

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.02.2020

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THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.Nos.33 & 510 of 2017 & 930 of 2019

O.P.No.33 of 2017:

M/s.Renaatus Projects Private Limited,
Represented by its Executive Director, Mr.Manor Poosappan,
No.26, Chellammal Street,
Shenoy Nagar, Aminjikarai,
Chennai – 600030 ... Petitioner

Vs

M/s.National Centre for Sustainable Coastal Management,
Represented by its Director
Koodal Building,
Anna University Campus,
Chennai 25 ... respondent

O.P.No. 510 of 2017

Director
M/s.National Centre for Sustainable Coastal Management,
Represented by its Director
Koodal Building,
Anna University Campus,
Chennai 25 ... Petitioner

Vs

M/s.Renaatus Projects Private Limited,
Represented by its Executive Director, Mr.Manor Poosappan,
No.26, Chellammal Street,
Shenoy Nagar, Aminjikarai,
Chennai – 600030

... respondent

O.P.No.930 of 2019:

M/s.Renaatus Projects Private Limited,
Represented by its Executive Director, Mr.Manor Poosappan,
No.156, Mullamparappu, NG Palayam (Post)
Erode – 638 115

... Petitioner

Vs

M/s.National Centre for Sustainable Coastal Management,
Represented by its Director
Ministry of Environment, Forest and Climate Change,
Government of India,
Anna University Campus,
Chennai - 600025

... respondent

Prayer in O.P.No.33 of 2017: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 18.08.2016 passed by the Honourable Arbitral Tribunal to the extent as aggrieved by the petitioner herein in respect of Arbitration proceedings between the petitioner and the 1st respondent.

Prayer in O.P.No.510 of 2017: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the arbitration award dated 18.08.2016 passed by majority of the Arbitral Tribunal to the extent which rejected all the claims of the petitioner and allowing claim No.3 of the respondent towards overheads.

Prayer in O.P.No.930 of 2019: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 09.05.2019 passed by the Arbitral Tribunal as aggrieved by the petitioner herein, in respect of the arbitral proceedings between the petitioner and the respondent.

O.P.Nos.33 of 2017 & 930 of 2019:

For Petitioner : Mr.P.J.Rishikesh
For Respondent : Mr.G.Karthikeyan
Additional Solicitor General
of India

O.P.No.510 of 2017:

For Petitioner : Mr.G.Karthikeyan
Additional Solicitor General
of India
For Respondent : Mr.P.J.Rishikesh

COMMON ORDER

The respondent before the arbitral Tribunal has invoked the Jurisdiction of this Court under Section 34 of the Arbitration and Conciliation Act, 1996, herein after called the 1996 Act, by filing the following petitions:

a) O.P.No.33 of 2017 is filed challenging that portion of the award which is against the petitioner herein in respect of the milestone nos.1 and 2.

b) O.P.No.930 of 2019 pertains to the award rejecting the claim in respect of milestone no.3 which is against the petitioner herein.

O.P.No.510 of 2017 is filed by the claimant before the arbitral Tribunal challenging the award passed by the arbitral Tribunal in respect of milestone numbers 1 and 2 . The issue at hand is herein below set out.

O.P.Nos.33 and 510 of 2017:

2. M/s.Renaatus Projects Private Limited is referred to as the petitioner and National Center for Sustainable Coastal Management is referred to as the respondent. The respondent had floated a tender for the construction of building (including electrical and plumbing works) for the National Centre for Sustainable Coastal Management, Chennai. The petitioner emerged as the successful bidder. Under the contract the scheduled work was supposed to be completed under three milestones.

i) Milestone I - Completion of foundation and plinth beam works in six weeks.

ii) Milestone 2 - Completion of all RCC slab and frame upto roof slab level in twenty two weeks.

iii) Milestone 3 - Completion of all other works within a period of fifty two weeks.

Therefore under the terms of the contract the entire work had to be completed within a period of fifty two weeks i.e., twelve months from the date of issue of the notice to proceed with the work.

3. The said notice was issued by the respondent to the petitioner on 17.12.2013. Therefore, as per the terms of the agreement, the work had to be completed on or before 16.12.2014. The petitioner would submit that delays cropped up in the execution of the work all of which was attributable to the respondent with reference to milestones 1 and 2. The works got inordinately delayed constraining the petitioner to raise claims pertaining to the said milestones 1 and 2. The petitioner would contend that the delay had occurred on account of the following reasons:

a) Delay in issuance of drawings:

Though it was stipulated in the agreement that the drawings would be provided at the start of the contract, however this stipulation was not adhered to by the respondent. On 28.07.2017, the respondent gave drawings for works upto the plinth beam which was nearly 223 days after the stipulated time. In the terms of original agreement this drawings had to be provided within 45 days. Since drawings had not been submitted in time, the modified start date of 30.12.2013 and 11.04.2014 was issued by the respondent acknowledging the fact that they had caused a delay in releasing the

drawing.

b) Repeated revisions of the drawings.

c) While digging, hard strata was found for which reason a portion of the work was stopped so as to obtain the revised drawing. The respondent unfortunately took considerable time for releasing the modified drawing and this resulted in delayed execution.

d) The Structural drawings of the Chiller room in the two floors was not available till 02.09.2015 when the original contract period expired on 16.12.2014.

e) Delay in providing completion schedule for the work

f) Delay in release of payments etc

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4. The reasons for the delay has been given in detail in the

claim statement, therefore, I do not intend to extract each and everyone of them. It would suffice to state that the petitioner had alleged these delays were caused by the respondent.

5. Considering the delay, the petitioner has sought for extension of time till 31.10.2015 (from 07.12.2014) without imposing liquidated damages. The petitioner had also sought for an escalation for the value of the work for the extended period in order to meet the additional expenditure, price difference etc. The extension of time was granted upto 31.03.2015 without any cost. However, the petitioner refused to grant escalation charges. The respondent sought to recover Liquidated Damages from pending RA Bills. The levy of Liquidated damages was raised for the first time after extending the contract period to 31.03.2015 in and by which the respondent had acknowledged the fact that there was a delay and that they had condoned the same and the claim is nothing but an attempt on the part of the respondent to coerce the petitioner into not seeking price escalation.

6. The attempts ended in a failure constraining the petitioner to invoke the dispute resolution clause vide their letter dated 02.03.2015 addressed to the Engineer in-charge who was the first tier for resolution of disputes. The Engineer in-charge on receipt of the letter refused to take up the matter contending that she had nothing to do with the project and that she would not be able to bring about a solution. Thereafter, the petitioner herein had invoked clause 24 of the contract and requested the claimant vide letter dated 17.03.2015 to appoint an adjudicator to resolve the disputes. The appointed adjudicator held in favour of the petitioner with reference to delay on the part of the respondent granting interest to the petitioner paying compensation to the petitioner at 5 % of the value of the work.

7. The petitioner had also simultaneously filed an application under Section 9 before the Honorable Court in O.A.No.244 of 2015 and had obtained an injunction restraining the respondent from deducting liquidated damages from out of the RA Bills. Thereafter aggrieved by the adjudicator's order the respondent had the dispute referred to arbitration with the respondent appointing an arbitrator on

their behalf. The petitioner appointed their nominee and together the two had appointed the presiding arbitrator. The petitioner had filed a counter claim to the respondent's claim before the arbitral Tribunal. It is out of these proceedings that O.P.Nos.33 and 510 of 2017 emanate for declaring the demand for liquidated damages as illegal and wrong and to pay the petitioner a sum of Rs.1,83,65,977/- under the heads of escalation and loss towards overheads and loss of profits. The majority of the arbitral tribunal had given an award and the third arbitrator gave a separate award. The details of the award as given in the written arguments of the petitioner is herein below extracted:

Award of the majority:

<i>Claims raised by the respondent herein / claimant herein</i>	<i>Details</i>	<i>Award</i>
Claim 1	Levy of LD	Rejected – in favour of this petitioner.
Claim 2	Towards of compensation incurred	Rejected – in favour of this petitioner.

<i>Counter claims raised by the petitioner herein</i>	<i>Details</i>	<i>Award</i>
Counter Claim No 1:	To declare that the delays were attributable only to the respondent herein and	Directions given to the Respondent herein not to levy LD since it is not

<i>Counter claims raised by the petitioner herein</i>	<i>Details</i>	<i>Award</i>
	Direct the respondent herein not to levy liquidated damages and to declare that any levy of liquidated damages by the respondent herein is illegal and wrong	entitled to; - in favour of this Petitioner;
Counter Claim No 2:	To direct the respondent herein to pay a sum of Rs.1,83,65,977/- towards escalation;	Rejected – Challenged herein;
Counter Claim No 3:	Claim towards overheads and loss of profits of Rs.3,67,31,954/-	Awarded Rs.52,48,899/- partly in favor of the petitioner – challenged herein;
Counter Claim No 4:	To pay compensation for the delayed payments @ 8% which works out to Rs.3,15,335.45 upto bill no 14, the details of which are filed as R – 45	Allowed in full;
Counter Claim No 5:	To direct the respondent herein to adhere to the terms and conditions of the contract and ensure in smooth functioning of the project	Directions issued;
Counter Claim No 6:	Interest	Awarded Rs.27,921/-
Counter Claim No 7	Costs	No relief;

8. Challenging the award of the arbitrator in so far as it related to the rejection of escalation and towards overheads and loss of

profits in respect of milestone nos.1 and 2 the petitioner has filed O.P.No.33 of 2017. The learned counsel for the petitioner would submit that in so far as rejection relating to escalation, the tribunal after observing that the delay was only attributable to the respondent has failed in allowing price escalation. The arbitral Tribunal has failed to appreciate that the escalation was to the tune of Rs.1,83,65,977/- which had been worked out by the petitioner by taking into account the wholesale price indices and the monthly consumer price indices for labour.

9. He would also rely upon the Judgment of the Honorable Supreme Court reported in **2006 (13) SCC 799 – Food Corporation of India Vs. A.M.Ahmed and Co. and others** and **2007 (13) SCC 43 – K.N.Sathyapalan (dead) by LRs Vs. State of Kerala.**

10. As regards, the claim towards overheads and loss of profits which the arbitral tribunal had partly allowed, the learned counsel for

the petitioner would submit that once again the entire project had been delayed only on account of the respondent. For this breach and delay the petitioner is entitled to compensation. He further submitted that the overheads and loss of profits have been calculated by the petitioner employing Emden's formula which is a recognized methodology to arrive at the compensation. The Tribunal has restricted the percentage of the overhead charges at 3 % without any basis when the CPWD norms itself would provide for a percentage of 7.5%. It is the petitioner's argument that when there is a recognized mode of calculating the loss, the Tribunal erred in restricting the overhead charges to 3% without any basis. He would therefore submit that the award of the Tribunal requires a revisit.

11. The Original Petition in O.P.No.510 of 2017 has been filed by the respondent challenging the award in so far as it rejects the respondent's claim for liquidated damages in respect of the milestone nos.1 and 2. The petitioner would submit that the respondent had not raised any grounds available under Section 34 to challenge the award passed by arbitral Tribunal. There is absolutely no pleading or

grounds as envisaged under Section 34 (2) of the 1996 Act. The arbitral Tribunal having come to the conclusion that the delay was only attributable to the respondent has correctly rejected their claim for Liquidated damages. That apart, the respondent has not proved as to how he has suffered any loss and in the absence of the same there is no question of liquidated damages being awarded to the respondent. The counsel for the petitioner would rely upon the Judgment in the matter of **Associate Builders** reported in **2005 (3) SCC 49 and** the order of the Division Bench of this Court reported in **2018 (4) MLJ 385 - Chennai Container Terminal Vs. Board of Trustees, Chennai Port Trust.**

12. **O.P.No.930 of 2019** relates to the claims under milestone 3. Here again the respondent has caused a great deal of delay by not providing the petitioner with the requisite material which as per stipulations of the contract, the respondent was bound to supply. The petitioner would submit that three extensions were therefore sought for and granted by the respondent. The respondent had extended the period of the contract knowing fully well that the delay has been

caused only by them. The petitioner had raised claims under four heads which are as follows:

- a)Overheads and loss of profits - Rs.6,03,23,192/-
- b)Escalation in rate of labour - Rs.48,87,708/-
- c)Interest for late payment - Rs.18,39,162/-
- d)Interest at 12%.

13. The arbitral Tribunal after framing the issues took up the main issue which was to decide as to who had caused the delay. The parties had adduced evidence on either side and the respondent also filed a counter claim for liquidated damages on the ground of loss of revenue due to the delay in construction by the petitioner. The arbitral Tribunal did not address the issue as to who had caused the delay. A finding regarding this was essential since it is the contention of the petitioner that the delay was only caused by the respondent whereas the respondent would attribute delay to the petitioner. The petitioner would argue that the Tribunal below has held that there was no delay based on Ex.R.1. The tribunal has failed to appreciate that the petitioner was made to execute the amended agreement

dated 26.03.2018 as a condition precedent for releasing the final payment. Having done so the Tribunal erred in holding that there was no delay as per the revised schedule.

14. The learned counsel for the respondent on the other hand would make his submissions inter alia contending that the work which is supposed to have been completed on or before 16.12.2014 was completed only on 23.03.2018 after a period of nearly three years and three months from the date fixed for completion. He would contend that the entire project had been divided into three milestones for the convenience of the parties. The counsel for the respondent would contend that apart from the petitioner there were nine other contractors who were also involved in the very same project. The counsel would argue that the allegations that the delay was only on account of the respondent is totally misconceived. The delay in handing over the original drawing was raised as a main plea by the petitioner. In this regard, the counsel would contend that original drawing was given and thereafter when the petitioners struck rock while digging, the respondent has to prepare a revised drawing. This

is very much within the knowledge of the petitioner and has caused the delay. That apart, the petitioner had never submitted their programme as contemplated under Clause 27.1 of the conditions of contract and it was on account of this that the drawings could not be provided in time.

15. The terms of the contract contemplated that the petitioner / contractor had to keep updating the progress at intervals under Section 27.3. It is the case of the respondent that the delay of more than three years was attributable only partly to the respondent. There were several factors which made towards delay.

- a) shortage of labour / man power.
- b) Inexperienced Engineers and Staffs
- c) Project team and key personnel
- d) Absence of Project Manager for a long time
- e) Quality Engineer was not appointed and the absence of the experienced project manager in the site.

16. At every stage of the project there was a delay on the part

of the petitioner. The work of construction was also very slow and of a poor quality as a result of which the respondent was constrained to demolish certain portions of the work. There was an absolute lack of Co-ordination since the petitioner did not provided fixed dates for the meeting. The respondent would therefore submit that in view of these factors the Honorable Court should dismiss O.P.Nos.33 of 2017 and 930 of 2019 and allow O.P.No.510 of 2017 filed by the respondent.

17. Heard the counsels, perused the records and the Judgments cited.

18. O.P.Nos.33 & 510 of 2017:

(a) The above Original Petitions have been filed by the respondent and the claimant before the arbitral tribunal respectively. The contract in question relates to the works covered under milestone nos.1 and 2. A reading of the award would indicate that when the work was completed and handed over to the respondent (claimant) it had been clearly stated that there was no claim on the quality issues.

That apart, the documents and evidence would clearly indicate that the respondent herein was very much in the know about the delay in the execution of the contract by the petitioner. The Tribunal has clearly held that the delay was only on account of the respondent herein as there were frequent revisions of drawings in respect of the various locations. The Tribunal has also referred to Ex.R.7, 8, 9 and 19 which proves that there was frequent revision of drawings.

(b) The arbitral tribunal has clearly held that the delay was not attributable to the petitioner herein and therefore the respondent was not entitled to any compensation by way of a liquidated damages. Although, the tribunal has held that the entire project had been pushed back on account of the delay on the part of the respondent herein, however, the demand for liquidated damages claimed by the claimant has been brushed aside by the Tribunal on the ground that the amount fixed in the contract for levy of the liquidated damages on non-achieving milestone dates was in maximum percentage of 10% of the contract rights in the pre-estimated loss of the claimant / respondent herein. The tribunal has ultimately held that the

respondent herein was not entitled to compensation.

(c) The petitioner's request for cost escalation has been rejected on the ground that the contract contained a clause, namely, Clause 13.4 that the rates and prices quoted by the bidder shall be fixed for the duration of the contract and shall not be subjected to adjustment on any account. After holding that the petitioner herein was entitled to the difference and rise in cost beyond 16.12.2014, the arbitral tribunal has not quantified the same and awarded amounts under this head but have relegated the petitioner herein to raise the issue before the employer. The award under this head is liable to be set aside since the arbitral Tribunal has not considered the terms of reference and has simply relegated the said issue back to the respondent. The arbitral Tribunal has given sufficient reasons for granting compensation towards overheads and loss of profits. The tribunal has however erred in calculating the percentage of the loss of profits and overheads by adopting CPWD norms and not recognized formulas like Hudson's and Emden's.

(d) The Tribunal has not given any reasons whatsoever for fixing the percentage at 3% although they had observed that even as per CPWD terms and even granted overheads as per that calculation. The Tribunal has not even considered that the CPWD rates for loss of profits and overhead charges is at rate of 15%. While so, the tribunal calculating overhead charges at 3% that too without giving any reasons whatsoever deserves to be set aside as the same is not a well reasoned award.

(e) The tribunal having come to the conclusion that the respondent herein has been solely responsible for the delay in supplying the drawings etc, has considered levying interest. The tribunal has granted the interest at 8% which is well reasoned award. After holding that the entire contract had been delayed on account of the respondent the Tribunal ought to have granted amounts under the head of escalation.

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(f) In a Judgment of the Hon'ble Supreme Court reported in

2006 (13) SCC 779 - Food Corporation of India Vs. A.M.Ahmed & Co. and Another, the learned Judges were considering the defense raised by the Food Corporation of India before the Arbitrator that escalation in rates cannot be granted as the agreement does not provide for the same. The Bench had relied on two earlier Judgments reported in **1985 (2) SCC 9 - Hyderabad Municipal Corporation Vs. M.Krishnaswami Mudaliar & Mudaliar** and **AIR 1989 SC 1034 - P.M.Paul Vs. Union of India** and ultimately come to the following conclusion:

"Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of the FCI, the Corporation was liable for the consequences of the delay, namely,

increase in statutory wages. Therefore, the arbitrator, in our opinion, had jurisdiction to go into this question. He has gone into that question and has awarded as he did. The Arbitrator by awarding wage revision has not mis-conducted himself. The award was, therefore, made rule of the High Court, rightly so in our opinion."

(g) In the Judgment in **2007 (13) SCC 43 - K.N.Sathyapalan (dead) by LRs Vs. State of Kerala and another**, the Hon'ble Supreme Court had held that though parties are bound by the terms of the contract, when one of them fails to fulfill its obligations which directly affects the work to be executed by another party then the Arbitrator was vested with the right to compensate the other party the extra cost incurred by them by reason of the failure of the first party to fulfill its obligation.

(h) In the Judgment reported in **2017 (8) SCC 146 - Assam State Electricity Board and Others Vs. Buildworth Private**

Limited, the Bench relying on the Judgments of **P.M.Paul, Food Corporation of India** and **K.N.Sathyapalan** cited supra held that even if the terms of the contract contemplated an amount payable for escalation such a stipulation was applicable only during the scheduled term of the contract and not for the extended period. For the extended period the contractor is entitled to price escalation.

This view is once again reiterated in the Judgement of the Hon'ble Supreme Court in **2018 (12) SCC 393 - Aries & Aries Vs. Tamil Nadu Electricity Board**.

(i) Therefore, on a reading of the above Judgments I hold that the award challenged in O.P.No.33 of 2017 is liable to be set aside in so far as it relates to the claim towards cost of escalation and the rejected portion of the claim towards overheads and loss of profits. The petition filed by the respondent in O.P.No.510 of 2017 is consequently dismissed.

19. O.P.No.930 of 2019:

(a) The petitioner is the claimant before the arbitral Tribunal.

The claim related to the works covered under milestone no.3. Once again in this claim the claimant has sought to be compensated under two heads, towards overheads and loss of profits. A sum of Rs.6,03,23,192/- has been sought for under the two heads. Under the head of escalation in rates of labour a sum of Rs.48,87,708/- has been claimed. The petitioner has calculated the claim of overheads and profits by adopting Emden's formula. The arbitral tribunal has rejected this claim despite attributing the delay only to the respondent herein. The arbitral Tribunal has rejected the claim only on the ground that although the petitioner herein would contend that the work had completed by 30.06.2017 however a perusal of Ex.R.1 would show that the work had been completed only on 23.03.2018.

(b) The tribunal has totally ignored the documents produced on the side of the claimant / petitioner herein like Ex.C.52 which was an invitation for the inaugural function on 08.07.2017 and also the admission of R.W.1 that they had occupied the premises in July 2017. Since the tribunal has rejected these documents and relied upon Ex.R.1 ignoring the explanation of the petitioner herein that they had been forced to sign Ex.R.1 as the respondent herein had made the

signing of the same for the claimant to receive the final payments. The reliance on Ex.R.1 ignoring the other documents filed on the side of the petitioner would clearly indicate that the petitioner have not been given equal treatment and would show that the tribunal has ignored the terms of agreement between the parties.

(c) The arbitral Tribunal has placed reliance upon Ex.R.25, e-mails dated 30.10.2017, to conclude that the works were pending. The petitioner herein had submitted proof to show that these works were snags and that the same had been fully rectified. The arbitral Tribunal has relied upon the revised dates given in Ex.R.1 to reject the petitioner's claim under the head of escalation. The arbitral Tribunal has ignored the various documents produced on the side of the claimant to prove not only the delay but also the fact that the delay was solely on account of the respondent herein. The tribunal therefore ought to have considered the claim towards overheads and loss of profits as well as towards escalation in the cost of labour. The award suffers from a patent illegality in as much as the arbitral

tribunal has not considered the evidence that is let in on the side of the petitioner. The awards in so far as it relates to the interest is confirmed.

20. The award challenged in O.P.No.33 of 2017 is set aside in so far as it relates to the claim towards cost of escalation and the rejected portion with regard to the claim towards overheads and loss of profits. The award is confirmed insofar as it relates to the award of interest. The petition in O.P.No.33 of 2017 is partly allowed and consequently, the petition filed by the respondent in O.P.No.510 of 2017 is dismissed. As regards O.P.No.930 of 2019, the award is set aside with reference to overheads and loss of profits as well as escalation for the cost of labour and confirmed with reference to the grant of interest. The Original Petition in O.P.No.930 of 2019 is allowed. There shall be no order of costs.

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

P.T.ASHA, J.,

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O.P.Nos.33 & 510 of 2017 & 930 of 2019

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25.02.2020