IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.02.2020

PRONOUNCED ON: 11.05.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.No.1045 of 2017
and
A.No.2078 of 2018

1. The General Manager
Southern Railway,
Head Quarters Office,
Part Town,
Chennai- 600 003.

2. The Deputy Chief Engineer II
Guage Conversion
Southern Railway/Construction,
Thiruchirapalli - 620 001. ... Petitioners

Vs

M/s. Dharani Hi-Tech Projects (P) Ltd.,
Railway Contractors,
No. 28, Annavasal Street,
Mannargudi - 614 001,
Tiruvarur District, Tamil Nadu,
Represented by its Managing Director. ... Respondent

PRAYER: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside Arbitral Award dated 11.09.2017 is so far as part of the amount awarded in claim No.1, Claim No.2, Claim No.6 and interest at 18 % against the petitioners in the disputes arising out of the Agreement No.117/HQ/DY.CE/GC/II/TPJ dated 21.11.2011 passed by the learned Arbitrator.

For Petitioner : Mr. P.T. Ramkumar, SC

For Respondent : Ms. Aparna Devi
for M/s. P. Subba Reddy

ORDER

The respondent Railways are the petitioners before this Court challenging the award dated 11.09.2017 of the Sole Arbitrator. For ease of understanding the parties to the proceedings viz; the claimant and respondent before the Arbitral Tribunal are hereinbelow referred to as the Contractor and the Railways respectively.

2. The counsel for the Railways even at the commencement of his arguments had submitted that though the entire award has been challenged, the challenge is being restricted to the amount awarded towards claim No.3 i.e; Damages for non-execution of contract @ 15 % (Loss of profit) to the tune of Rs.24,00,000/- and that the Railways had honoured the other portions of the award.

3. Considering this limited ground of challenge it is necessary to briefly allude to the contract entered into between the Contractor and the Railways out of which the present proceedings emanate.

4. In pursuance of the tender floated by the Railways on 06.05.2011 the Contractor who participated the contractor who participated in the tender on 10.06.2011 emerged successful being the lowest tenderer. A letter of acceptance dated 06.09.2011 was issued to the Contractor for a total value of Rs.6,47,52,568/-. The entire project was to be completed within 8 months from the date of the letter of acceptance i.e; by 05.05.2012.

After the Contractor submitted the performance guarantee, an agreement dated 21.11.2011 was entered into between the Contractor and the Railways. The contract was governed by the general conditions of contract of the Railway and the special conditions as enshrined in the Agreement.

5. The Contractor would contend that despite their preparedness they were unable to proceed to execute the contract on account of the Railways not handing over the site and the drawings within the stipulated time. As a result the Contractor was unable to submit the program of work. The Contractor sought for an extension of the currency upto 31.10.2012 on 26.04.2012. This extension was recommended by the Railways.

6. The contractor would submit that there was a total non-application of mind and a lack of co-ordination between the officials of the Railways. While on the one hand the Railways acknowledging the fact that the site had not been completely handed over to the Contractor sans the obstructions, on the other hand the Inspecting authority kept issuing notices threatening

imposition of penalty.

7. From a perusal of the claim statement, it appears that the following extensions had been granted by the Railways to the Contractor.

(a) From 05.05.2010 to 31.10.2012

(b) From 01.11.2012 to 15.12.2012 under clause 17-A (ii) of the GCC

(c) From 15.12.2013 to 15.01.2013 under clause 17-B of GCC

(d) From 06.01.2013 to 15.04.2013

(e) Upto 31.05.2013

(f) Upto 30.06.2013

(g) From 01.06.2013 to 31.07.2013 under clause 17-A (iii) of GCC

(h) 1.08.2013 to 31.08.2013 under clause 17-B of GCC

The Railways had in all granted 7 extensions. However by notice dated 17.08.2013 the Railways had terminated the contract.

8. The Contractor would submit on the day of termination the

Railways was liable to pay them a sum of Rs35 lakhs under the contract, Rs.10,46,079/- towards new items executed besides refund of the performance guarantee and security deposit. The Contractor thereafter invoked the Arbitration clause by invoking the provisions of Sec 11 of the Arbitration and conciliation Act, 1996, hereinafter called the Act, by filing OP.No.414 of 2016 and this Court by order dated 09.09.2016 was pleased to appoint the sole Arbitrator.

9. The Contractor had claimed the following amounts as due to them from the Railways:

(a)	Finalization of contract and payment of dues along with Refund of withheld amount including new item	Rs. 1, 40,00,000/-
(b)	Refund of recovered amount on account of the work executed by the other Agency	Rs. 10,00,000/-
(c)	Damages for non-execution of contract 15 %	Rs.24,00,000/-
(d)	Damages on the about amount from the date of termination on 17.08.2013 and up to the date of this invocation	Rs. 74,00,000/-
(e)	Damages as interest from the date of award and	to be quantified

(a)	Finalization of contract and payment of dues along with Refund of withheld amount including new item	Rs. 1, 40,00,000/-
	up to the date of realization of amount of 15 %	
(f)	Cost of Arbitration	to be quantified
	Total	Rs.2,48,00,000/- to be quantified

10. The Railways had filed a counter statement inclusive of a counter claim of a sum of Rs.2,23,10,014/-. The respondent would contend that the contractor, despite being warned and though the currency of the contract had been extended periodically by over a period of 15 months from the date on which the contract was to conclude originally, had failed to deliver. The Railways had categorically refuted the claim of the Contractor that they had not made available the site as undertaken by the Railways. The Railways had also contended that the Contractor had permitted the Railways to engage the service of a third party Contractor as they were unable to proceed with the work.

11. The Contractor had resisted the counter claim by filing a

rejoinder inter alia contending that the delay had occurred only on account of the fact that the Railways was unable to clear the obstructions on the site. They had emphatically denied the contention of the Railways that they had permitted the Railways to engage a 3rd party for completing the work. The Contractor once again reiterated the contention of their claim statement.

12. In their reply to the rejoinder the Railways had contended that as per the final Bill prepared by them a sum of Rs.40,69,825/- was payable for the work done and a sum of Rs.10,64,078/- towards the "News Items" proposal. These amounts would be paid after making necessary recoveries, hire charge of railway material etc.

13. The Arbitral Tribunal has framed 6 issues and in these proceedings issue No.2 with particular reference to claim No.3 is the only issue to be considered as the Railways have fairly contended that it is only the finding given with reference to this issue which is being challenged.

14. The finding of the Arbitral Tribunal under this head is that due to the illegal termination of the contract by the Railway and in view of the provisions of Sec 73 of the Indian Contract Act the Contractor was entitled to loss of profit at the rate of 15% of the unexecuted value of work i.e; 15 % of Rs.1,41,12,618/- which works out to a sum of Rs.21,16,893/-. The learned Arbitrator has proceeded to allow this claim on the basis of the following judgments of the Hon'ble Supreme Court:

(i) "[1977 (3) SCC 590]- Mohd. Salamutullah and others Vs. Govt of Andhra Pradesh"

(ii) "[1984 (4) SCC 59]- A.T. Brij Paul Singh VS. State of Gujarat"

(iii) "[2011 (10) SCC 573] - MSK projects India (JV) Ltd Vs. State of Rajasthan and others".

The learned Arbitrator has not considered the terms of the contact or the evidence on record before arriving at the above conclusion.

15. Challenging the above, the Railways is before this Court.

Mr.P.T. Ram Kumar, learned counsel appearing for the Railways would contend that despite 7 extensions the Contractor had only completed 15 % of the work. He would further contend that the Contractor had not provided any proof to show the extent of the unexecuted work and further they have not let in any proof to show the loss of profit suffered by them. On the contrary, he would contend that, the Railways had on 8 occasions informed the Contractor that their work was proceeding at a very slow pace and was not satisfactory. These warning were never paid heed to by the Contractor. The Contractor had not deployed requisite men and material at the work place. The provisions of Section 73 and 74 of the Contract Act would not apply to the instant case as the Contractor had themselves permitted the Railways to engage a 3rd party to complete the works at the risk and cost of the Contractor. He would draw the attention of the court to Clause 61 (3) of the general conditions of contract which state as follows:-

> *"(3) The contractor shall have no claim to any payment of compensation or otherwise, however on account of any profit or advantage which he might have derived from the execution of*

the work in full but which he did not derive in consequence of determination of contract".

16. In the light of the above clause and in the absence of proof the learned Arbitrator has grossly erred in allowing the claim under the head of "Loss of Profit". He would rely upon the following Judgments:

(a) "[(2004) 5 SCC 109] - Bharat Coking Coa Ltd. Vs L.K. Ahuja"

(b) "(2007) 2 SCC 453] - Ramnath International Construction (P) Ltd Vs. Union of India"

(c) "[(2010) 13 SCC 377]- ONGC Vs. WIG BROS. Builders & Engineers (P) Ltd."

(d) "[2007 (5) CTC 17]- Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager-Works, Palghat Division".

(e) "[OP.No.1072 of 2018] - The Chief

Engineer Vs. M/s. R.R.K.R. Rail One (J.V)- Madras High Court".

(f) "[O.P.No.305 of 2010]- Union of India Vss. M/s. S.K. Swamy and Co. and others"- Madras High Court.

(g) "[O.P.Nos.87 and 88 of 2014]- The Chief Engineer and others Vs. Sri Swarna and Co. and others"- Madras High Court.

17. Per contra Mrs. Aparna Devi, learned counsel appearing on behalf of the Contractor would submit that they have filed A.No.2078 of 2018 to have the OP pending before this Court remitted back to the learned Arbitrator to resume the hearing and eliminate the grounds for setting aside the award under the various grounds including loss of profit of an amount of Rs.21,16,893/-. She would submit that the only grounds to challenge the award is on the ground that the learned Arbitrator has not considered the evidence on record and therefore the award may be remitted to the learned

Arbitrator to give reasons. She would put forward the following judgments in support of her contentions:

(a) "[(2009) 10 SCC 259]- Som Datt Builders Ltd. Vs. State of Kerala".

(b) "[(2018) 11 SCC 328] - Kinnari Mullick Vs. Ghanshyam Das Damani".

(c) "[2008 (3)-L.W. page 1063]- M/s. M.M.T.C., through its General Manager, Chennai Vs. Vicnivass Agency and another".

18. **Discussion:**

a) The only issue to be considered is whether in the absence of proof the learned Arbitrator was correct in awarding the claim under the head "Loss of Profit". The Award under this head is challenged on the following grounds:-

(a) the Contractor has not let in any evidence to prove loss;

(b) the terms of the contract clearly provide that the Contractor is not entitled to claim compensation for the unexecuted portion of the contract on its determination.

b) The very finding of the learned Arbitrator would clearly prove that he has not considered the agreed terms of the contract but has based his award on judgements of the Hon'ble Supreme Court. There is no basis as to how the learned Arbitrator has arrived at a value for the unexecuted work at Rs.1,41,12,618/-. Even the claim statement does not give any details about the unexecuted work. The learned Arbitrator has also ignored the terms of the contract.

c) The Arbitrator being a creation of the agreement between parties is bound by its terms and cannot operate outside its scope. The award of an Arbitrator is in the normal circumstances final and conclusive so long as the Arbitrator has acted within his authority (i.e, the terms of the agreement) and according to principles of fair play. Section 28(3) of the Act provides that the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall also take into account the usage of the Trade that is applicable to the transaction.

d) The Hon'ble Supreme Court in the judgment reported in *"[2007 (4) MLJ page 73]-Food Corporation of India Vs. Chandu Construction and another"* had observed as follows:

> *" 38.There was mutual Agreement between the parties that the same terms and conditions would apply and extension of time will not result in any financial loss to the administration. When there was such express terms, Arbitrators erred in ignoring such clauses in rider Agreements. Holding that Arbitrator being creatures of the Agreement between the parties and that he has to operate within the four corners of the Agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award.*
>
> *11. It is trite to say that the Arbitrator being a creature of the Agreement between the parties, he has to act within the four corners of the Agreement and if he ignores the specific terms of*

the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the Court. We may however, hasten to add that if the Arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. [Associated Engg. Co. v. State of Andhra Pradesh [AIR 1992 SC 232 : 1991(4) SCC 93] and Rajasthan State Mines and Minerals Ltd. Vs.Eastern Engineering Enterprises and another [AIR 1999 SC 3627 : 1999 (9) SCC 283].

Similarly in ***Bharat Coking Coal Ltd. Vs. Annapurna Construction [2003 (8) SCC 154***, the Hon'ble Supreme Court, *while inter alia, observing that the Arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract, it was observed, thus :*

"There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the Arbitrator is to arbitrate within the terms of the

contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parametres of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."

In the instant case under clause 61 (3) of the general conditions of contract the contractor has expressly agreed not to claim compensation on the unexecuted portion of the contract on its determination.

(e) While considering an issue whether compensation can be granted for the loss and extra cost incurred by the Contractor on account of the delay and extended execution the Hon'ble Supreme Court in the judgment reported in *"[(2007) 2 SCC page 453] - Ramnath International Construction (P) Ltd Vs. Union of India"* had observed and held as follows:

"12. Clause (C) provides that where extensions have been granted by reason of the delays enumerated in clause (A) which were

beyond the control of the contractor, or on account of the delays on the part of the employer specified in clause (B), the contractor is not entitled to make any claim either for compensation or otherwise, arising in whatsoever manner, as a result of such extensions. After enumerating certain delays, sub-clause (viii) of clause (A) specifically mentions delay on account of any other cause beyond the control of the contractor. The causes for delays specified in clause (A), thus, encompass all delays over which the contractor has no control. This will necessarily include any delays attributable to the employer or any delay for which both the employer and the contractor are responsible. The contract thus provides that if there is any delay, attributable either to the contractor or the employer or to both, and the contractor seeks and obtains extension of time for execution on that account, he will not be entitled to claim compensation of any nature, on the ground of such delay, in addition to the extension of time obtained by him. Therefore, the claims for compensation as *a consequence of delays, that is Claim 24 of the Hangar Contract and Claims 13 to 16 of the Road Contract are barred by clause 11 (C)"*

Clause 11 (c) in the above referred case provided that there can be no claim for compensation on account of extensions granted under condition (A) and (B). Likewise clause 61 (3) of the GCC in the instant case provides that no compensation can be claimed for the unexecuted work in the case of its determination.

The Bench ultimately set aside the award under these heads on the ground that the learned Arbitrator had acted in excess of his jurisdiction.

(f) A Division Bench of this Court in the judgment reported in "[*2007 (5) CTC 17] - Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager-Works, Palghat Division"* was considering a similar issue relating to a Railway contract. The Contractor had claimed compensation under the heads " Labour rendered idle" and " Losses suffered owing to overstay". The claim under these heads were also awarded by the Arbitrator. As regards the head of Labour rendered idle the terms of the contract had clearly stipulated that the Contractor would not be entitled to any compensation under this head and this clause was ignored by the Arbitrator. After referring to the various judgments of the Hon'ble Supreme Court on the scope and jurisdiction of the Arbitral Tribunal the Bench had observed as follows:

> *"By catena of decisions, it is well settled that where fundamental terms of the Agreement of the parties is ignored by the Arbitrator, the Arbitrator was held to have exceeded his jurisdiction, even where the jurisdiction clause itself is widely worded."*

With regard to the 2nd claim ' Losses suffered owing to overstay the bench has held as follows:

> *38.There was mutual Agreement between the parties that the same terms and conditions would apply and extension of time will not result in any financial loss to the administration. When there was such express terms, Arbitrators erred in ignoring such clauses in rider Agreements.*

Holding that Arbitrator being creatures of the Agreement between the parties and that he has to operate within the four corners of the Agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, in 2007 (4) MLJ 73 [Food Corporation of India Vs. Chandu Construction and another], the Supreme Court has held thus :

11.It is trite to say that the Arbitrator being a creature of the Agreement between the parties, he has to act within the four corners of the Agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the Court. We may however, hasten to add that if the Arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. [Associated Engg. Co. v. State of Andhra

Pradesh [AIR 1992 SC 232 : 1991(4) SCC 93] and Rajasthan State Mines and Minerals Ltd. Vs.Eastern Engineering Enterprises and another [AIR 1999 SC 3627 : 1999 (9) SCC 283].

In this context, a reference can usefully be made to the observations of this Court in Alopi Parshad and sons, Ltd. v. Union of India, AIR 1960 SC 588 wherein it was observed that the Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contracts at rates different from the stipulated rates, on some vague plea of equity. The Court went on to say that in India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into will justify a Court, while holding the parties bound by the contract, in departing from the express terms thereof. Similarly in The Naihati Jute Mills Ltd. v.

Khyaliram Jagannath, AIR 1968 SC 522 the Supreme Court had observed that where there is an express term, the Court cannot find, on construction of the contract, an implied term inconsistent with such express term.

13.In Continental Construction Co. Ltd. v. State of Madhya Pradesh, AIR 1988 SC 1166 : 1988 (3) SCC 82 it was emphasized that not being a conciliator, an Arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a Tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the Court provided his error appears on the face of the award.

14.In Bharat Coking Coal Ltd., v. Amnapurna Construction [AIR 2003 SC 3660 : 2003 (8) SCC 154], while interalia, observing that the Arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract, it was observed, thus :

"There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the Arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parametres of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."

15.therefore, it needs little emphasis that an Arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a malafide action.

(g) On a conspectus of the above pronouncements it is therefore clear that the learned Arbitrator has exceeded his jurisdiction in granting an award under the head of loss of profit.

(h) As regards the submission of the counsel for the Contractor seeking to remand the matter back to the Arbitrator keeping the OP pending, the same cannot countenanced. The claim statement does not contain any pleading as to how the Contractor claims compensation towards loss of profits. Its trite law that there cannot be evidence in the absence of pleadings. Therefore no useful purpose would be served by remitting the matter. That apart the Contractor has also not let in any evidence to show the extent of work completed by them and the work that was left unexecuted and how the termination has caused a loss to them. Hence Application No.2078 of 2018 is dismissed.

In fine, the O.P. is partly allowed. The Award dated 11.09.2017 insofar as it relates to claim N0.3 is set aside in all other respects the Award is confirmed. A.No.2078 of 2018 is dismissed. No costs.

11.05.2020

mrn

Index : Yes/No
Speaking order/non-speaking order

P.T.ASHA, J,

mrn/mps

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