

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	29.11.2019
Judgment pronounced on	09..01.2020

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.566 of 2019
and
A.No.5076 of 2019

M/s.Express Infrastructure Private Limited.
No.2, Club House Road,
Mount Road, Chennai – 600 002.
Rep. by its Authorised Signatory
Mr.R.R.Aroon Kumar

... Petitioner

Vs.

M/s.B.L.Kashyap and Sons Limited,
409, 4th Floor, DLF Tower – a, Jasola,
New Delhi – 110 025.
Also having office at
B-15-003, Dr.Abdul Kalam Road,
Pudupakkam Village,
Kancheepuram District – 603 103.

... Respondent

PRYER: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Majority Award dated 27.03.2019 corrected on 02.06.2019 passed by the Arbitral Tribunal pertaining to the dispute between the Petitioner and the Respondent.

For Petitioner : Mr.Satish Parasaran, senior counsel
for M/s.Surana & Surana

For Respondent : Mr.P.S.Raman, senior counsel
for M/s.T.K.Bhaskar

ORDER

The respondent in the arbitration is the Petitioner before this Court. In 2007, the Petitioner floated a tender in respect of the concrete and block work package (i.e. the bare shell) as part of the construction of a commercial complex. The Respondent was the successful bidder and a Letter of Intent dated 24.03.2007 (the LOI) was issued to the Respondent, whereby the Respondent was appointed as the contractor to carry out the concrete and block work package for the commercial complex. Subsequent to the LOI, the parties executed a detailed and binding Notice of Award dated 01.07.2007 (the NOA). The aforesaid contract was for a duration of 11 months, i.e. from 01.07.2007 to 30.05.2008, pursuant to an amendment to the NOA, whereby the start date of the project was revised to 01.07.2007. Thereafter, an Articles of Agreement dated 20.07.2007 (the AOA) was executed. Synergy Property Development Services Private Limited (the Development Manager) was appointed as the Development Manager under the contract. During the course of execution of work, there were delays which appear to be partly attributable to each of the parties although there seems to be disagreement both over the extent of attribution and the impact of

relevant delay events. Nevertheless, extension of time was granted from 30.05.2008 to 15.01.2009 (EOT-1) and again up to 28.06.2009 (EOT-2). Both extensions were on the same terms and conditions as the original contract but it was expressly stipulated that no escalation would be paid during the EOT-2 period. The work appears to have been substantially completed in or about August 2009.

2. While work was being carried out, according to the Respondent, the Development Manager, by unsigned letter dated 26 November 2008 (Ex.C 54), certified the claim of the Respondent for a sum of Rs.8.54 crore towards escalation in cost of materials and manpower and Rs.1.03 crore towards under-utilisation of machinery, aggregating to a sum of Rs.9.57 crore. Subsequent thereto, a sum of Rs.3 crore was paid by the Petitioner as an ad hoc advance on 01.12.2008 (Exhibit C-55). Upon completion of work, disputes arose between the parties with regard to the aforesaid escalation and other claims as also the manner of appropriation of the ad hoc advance and the notice invoking the arbitration clause was issued on 24.11.2011. These disputes were referred to arbitration and, in the arbitration, the Respondent claimed the following: a sum of Rs.6,89,52,843/- towards the escalation claim, as certified by the Development Manager (Claim 1); a sum of Rs.4,01,11,703/- towards amounts outstanding against running account

bills (RA bills) (Claim 2); and a sum of Rs. 6,38,92,985/- towards the outstanding retention amount (Claim 3). By reply and counterclaim dated 25.08.2012, the Petitioner denied the claims of the Respondent and made nine counter claims for an aggregate sum of Rs.56,41,63,562/-. These counter claims included a sum of Rs.1,45,74,855/- towards money spent by the Petitioner to rectify defects in workmanship(Counter claim 3); a sum of Rs.23,38,209/- towards extra money spent by the Petitioner because the work was removed from the Respondent's scope (Counter claim 6); and a sum of Rs.50,000/- towards damages for non-availability of "as built" drawings (Counter claim 7). Upon completion of pleadings, the Arbitral Tribunal framed 11 issues, which are set out at internal pages 4 and 5 of the Arbitral Award. By Arbitral Award dated 27.03.2019 (the Original Award), the Arbitral Tribunal allowed Claim 1 in respect of escalation to the extent of Rs.6,31,00,000/-; Claim 2 in respect of amounts outstanding against running account bills to the extent of Rs.3,39,25,355.18; Claim 3 towards the outstanding against the retention amount in a gross sum of Rs.6,38,92,985/- and, after adjusting the amounts awarded towards Counter claims, in a net sum of Rs. 4,69,29,921/-. Interest was awarded on the outstanding amounts at the rate of 9% per annum from the date of the statement of claim until the date of realisation. As stated earlier, Counter claim 3 was allowed partly in a sum of Rs.1,45,74, 855/-; Counter claim 6 was allowed in full for a sum

of Rs.23,38,209/- and Counter claim 7 was allowed partly in a sum of Rs.50,000/-, thereby aggregating to a sum of Rs.1,69,63,064/- which was set-off against Claim 3 while arriving at the net payable by the Petitioner. Subsequently, an application was filed by the Petitioner under Section 33 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) with regard to the non-adjustment of the sum of Rs.3 crores, in the Original Award, against amounts payable towards the running account bills (Claim 2). By Corrected Award dated 02.06.2019 (the Corrected Award), the Original Award was corrected by adjusting the sum of Rs.3 crores against Claim 1 and, consequently, directing that the net payable towards Claim 1 would be Rs.3,31,00,000/- instead of Rs.6,31,00,000/-. The Original Award, as modified by the Corrected Award, is impugned by the Petitioner and is referred to herein as the Award.

3. I heard the learned senior counsel for the Petitioner, Mr.Satish Parasaran, and the learned senior counsel for the Respondent, Mr.P.S.Raman.

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4. At the outset, the learned senior counsel for the Petitioner submitted that the Award is fundamentally flawed because the Arbitral Tribunal did not undertake a critical path analysis of the delay or endeavour to apportion such delay. He further submitted that the

conclusions and findings of the Arbitral Tribunal on escalation are directly contrary to the General Conditions of Contract (the GCC). In specific, he pointed out that clause 2/6.12 of the GCC stipulates that escalation is not applicable. He further submitted that two extensions of time were granted and that both extensions of time (EOT-1 and 2) were granted on the same terms and conditions as the original contract. Consequently, he contended that escalation continued to be inapplicable during the extended period of contract. As regards the NOA, he submitted that it provides for escalation only with regard to steel and cement. In that contractual context, he submitted that the grant of escalation is contrary to the contract.

5. In support of the contention that the Arbitral Tribunal should have undertaken a critical path analysis or at least an apportionment of responsibility for delay, he referred to paragraph 25 of the Award wherein the Arbitral Tribunal concluded that the apportionment of responsibility for delay in Ex.C-54 was carried out arbitrarily, without credibility and that the Arbitral Tribunal is unwilling to approve or accept the exercise undertaken in Ex.C-54, wherein 65% of the responsibility, on average across the office, mall and hotel, was attributed to the Petitioner by the Development Manager. By adverting to the aforesaid paragraph, the learned senior counsel contended that especially in light of the above conclusions with regard to Ex.C-54, the Arbitral Tribunal ought to have

independently undertaken a critical path analysis or at least an apportionment of responsibility for delay. He further submitted that without undertaking such exercise and drawing definitive conclusions on that basis, the Award in respect of escalation is patently flawed and liable to be set aside. He also relied upon paragraph 32 of the Award, wherein the Arbitral Tribunal examined Exs.C-45, C-46 and C-47, which deal with the causes for delay. After advertent to the said documents, the Arbitral Tribunal concluded that the Respondent herein failed to demonstrate the impact of delay events, i.e. the manner, extent and part of the work that was delayed as a consequence. Once such conclusions were reached, he submitted that the Arbitral Tribunal is completely unjustified in awarding escalation. In this context, the learned senior counsel pointed out whenever escalation was granted, it was preceded by a determination that the employer was responsible for delay. For this purpose, he referred to the judgment of the Hon'ble Supreme Court in **K.N. Sathyapalan (dead) v. State of Kerala (2007) 13 SCC 43 (Sathyapalan)**, wherein, at paragraphs 32 and 33, factual findings were recorded with regard to the attribution of responsibility on the employer for the delay and this formed the basis for the grant of escalation.

6. He also submitted that the Arbitral Tribunal completely discredited and disregarded Ex.C-54 but proceeded to rely upon the

annexures thereto in order to award the claim in respect of escalation. In this respect, he submitted that the Award contains an error apparent on its face and is, therefore, liable to be set aside.

7. In response, the learned senior counsel for the Respondent submitted that the scope of work under the contract was limited to structural and block work. Consequently, he pointed out that all preceding activities such as foundation work, including piling, de-watering and de-excavation were to be undertaken by other contractors. He further submitted that extension of time was granted by way of EOT-1 and 2 because the Respondent was not responsible for delay. He also pointed out that the escalation claim is confined to the EOT-1 period because escalation claims were not prohibited during this period unlike the EOT-2 period. As regards Ex.C-54, he pointed out that the annexures thereto were marked as an exhibit by the Petitioner (Ex.R-139) and not by the Respondent. In this connection, the learned senior counsel referred to the documents that preceded Ex.C-54. In particular, he referred to the letter dated 23.07.2008 (Ex.C-50), the letter dated 20.08.2008 (Ex.C-51), the letter dated 30.08.2008 (Ex.C-52) and the letter dated 03.11.2008 (Ex.C-53). According to the learned senior counsel, all these letters indicate that the parties agreed to the payment of escalation, including the quantum thereof. On that basis, he contended that the Arbitral Tribunal reasonably

interpreted the contract and appraised the evidence on the escalation claim, holistically, and correctly concluded that the said claim is tenable even if Ex.C-54 is disregarded. In the circumstances, he pointed out that the Arbitral Tribunal relied upon the annexures to Ex.C-54, which contain calculations with regard to escalation, including delay analysis, and that an independent delay analysis by the Arbitral Tribunal was unnecessary in the factual context.

8. He also pointed out that the Petitioner made an ad hoc payment of Rs.3 crores and that this payment was in response to the letter dated 27.11.2008 (Ex.R-2) requesting the release of Rs.3 crores from and out of the amount of Rs.3.4 crore, which was determined towards escalation. Therefore, he contended that the Arbitral Tribunal held that this amount should be adjusted against the amounts awarded towards escalation in the Corrected Award.

9. The learned senior counsel also referred to and relied upon the judgments, which are set out below along with context and principle:

(i) **Assam State Electricity Board v. Buildworth Pvt. Ltd. MANU/SC/0765/2017 (Assam SEB)**, where, at paragraphs 12-15, the Hon'ble Supreme Court held that the construction of the escalation clause by the Arbitral Tribunal in such manner as to restrict the prohibition on

payment of escalation to the original contract period is in conformity with established principles, in that regard, and does not call for interference under Section 34 of the Arbitration Act.

(ii) **Oil Industry Development Board v. Godrej & Boyce Manufacturing Co. Ltd. MANU/DE/3105/2019**, where, at paragraph 22, the Delhi High Court held that the factual finding that both parties contributed equally to the delay should not be interfered with under Section 34.

(iii) **Gas Authority of India Ltd. v. Thermax Ltd. MANU/DE/1313/2010**, where, at paragraphs 21 and 22, the Delhi High Court held that the bifurcation of the percentage of delay that is attributable to the parties cannot be said to be perverse in the absence of a critical path analysis.

10. By relying upon the aforesaid judgments, the learned senior counsel concluded his submissions by pointing out that the contractor's claims were confined to escalation, outstanding amounts towards running account bills and retention and that the Petitioner has not made out a case to interfere with the Award.

11. By way of rejoinder, the learned senior counsel for the Petitioner submitted that the contract does not provide for escalation in

the original contract period and that the same terms and conditions were accepted during the extended period. According to the learned senior counsel, the escalation claim was entirely based on Ex.C-54 and, therefore, once Ex.C-54 was rejected by the Arbitral Tribunal, as a corollary, the escalation claim ought to have been rejected unless the Arbitral Tribunal independently carried out a critical path analysis or at least an objective evaluation and apportionment of responsibility for delay. Instead, the Arbitral Tribunal committed the fundamental and patent error of adopting the calculations in the annexures to Ex.C-54 and thereby allowed the claim.

12. The records were examined and the submissions of the learned senior counsel for the two parties were considered carefully. The principal question that arises for consideration is whether the Award of the Arbitral Tribunal on escalation is liable to be set aside. The contention of the learned senior counsel for the Petitioner, in this regard, was that the contract prohibits the grant of escalation and that, in any event, the Arbitral Tribunal should have undertaken a critical path analysis or, at a minimum, an objective apportionment of responsibility for delay as between the contractor and the employer as an essential pre-requisite before deciding the escalation claim. Instead, the Arbitral Tribunal rejected Ex.C-54, which was the basis on which the contractor claimed

escalation, but proceeded to rely upon the annexures to Ex.C-54 and awarded escalation on that basis. By contrast, the learned senior counsel for the Respondent submitted that escalation claims were not prohibited during the extended period and, in fact, that both parties had agreed to the grant of escalation as would be evident from the documents that preceded Ex.C-54. For that purpose, he relied upon Exs.C-50 to C-53.

13. Before proceeding further, it is pertinent to note that one is not dealing with a prolongation claim for additional overheads or profits during the extended period of work. Such claims would necessarily be contingent on the prior determination of the causes for delay in execution of work, including the attribution of responsibility for such delay to the employer or contractor or both in case concurrent events attributable to both caused delay. By contrast, escalation or de-escalation is a natural consequence of the increase or decrease in prices of materials and/or labour during the period of execution of work and parties could, by inserting appropriate contractual terms, enable or prohibit escalation claims both during the original contract period or the extended period. As described in Hudson's Building and Engineering Contracts, 13th Edition:

“The purpose of such clauses is to reimburse the contractor the actual amount of any effect on its costs which is beyond its control, and to avoid difficulties in

making an appropriate allowance for such unpredictable things in the tender.”

Consequently, the tenability of such claims would turn largely on whether the contract was designed to absorb price variation due to escalation or de-escalation within the contract price. In other words, the bargain between the parties, as reflected in the contract, would matter more than responsibility for delay although responsibility for delay is not irrelevant especially for escalation claims during the extended period. It is also pertinent to bear in mind that this contract contained an agreed compensation clause for delay that is attributable to the contractor, Clause 2/3.21.1, which was admittedly not activated. Therefore, the first step would be to examine the contractual stipulations in this regard.

14. Clause 2/6.12 of the AOA, which deals with payment conditions, stipulated, as under:

"Escalation

Not applicable"

From the above, it is clear that escalation does not apply during the original contract period but there is no indication as to whether this position continues during the extended period and, therefore, the communications relating to EOT-1 and 2 should be examined for this

purpose. The Extension of Contract on 30.05.2008 (EOT-1) provided, in relevant part, as under:

"1. The original Contract shall be extended up to 15th January 2009.

2. All other terms and conditions of Original Contract including the scope of work & remuneration remain unchanged."

The letter dated 17.02.2009 (EOT-2) provided, in relevant part, as under:

"The minutes of WPRM and notices and mails sent to you by us amply shows the delay caused by you in completing the project.

However, with a view to complete the project, extension of time is hereby granted to you up to 28 June 2009, to complete the work.

The above extension is granted under the same terms and conditions of original contract and **without any escalation of rates during the period"**

(emphasis added).

15. Thus, as regards EOT-1, escalation is not expressly dealt with, whereas the letter granting EOT-2 records that the delay was caused by the Respondent and expressly prohibits an escalation claim. In this contractual matrix, keeping in mind the factual context of communications on escalation such as Ex.C-50-C53, in paragraph 36 of the Award, the Arbitral Tribunal considered the contention of the Petitioner that the

contract prohibits the grant of escalation and the contention of the Respondent to the contrary and also took note of the judgments of the Supreme Court in cases such as **P.M. Paul v. Union of India 1989 Supp. (1) SCC 368** and **Sathyapalan**, and the evidence on record and concluded that "the objection of the respondent/Petitioner herein is not well merited...." The said conclusion is based on an appraisal of material evidence and construction of the relevant contractual clauses. In this regard, the stipulation in the communication granting the second extension, i.e. EOT-2, to the effect that no escalation would be paid supports the interpretation that the parties did not intend to exclude escalation claims in the EOT-1 period especially when viewed in the context of material evidence such as Ex. C-50-C53. Consequently, no interference is warranted with such finding.

16. This leads to the question as to whether the Award of escalation for 50% of the EOT-1 period warrants interference especially when the Arbitral Tribunal concluded that Ex.C-54 cannot be relied upon. Upon perusal of the Award and, in particular, paragraph 35 thereof, I find that the Arbitral Tribunal examined the evidence on record, including Ex. C-50, C-54 and the answer of R.W.1 to question 330, so as to conclude that escalation is payable for 50% of the EOT-1 period. The conclusion that 50% of the delay is attributable to the Petitioner is in line with Exs. C-50,

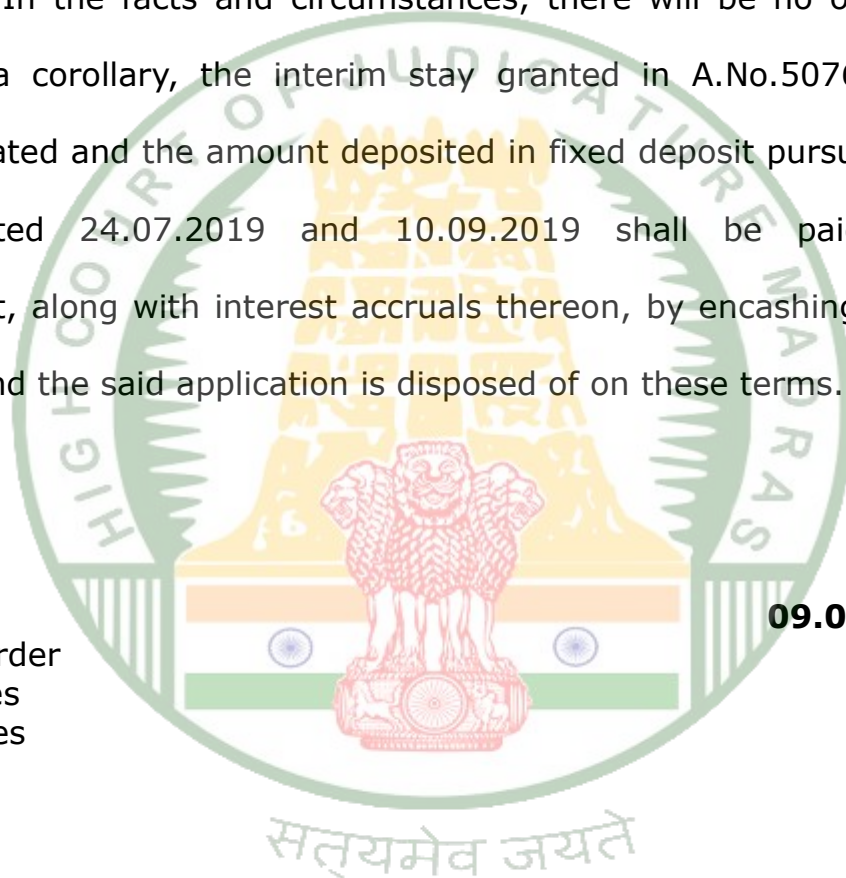
C-51 and C-52. Therefore, the said conclusion cannot be said to be arbitrary. In addition, the adoption of Chennai DSR/PWD rates, as opposed to RBI Indices, cannot be said to be arbitrary or perverse especially in light of the fact that the contract does not prescribe the formula for calculating escalation and, in answer to question 330, R.W.1 stated that Chennai DSR/PWD rates may be applied, if need be, to compute escalation. In the facts and circumstances, I also find that not undertaking a critical path analysis to apportion responsibility does not vitiate the Award especially when one bears in mind the evidence on record and the fact that the contractor did not claim additional overheads or profits in such extended period.

17. The conclusion of the Arbitral Tribunal that the ad hoc payment of Rs. 3 crore should be set-off against the amount awarded towards escalation is also reasonable especially when viewed in the context of the letter dated 27.11.2008 (Ex.R-2), which immediately preceded such payment. By this letter, the employer was requested to release a sum of Rs.3 crore as against the determined escalation amount of Rs.3.4 crores. Keeping in mind this payment, the date of completion of work and the date of issuance of the notice dated 24.11.2008 invoking the arbitration clause, the conclusion of the Arbitral Tribunal that the claims are not barred by limitation is also not unreasonable.

18. For all these reasons, I am of the view that the Petitioner has failed to make out a case to set aside the Award as per section 34 of the Arbitration Act. Consequently, the Petition to set aside the Award is dismissed. In the facts and circumstances, there will be no order as to costs. As a corollary, the interim stay granted in A.No.5076 of 2019 stands vacated and the amount deposited in fixed deposit pursuant to the orders dated 24.07.2019 and 10.09.2019 shall be paid to the Respondent, along with interest accruals thereon, by encashing the fixed deposit, and the said application is disposed of on these terms.

Speaking order
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SENTHILKUMAR RAMAMOORTHY, J.
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