to the 21 issues that were framed by the

Arbitral Tribunal at pages 120 to 122 of the pleadings volume. He also referred to the conclusions of Mr.K.V.Kuppuswamy, the learned Arbitrator, at pages 122 to 128 of the pleadings volume and pointed out as to how the Arbitral Tribunal did not properly appraise the evidence. Instead, he pointed out that the learned Arbitrator recorded findings that the Petitioner committed breach with regard to the handing over of the site, payment of mobilization advance, release of structural drawings and release of good for construction drawings (GFC Drawings), etc. without providing reasons for such conclusions. By way of illustration, the learned senior counsel pointed out that as to how the contract does not stipulate that the mobilization advance should be paid in a lump sum, whereas the learned Arbitrator recorded that "the delay of 69 days in releasing the full advance payment is a breach on terms of the agreement". Similarly, the learned senior counsel pointed out as to how the learned Arbitrator recorded, inter alia, in para 16.5 as under:

"During the performance of the work the Tribunal noted the Respondent

Changed the benchmarks.

Delayed in the release of structural drawings.

Delayed in the release of good for construction drawings.

Changed the plans midway.

Delay of in providing power supply, though agreed during pre-bid meeting.

Frequent changes in the drawings".

By referring to the above findings, the learned senior counsel contended that the documentary or evidentiary basis for such conclusions are not stated. Consequently, he submitted that these findings are not based on appraisal of the pleadings or evidence and that, therefore, the Award is not a speaking award notwithstanding the fact that it professes to be a speaking award.

8. The learned senior counsel, thereafter, referred to the Award of the Presiding Arbitrator, namely, C.H.Gopinatha Rao. For example, he pointed out that Mr.C.H.Gopinatha Rao recorded a finding that delayed permission was given to store steel at the barricaded site. In this regard, he pointed out that a 20,000 sq.ft. site was handed over and that barricades were admittedly erected around the said site. Consequently, he submitted that it was not necessary for the first Respondent to request for permission to store steel at such site or for the learned Arbitrator to record that such permission was given only on 14.06.2010. On the contrary, he pointed out as to how the first batch of steel arrived at site only on 24.06.2010(Ex.R-51 Volume VI page 143) and that, therefore, the first Respondent requested for permission to store steel a little in advance of the arrival of steel at site. Therefore, he pointed out that the said finding of the Arbitral Tribunal is perverse. With regard to the finding that the word "materials" includes steel, the learned senior

counsel pointed out that such conclusion is directly contrary to the response to clarification question 20 at the pre-bid meeting. The learned senior counsel also pointed out that the Presiding Arbitrator recorded that the delay in execution of the project is due to both parties and that such conclusion was arrived at without apportioning the delay and without recording a finding as to whether and, if so, how such delay impacted the critical path. He also pointed out that the Presiding Arbitrator recorded a conclusion that the Petitioner harassed the first Respondent and did not allow the first Respondent to proceed with the work. The learned senior counsel further pointed out that the Arbitral Tribunal followed the highly irregular and impermissible procedure whereby each of the majority arbitrators, namely, Mr.K.V.Kuppuswamy, and the Presiding Arbitrator, Mr.C.H. Gopinatha Rao, pronounced separate Awards at pages 113 to 128 and 128 to 140 of the pleadings volume, respectively. Thereafter, the said two Arbitrators pronounced joint findings between pages 141 and 146 in respect of individual claims and counter claims. Thus, he submitted that the majority Award is only in respect of the operative portion, whereas in all other aspects each of the three Arbitrators delivered separate Awards. For all these reasons, the learned senior counsel submitted that the Award is liable to be set aside.

9. In response and to the contrary, Mr.Ramakrishnan Viraragavan made submissions on behalf of the first Respondent. He opened his submissions by pointing out that this is a construction contract awarded on a measure and pay basis. In support of this submission, he referred to the Agreement, namely, Ex.R-18, dated 13.01.2010. In the said document, he referred to the definition of BoQ and also pointed out as to how drawings are a part of the Agreement. By referring to pages 30-A and 42 of the Agreement, he pointed out that it is provided therein that the contract price is to be adjusted on the basis of the quantity of work done. The learned senior counsel also pointed out as to how the Arbitral Tribunal applied its mind and did not award the entire amount that was claimed. For instance, he pointed out that a sum of about Rs.1,00,96,905/- was claimed towards the amount realized from bank guarantees whereas a sum of Rs.23,65,000/- was awarded after adjusting the amounts realized by the first Respondent by way of mobilization advance. Similarly, he pointed out that as against the amounts claimed towards the RA bill 1 and 2, the Arbitral Tribunal had correctly applied its mind while directing payment of the net amount. However, with regard to the water proofing bill, he pointed out that the net sum claimed is Rs.5,04,435/- whereas the Arbitral Tribunal had inadvertently included the interest amount and awarded a sum of Rs.5,83,935/-, which is liable to be revised to Rs.5,04,435/-. As regards overheads, he pointed out that the

first Respondent claimed a sum of Rs.59,19,770/- whereas the Arbitral Tribunal awarded a sum of Rs.37,26,000/-. Equally, with regard to loss of profits, he pointed out that a sum of Rs.24,28,416/- was awarded as against a claim of Rs.58,32,068/-.

10. After referring to the Award in respect of specific claims, the learned senior counsel for the first Respondent contended that this Award does not violate substantive law or the Arbitration Act. Therefore, it cannot be said to be contrary to law. He further submitted that the Award is based on an appraisal of evidence and that it is necessary for the Arbitral Tribunal to record reasons but the manner of recording reasons need not take the form of a court judgment. In support of this submission, he referred and relied upon the judgment of the Hon'ble Supreme Court in **Associate Builders vs Delhi Development Authority (Associate Builders) (2015) 3 SCC 49** and **McDermott International Inc. vs Burn Standard Company Limited & Ors (Mcdermott) (2006) 11 SCC 181**. In particular, he relied upon paragraph 55 of the judgment in **McDermott** for the proposition that irrelevant materials may be ignored while providing reasons for the award. He also pointed out as to how the Award of the Presiding Arbitrator, Mr.C.H.Gopinatha Rao, contains a detailed discussion of the evidence at pages 132 to 140. In particular, he pointed out as to how

there are factual conclusions with regard to the non-availability of space for storage of steel and that permission was given for such purposes only on 14.06.2010. He also pointed out as to how there are factual findings that the GFC drawings were not provided in the first instance. He also referred to the minutes of meeting dated 13.11.2010(Ex.R-84 at Volume VI page 204), wherein an assurance was requested by the first Respondent that no further changes would be made at the basement area. By relying upon the aforesaid, he concluded his submissions by pointing out that all the conclusions of the Arbitral Tribunal are based on an appraisal of evidence and that such conclusions should not be interfered with in a petition under Section 34 of the Arbitration Act.

11. By way of rejoinder, Mr.G.Masilamani, the learned senior counsel for the Petitioner pointed out that it is clear from Ex.R-45 at page No.132 of Volume VI that barricades were placed around the perimeter of the site and that, therefore, no permission was required for storage of steel in such area. He also pointed out, by referring to Volume No.IV at pages 19 and 20, that all necessary drawings for the basement work were available. He concluded his submissions by emphasizing that the first batch of steel arrived after the last installment of mobilization advance was released and that, therefore, the delay in release of mobilization advance did not impact the execution of the work.

12. The submissions of the learned senior counsel for the contesting parties were considered carefully and the records were examined. The Arbitral Tribunal was required to examine the Agreement and evidence on record so as to determine as to whether the Petitioner/Employer prevented the execution of work by the first Respondent/Contractor or whether the first Respondent/Contractor delayed the execution of work by failing to mobilize men and material so as to execute the work as per the construction schedule. In case the Arbitral Tribunal was of the view that both the Petitioner and the first Respondent contributed to such delay in execution, it would have been necessary for the Arbitral Tribunal to examine the alleged causes of delay and decide whether such causes of delay impacted the critical path. By way of illustration, the delay in providing drawings for the first floor would not impact the execution of work, if the contractor was executing work at the basement level at the relevant point of time. Similarly, the delay, if any, in providing permission to store steel at the site would not have any material effect, if the first batch of steel arrived after the date of permission. In this case, it is clear that the Arbitral Tribunal did not evaluate or assess the impact of the alleged delay events by undertaking a critical path analysis. In fact, the Arbitral Tribunal records that both parties were responsible for delay and that the Petitioner was responsible for greater delay without either undertaking a critical path analysis or

even an apportionment of delay. As correctly contended by the learned senior counsel for the Petitioner, the methodology adopted by the Arbitral Tribunal is also irregular to say the least. Indeed, the ostensible "Speaking Award" of the learned Arbitrator, Mr.K.V.Kuppuswamy, does not fulfill the requirement of a speaking award as set out in **McDermott**, wherein the Hon'ble Supreme Court adverted to a judgment of the Kerala High Court and held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. In this case, one cannot discern the links between the materials and the conclusions of the learned Arbitrators. Even the conclusions of the learned Presiding Arbitrator are totally unsatisfactory. For instance, with regard to the finding that permission for storing steel was given belatedly, there is no consideration as to when the request for storing steel was first made and as to when the first batch of steel arrived at site. Needless to say, the above relevant aspects should have been considered by the Presiding Arbitrator before recording the finding that permission to store steel at site was given belatedly especially when such conclusions were relied upon so as to hold the Petitioner in breach of the Agreement.

13. In light of the contention of the learned senior counsel for the Petitioner that the Arbitral Tribunal put a large number of questions to RW-1 and RW-2, including leading questions and suggestions, I examined

the depositions. Upon such examination, I found that virtually no questions were put to CW-1 and CW-2, i.e. the first Respondent's witnesses by the Arbitral Tribunal. By contrast, it is evident that a large number of questions were put to RW-1 and RW-2. While the authority of an arbitral tribunal to put questions to witnesses so as to clear doubts and enhance their understanding of the dispute is beyond doubt, the arbitral tribunal cannot assume an inquisitorial role and cross-examine witnesses. I set out below a few questions by the Arbitral Tribunal to RW-1:

Q.175:Is the architect learning from the contractor? Architect only specified 1 mm earlier. That means he has no confidence in himself. Am I right?

Q.176:That means the architect has not designed the raft beam earlier?

Q.206:Please refer your letter addressed to Architect dated 10.07.2010(Ex.C103 Vol L page 24). What is the need for this letter if there had been no delay?

Q.208: That means you have not shown in the earlier drawings the position asked for. Am I correct?

Re-examination Q.12: Therefore, I put it to you that you have not followed PWD procedures?

An attempt was made by the Arbitral Tribunal to explain this anomaly at internal page 19 of the Award, page 131 of the typed set of pleadings. However, on examining the questions of the Arbitral Tribunal, I find that the purported justification that it was intended to have a proper understanding of the subject is untenable. Indeed, I am of the view that the Arbitral Tribunal cross-examined RW-1 and RW-2 and the mandate of Section 18 of the Arbitration Act to treat the parties equally was violated in this case. Moreover, the adjudication of disputes through an adversarial, as opposed to an inquisitorial, process is a fundamental policy of Indian law and the cross-examination of witnesses by the Arbitral Tribunal violates this policy.

14. In addition to the aforesaid, I find that the Award in respect of individual claims are, in any event, unsustainable. Given that this is a measure and pay or BoQ contract, the award of the amount claimed in respect of RA bills 1 and 2 and the water proofing bill should have been preceded by a discussion as to how such bills were based upon the quantity of work carried out by the first Respondent/Contractor as per available measurements in that regard. However, I do not find any such discussion in the Award. In effect, there is no reasoning as to why the amounts claimed are payable. As regards the claim for overheads at 10% of the contract value, such claim is *ex facie* untenable when there is no

prolongation of the Agreement and, on the contrary, the Agreement was terminated prematurely by the Petitioner. In other words, the contract price, whether fixed price or BoQ, typically includes overheads and profits, and claims of this nature would be tenable only if there is prolongation for reasons attributable to the Employer. In this case, as stated above, there is no prolongation and, therefore, this claim was liable to be rejected. The award of the loss of profit claim in the absence of proof of loss is equally untenable. Once again, this claim is maintainable only if the first Respondent/Contractor adduces evidence that the bid was submitted on the basis that 5% of the contract price is towards profit and that the first Respondent/Contractor had submitted bids for other contracts with 5% profit margin. In this case, this amount was awarded without any evidence in support of the claim. Furthermore, I find that the rejection of the counter claims without undertaking either a critical path analysis of the alleged impact of delay events or an apportionment of delay, which is attributable to each of the contesting parties, is patently flawed. For all these reasons, I conclude that this Award is liable to be set aside as being both in violation of public policy and patently illegal as per the decisions of the Hon'ble Supreme Court in **ONGC vs Saw Pipes Limited (2003) 5 SCC 705** and **Associate Builders**. By way of demurrer, the learned senior counsel for the first Respondent submitted that the Award should be remitted to the Arbitral Tribunal under Section 34(4) of the Arbitration

Act if the Court is of the view that it does not contain reasons. However, I find that such a course of action is not appropriate in this case because of the limited scope of Section 34(4) whereby the Arbitral Tribunal can only justify its earlier conclusions. In this case, the Award does not contain an appraisal of evidence or provide proper reasons for conclusions. In addition, as set out above, the Arbitral Tribunal cross-examined RW-1 and RW-2. In these circumstances, I do not consider it appropriate to remit the Award to the Arbitral Tribunal. For the foregoing reasons, this is not an Award wherein the Award can be severed so as to set aside the Award in part. On the other hand, the Award as a whole suffers from infirmities and is patently illegal.

15. In the result, the Arbitral Award dated 23.06.2014 is hereby set aside. Both parties are granted leave to initiate *de novo* arbitration proceedings as per the terms of the Agreement. If such proceedings are initiated, the parties concerned would be entitled to the benefit of Section 14 of the Limitation Act, 1963 in respect of time taken in the Arbitration proceedings and also in proceedings before this Court.

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