IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 04.10.2021

PRONOUNCED ON : 20.10.2021

CORAM

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

C.M.A.No.2860 of 2015

1.The Secretary,
Pondicherry Housing Board,
Anna Nagar, Puducherry.

2.The Executive Engineer,
Pondicherry Housing Board,
Anna Nagar, Puducherry. ... Appellants/Petitioners 2 & 3

..Vs..

1.M/s.Muthusamy Constructions,
Rep. by its Partners A.Anbu & A.K.Sankaran

2.A.Anbu

3.A.K.Sankaran ...1 to 3 Respondents/Respondents

4.The Chairman,
Pondicherry Housing Board,
Anna Nagar, Puducherry. ...4thRespondent/1st Petitioner

Prayer: Civil Miscellaneous Appeal filed under Section 96 of Code of Civil Procedure r/w. section 37(1) of Arbitration and Conciliation Act, 1996 against the order and decreetal order dated 23.09.2014 made in Arbitration O.P.No.56 of 2011 on the file of the Court of the Principal District Judge, Puducherry.

For Appellants : Mr.T.P.Manoharan, Senior Counsel for M/s.K.P.Jotheeswaran

For Respondent 1 to 3: Mr.N.Thiagarajan

For Respondent 4 : No appearance

J U D G M E N T

This appeal has been filed under section 37 of the Arbitration and Conciliation Act, challenging the order dated

23.09.2014 passed by the learned Principal District Judge, Puducherry in Arbitration O.P.No.56 of 2011 under section 34 of the Arbitration and Conciliation Act dismissing the application filed by the Appellants challenging the arbitral award dated 11.04.2011 passed in favour of the respondents against the Appellants in respect of claim Nos.II, III, V & VI.

2. The first respondent which is a partnership firm is a contractor and the second and third respondents are its partners. They were issued work order on 24.01.2005 by the Appellants for construction of a composite housing scheme at Sudhandira Pon Vizha Nagar, Rainbow Nagar, Pondicherry. After the completion of the project by the first respondent, there arose certain disputes between the parties and the said dispute was referred to arbitration in accordance with arbitration clause contained in the work order. The first respondent made the following claims against the Appellants before the sole Arbitrator:

(a) Claim No.I: Pending Final bill from 24.01.2007. (This excludes additional cost claimed for TMT Bars) but includes Purposeful omission of measurements for executed as per Agreement items - Rs.4,34,953/-

(b) Claim No.II: Difference in cost between TMT bars used and conventional bars as per Agreement - Rs.15,02,400/-

(c) Claim No.III: Unnecessary retention of bill amount in running bills for use of TMT bars - 18% commercial interest claimed - Rs.13,87,825/-

(d) Claim No.IV: Erratic payment of monthly bills and non-payment of Secured Advance - Violation of payment Clauses - Simple interest claimed - Rs.2,02,551/-

(e) Claim No.V: Unnecessary establishment / over head charges beyond stipulated period of completion. Damagers claimed - Rs.9,24,624/-

(f) Claim No.VI: Interest at 18% for pending final bill - Claim No.I. from the date completion 24.01.2007 to 24.10.2010 = 33 months (subject to revision) - Rs.2,81,992/-

(g) Claim No.VII - Cost escalation similar to 10CA due to prolongation of work (Based on cost indices of Government of India) - Rs.2,54,425/-

Total - RS.49,88,770/-

3. The sole Arbitrator passed an arbitral award dated 11.04.2011 in favour of the first respondent against the Appellants as detailed hereunder:

| Sl. No. | Claim No. & Related Paras | Amount in Figure | In words |
|---|---|---|---|
| 1 | Claim No.1 – Issue No.II. Pending Final Bill Para – 24 | Rs.3,94,173/- | Rupees three lakhs ninety four thousand one hundred and seventy three only. |
| 2 | Claim No.II – Issue II – B5. Difference in cost between TMT bars & Conventional bars Para 29 | Rs.12,60,023/- | (Rupees twelve lakhs sixty thousand and twenty three only) |
| 3 | Claim No.III Issue No.III B1- Detention of bill amount in running bills for use of TMT bars Para – 37 | Rs.5,12,163/- | (Rupees five lakhs twelve thousand one hundred and sixty three only) |
| 4 | Claim No.IV Issue No.III B-2: Erratic payment on monthly bills & non payment of Secured Advance Para – 38 | Disallowed | - |
| 5 | Claim No.V issue No.III – A uncovered Field Establishment and over head charges during extended period. Para – 33 | Rs.1,80,458/- | Rupees one lakh eighty thousand four hundred and fifty eight only |
| 6 | Claim No.VI – Interest on Pending Final Bill and S.D – Issue III B-3. Para – 40 | Rs.2,13,779/- | Rupees two lakhs thirteen thousand seven hundred and seventy nine only |

| Sl. No. | Claim No. & Related Paras | Amount in Figure | In words |
|---|---|---|---|
| 7 | Claim No.VII - Cost escalation similar to 10 CA issue No.III - B-4<br>Para - 42 | Disallowed | -- |
| Total | | Rs.25,60,596/- | Rupees twenty five lakhs sixty thousand five hundred and ninety six only |

4. Aggrieved by the Arbitral award dated 11.04.2011, the Appellants who are the respondents in the arbitration challenged the same with regard to the award passed insofar as claim Nos.II, III, V & VI alone by filing an application under section 34 of the Arbitration and Conciliation Act before the learned Principal District Judge, Puducherry in A.O.P.No.56 of 2011. Insofar the award passed in favour of the first respondent by the sole Arbitrator in respect of Claim No.I is concerned, the Appellants did not challenge the same in A.O.P.No.56 of 2011.

5. The learned Principal District Judge, Puducherry dismissed A.O.P.No.56 of 2011 under the impugned order dated 23.09.2014. Aggrieved by the same, this appeal has been filed under section 37 of the Arbitration & Conciliation Act by the petitioners in A.O.P.No.56 of 2011 who are the respondents in the arbitration.

6. Heard Mr.T.P.Manoharan, learned Senior Counsel representing Mr.K.P.Jotheeswaran. learned counsel for the Appellants and Mr.N.Thiagarajan, learned counsel for the first respondent.

7. Learned Senior Counsel for the Appellants drew the attention of this Court to clause 9 of the terms and conditions of the contract between the parties and would submit that since the first respondent did not submit the final bill within the stipulated time, the first respondent has waived their right to make any further claims against the Appellants. According to him, in breach of clause 9, the first respondent has made claims before the sole arbitrator.

8. Learned Senior Counsel for the Appellants further submitted that only in accordance with M-Book, the materials will have to be supplied by the first respondent. He drew the attention of this Court to item No.21 in the M-Book and would submit that as per the terms of the supply, the first respondent

will have to use deformed bars, but without getting approval of the Appellants, the first respondent has alleged that they have used the TMT bars and have claimed the value of the same in the arbitral proceedings which is not maintainable.

9. Learned Senior Counsel for the Appellants then drew the attention of this court to additional conditions of the contract which is part of the M-Book and in particular, he referred to clause - 13 and would submit that only from the companies mentioned in the said clause namely SAIL / TISCO / IISCO / VISAG STEEL PLANT, the first respondent will have to procure the steel, but in violation of the same, the first respondent has procured the steel from other companies.

10. Learned Senior Counsel for the Appellants also drew the attention of this Court to various communications sent by the first respondent to the Appellants demanding payment of the cost of TMT bars supplied by them and has pointed out that the first respondent has been claiming different sums in each of their letters, though in the arbitral proceedings, they had made a claim for Rs.15,02,400/- which according to them, is in variance to the respondents/claimants own letters of demand.

11. Learned Senior Counsel for the Appellants once again drew the attention of this Court to M-Book and would submit that the first respondent / contractor having signed the M-Book, they are bound by the terms and conditions which stipulates that only deformed bars will have to be supplied and not TMT bars which the first respondent alleges to have supplied.

12. Learned Senior Counsel for the Appellants then drew the attention of this Court to the arbitral award dated 11.04.2011 passed in favour of the respondents and would submit that the award of the Arbitrator under claim No.II for a sum of Rs.12,60,023/- being the difference in cost between TMT bars & Conventional bars and for a sum of Rs.5,12,163/- in claim No.III being the interest accrued for detention of bill amount in running bills for use of TMT bars is absolutely devoid of merits and contrary to the evidence available on record. Learned Senior Counsel would contend that as per condition 13, the first respondent has to procure the required steel only from SAIL / TISCO / IISCO / VISAG STEEL PLANT and the rate for the steel was fixed under the work order only in accordance with the rates fixed by those companies. According to him, as the rate for steel was finalised only after taking into consideration the local market rate for TMT bars, the first respondent is estopped under law from claiming any additional amount contrary to the agreed rate under the terms of the agreement. According to him, the first respondent as per their purchase bills submitted with the Appellants have claimed the price of steel as Rs.38.69 per

kg, whereas under the contract, the first respondent is entitled only to a claim Rs.37 per kg. According to him, the Arbitrator has gone beyond the terms of the contract by awarding a higher sum towards the steel procured by the first respondent than what was agreed upon.

13. Learned Senior Counsel for the Appellants would further contend that the sole Arbitrator has awarded compensation towards establishment charges to the first respondent, when no evidence is available on record for the payment of such charges. According to him, the Arbitrator has erroneously relied upon the Income Tax return filed by the first respondent for the purpose of awarding establishment charges which is not legally sustainable. He would further contend that the sole Arbitrator has erroneously awarded interest to the first respondents which is not in accordance with the contract.

14. In support of his contentions, the learned Senior Counsel for the Appellants drew the attention of this Court to the following authorities:

(a) A decision of the Hon'ble Supreme Court in the case of Rajasthan State Mines and Minerals Ltd., vs. Eastern Engg. Enterprises and another reported in (1999) 9 SCC 283;

(b) A decision of the Hon'ble Supreme Court in the case of Food Corporation of India vs. Surendra, Devendra & Mahendra Transport Co. reported in (2003) 4 SCCC 80;

(c) A decision of the Hon'ble Supreme Court in the case of Ramesh Kumar and another vs. Furu Ram and Another reported in (2011) 8 SCC 613;

(d) A decision of the Hon'ble Supreme Court in the case of Ramachandra Reddy & Co. vs. State of A.P. and others reported in (2001) 4 SCC 241;

(e) State of Rajasthan and Another vs. Ferro Concrette Constructions Private Limited reported in (2009) 12 SCC 1;

(f) A decision of the Hon'ble Supreme Court in the case of Associate Builders vs. Delhi Development Authority reported in (2015) 3 SCC 49;

(g) A decision of the Hon'ble Supreme Court in the case of Oil and Natural Gas Corporation Limited vs. Western Geco International Limited reported in (2014) 9 SCC 263.

15. Per contra, learned counsel for the first respondent would submit that the Appellants have not challenged the Arbitral award as regards Rs.3,94,173/- towards final bill amount raised by the first respondent which is claim No.I and awarded under the Arbitral award. The learned Arbitrator in the impugned Arbitral award in paragraph No.11 has also given a finding that the Appellants have accepted the delay in payment of the final bill to the first respondent which is claim No.I by

stating that "The Hindrance period has been taken into account as a departmental one".

16. As regards (a) claim No.II (difference in cost between TMT bars and conventional bars), (b) the claim No.III (detention of bill amount in running bills for TMT Bars), (c ) claim No. V (uncovered field establishment and overhead charges during extended period) & (d) claim No.VI (interest and pending final bill and security deposit), the contention raised by the Appellants by relying upon clause 9 of the contract that the first respondent is deemed to have waived and extinguished from making any claim, since the first respondent made those claims along with final bill as per clause 9 is absurd.

17. Learned counsel for the first respondent further submits that in respect of claim No.II that is difference in cost between using TMT bars and conventional bars, the first respondent during the course of the execution of the work, submitted the difference in cost through their various letters and requested the Appellant to fix a higher rate for using TMT bars and raised the claims for difference in cost for using TMT bars as evident from the letters of first respondent dated 14.09.2005, 22.09.2005, 13.10.2005, 14.11.2005, & I.D. Note. 02.03.2006 and 06.03.2007.

18. Learned counsel for the first respondent drew the attention of this Court to the impugned Arbitral award dated 11.04.2011 and submitted that the Arbitral award is only based on the materials and evidence available on record. Learned counsel for the first respondent also drew the attention of this Court to the reasoning given by the Arbitrator for awarding amounts under various claims in favour of the first respondent and would submit that the Arbitral award is a well reasoned award which does not call for any interference. He would also submit that a Court exercising power under Section 34 of the Arbitration and Conciliation Act, cannot re-appreciate evidence and is not a Court of Appeal. He also submits that even if there can be any other possible view, the Arbitrator's view, if it is based on evidence available on record and is not arbitrary or perverse will have to be accepted. Hence, he would submit that the Principal District Court has rightly dismissed the application filed under Section 34 of the Arbitration and Conciliation Act.

Discussion:

19. We shall now deal with the issues framed by the Arbitrator under the Arbitral award dated 11.04.2011 with regard to the claims made by the first respondent and find out whether the findings of the Arbitral Tribunal with regard to those

claims is based on the materials and evidence available on record or without any evidence.

20. The Arbitral Tribunal framed the following issues based on the pleadings of the first respondent and the Appellants:

I. A. Whether the construction of composite Housing Scheme at Suthanthira Ponvizha Nagar (Rainbow Nagar), Pondicherry was commenced and completed within the scheduled agreement period?

B. If not, as in (A) above, what are the reasons for such delay?

C. Whether the above period of delay is attributable to the claimant or the Respondent?

II. A. Whether there were disputes during the period of execution, involving variations regarding extra, deviated and substituted items of work requiring additional time and whether the said disputes were resolved?

B. If not as in (A) above, what is the relief thereto with regard to the following claims?

1) Pending final bill excluding cost claimed for T.M.T. bars.

2) Extra and substituted items of work.

3) Electrical items not fully paid.

4) Omission of executed items of work as per agreement specifications.

5) Difference in cost between T.M.T. Bars and conventional bars.

III. A. Whether the contractor, is entitled to uncovered field establishment and overhead charges, during the extended period?

B. As a consequence of such delay whether the contractor is eligible for compensation for alleged loss due to ?

1) Detention of bill amount in running bills for use of T.M.T. Rods.

2) Erratic payment of monthly bills, and non-payment of secured advance.

3) Interest on pending final bill.

4) Cost escalation based on 10 C.A.

21. As regards issue No.I, the Arbitral Tribunal has given a finding that the completion of the work by the first respondent was unnecessarily delayed only due to the Appellants. The Arbitral Tribunal observed the following lapses on the part of the Appellants

(a) Delay in deciding the request made by the first respondent through its various letters for a higher rate since TMT bars were used instead of conventional bars.

(b) Market rate beyond 30% permissible limit for deviation.

(c ) delayed running bill
(d) delay in modification of structural roof design
(e) delay in finalizing colour scheme and delay in finalizing the Ceramic tiles
(f) blockage of huge amount from bill to bill
(g) Road cutting by P.W.D.for sewerage scheme work resulting in delay of completion of work.

22. The Appellants have accepted the delay on their side in their statement of defence under reply to claim No.I stating that " The Hindrance period has been taken into account as a departmental one".

23. With regard to the issue No.II, the Arbitral Tribunal under its Arbitral award No.235/Arbi/2011 dated 11.04.2011 has observed that after perusing and examining the pleadings of both the parties and after making a thorough search on available records, bills, statements, the Arbitral Tribunal is of the unqualified view that the first respondent is eligible for the final bill of Rs.3,94,173/-. The Arbitral Tribunal has also observed that it is of the opinion that a breach of contract has been committed by the Appellants in giving instructions in writing to the first respondent for deviation in quantities, extra items and substituted items and the first respondent was instructed to carryout the work instantly by the Appellants despite the deviation in quantities, extra items sought for and substituted items sought for by the Appellants. The Arbitral Tribunal has also observed that right from the starting of work till completion, the first respondent has raised various claims/ issues through a number of letters which have not been responded by the Appellants. Only thereafter, the Arbitral Tribunal came to the opinion that the rates are to be derived as per CPWD Works Manual - Section 23 alone. The Arbitral Tribunal has observed that the CPWD works manual which is being followed for guideline, is very specific that the payment of Extra items and deviated items beyond the permissible limit as given in the agreement will be worked out at market rates. The Arbitral Tribunal has also observed that for substituted items, the agreement rate of the original items will be adjusted for the difference in market rate of original and substituted items. Only after giving the aforementioned findings based on the materials and evidence available on record, the Arbitral Tribunal held that the first respondent's modified restricted items 6 as per Annexure 'B' adopting P.S.R. 2006 - 07 is found to be reasonable as the Appellants have not disputed the quantities executed by the first respondent as well as the deviation of P.S.R. (2006 - 07) by the Appellants. Accordingly, the Arbitral Tribunal awarded a sum of Rs. 12,278/- claimed by the first respondent for deviated items as shown in Annexure -1 to the Arbitral award.

24. Insofar as the claim value of the extra items used by the first respondent, the Arbitral Tribunal has observed as follows

(a) "the first respondent has originally claimed Rs.1,49,143/- as the amount due for the extra items executed but modified to Rs.91,896/- in the rejoinder to the statement of defence".

(b) "The Appellants have not agreed for the extra rate for disposal of excavated earth".

25. The Arbitral Tribunal in the Arbitral award has taken note of the fact that the Appellants have not denied the utilization of extra items by the first respondent. The Arbitral Tribunal has also taken note of the fact that the first respondent was repeatedly requesting extra rates through his letters along with analysis of rates which have not been replied by the Appellants. The Arbitral Tribunal did not agree with the first respondent's rate for the extra items but based on the evidence available on record, the Arbitral Tribunal fixed the rates for (a) exhaust fan hole, (b) disposal of excavated earth (c ) Honey comb plastering (d) clay tile laying in the slopped roof (e) PVC drinking water line. While fixing the rates, reasons have been given by the Arbitral Tribunal for its assessment. Only based on the materials and evidence available on record, the Arbitral Tribunal has awarded a sum of Rs.15,931/- to the first respondent towards utilization of extra items and substituted items for the completion of the project. The Arbitral Tribunal has also disallowed the claim of the first respondent towards supply of electrical items amounting to Rs.66,356/- which was later modified to Rs.960/- by the first respondent. The Arbitral Tribunal after giving due consideration to the materials and evidence available on record has given a finding that the first respondent is entitled to a sum of Rs.3,94,173/- towards his final bill as detailed hereunder

| Sl. No. | Brief Details | Award Amount in Rs. | |
|---|---|---|---|
| 1. | Final Bill amount as per para 19 | 3,15,544 | |
| 2. | Arithmetical Error accepted by Respondent para 19 | 11,393 | |
| 3. | Deviated item beyond 30% permissible limit para 19 | 12,278 | Annexure – I |

| Sl. No. | Brief Details | Award Amount in Rs. | |
|---|---|---|---|
| 4. | Approval of Extra Items Para 20 - a,b,c,d | 39,027 | Annexure - II |
| 5. | Substituted items/ difference in rate para - 21 | 15,931 | |
| 6. | Purposeful omission of measurements para 23 | Nil | |
| | Total | 3,94,173 | |

26. Insofar as the issue No.II formulated by the Arbitral Tribunal with regard to difference in cost between TMT bars and conventional bars are concerned, the Arbitral Tribunal has given the following reason for awarding the same in favour of the first respondent:

(a) the first respondent on 04.03.2005 has requested the permission from the Appellants to procure steel according to BIS Code (as per agreement) from PMRM steel plant, but the Asst. Engineer in his letter dated 09.03.2005 has not accepted request of the first respondent and specific instructions were given to procure steel only from notified firms. The Arbitral Tribunal has taken note of the fact that subsequently the first respondent has produced letters from notified manufacturers about non production of Deformed/ M.S. bars by them and also attached circular of P.W.D. promoting use of TMT Bars in lieu of conventional bars. The Arbitral Tribunal has also taken note of the fact that the first respondent had sent thirteen remainders to the Appellants requesting usage of TMT bars instead of conventional bars due to the non-availability of conventional bars. The Arbitral Tribunal has also taken note of the fact that the first respondent has justified his rates by furnishing complete analysis of rates based on average rate of steel procured by annexing cash Bills copy.

(b) The Arbitral Tribunal has also taken note of the fact that the Appellant have not denied that the first respondent has used only TMT bars. According to the Arbitral Tribunal, the Appellants have denied the higher rates sought for by the first respondent on the ground that the rates quoted by the first respondent is very high when compared to local rate prevailing at the time of the processing of the tender. The Arbitral Tribunal has also taken note of the fact that in the counter statement, the Appellants have justified the rate of Rs.36.23 /-

including the labour charges quoted by the first respondent for TMT bars.

27. Only based on the materials and evidence available on record, the Arbitral Tribunal has rejected the higher rate of claim made by the first respondent for utilization of TMT bars. Only based on the materials and evidence available on record, the Arbitral Tribunal came to the view that the first respondent should be adequately compensated for the loss sustained by him due to utilization of TMT bars during various stages of construction.

28. On the question of quantum of compensation, the Arbitral Tribunal in its award has observed that it had gone through the entire correspondence of the first respondent and the Appellants and only thereafter it came to the conclusion that

a) the first respondent has submitted the rate with the full analysis of rates adopting average rate of steel and the finalized rate worked out to Rs.46.05/kg. The Arbitral Tribunal has also taken note of the fact that the method and rate adopted in the analysis rate, has not been objected by the Appellants and

b) the Arbitral Tribunal has taken note of the fact that the Appellant's rate for the TMT bars is not justified through detailed analysis of rates.

29. The Arbitral Tribunal based on the materials and evidence available on record, has given a finding in the Arbitral award that it is of the considered view that the average of the rate between the rate of the first respondent and the rate decided by the Appellants shall be reasonable and justifiable and had worked out to Rs.44.59 /kg. (Rs.46.05+Rs.43.14) /2, the net difference being Rs.7.59 /kg (Rs.44.59 minus quoted rate of Rs.37/-) is to be paid to the first respondent.

30. With regard to the quantity of steel used by the first respondent, the Arbitral Tribunal took note of the first respondent's claim that it had used 1,66,011kgs of steel which has not been objected by the Appellants. On verification of steel quantity, the Appellants in the proposed final bill has adopted 1,66,080.96 kgs as per the Executive Engineer's letter dated 04.12.2010 to the first respondent. The Arbitral Tribunal however felt that the figure of the Appellants estimated at 1,66,080.96 kgs is on the higher side and therefore the Arbitral Tribunal for the purpose of deciding the compensation claim made by the first respondent, took into consideration the first respondent's estimate for the purpose of adjudicating the compensation amount. The Arbitral Tribunal has awarded a compensation for the usage of the TMT bars by the first

respondent at Rs.12,60,023/- calculated at Rs.7.57 per kg for 1,66,011kgs.

31. Insofar as issue III-A, formulated by the Arbitral Tribunal is concerned, with regard to the first respondent's entitlement for uncovered field estimate and overhead charges during the extended period is concerned, based on the materials and evidence available on record, the Arbitral Tribunal came to the opinion that the first respondent has suffered loss due to prolonging of contract due to the Appellant's lapses / Hindrances which has been accepted by the Appellants while granting final EoT without levy of compensation. However, one of the claim was rejected as there is a possibility of utilization of services of Engineers in other related works and therefore the Arbitral Tribunal did not agree that the claim of the partners will have to be paid in full.

32. The Arbitral Tribunal has awarded only 10% of the partners pay, Site Engineers Supervision charges as reasonable, pay for watch & ward staff. The Arbitral Tribunal has awarded a sum of Rs.1,80,458/- by giving sufficient reasons towards establishment charges taking into account the delay on the part of the Appellants which have been referred to supra.

33. With regard to claim No.III-B is concerned, the Arbitral Tribunal has taken into consideration the fact that the Appellants did not respond to the thirteen letters sent by the first respondent which have been marked as exhibits and only thereafter it has come to the conclusion that the first respondent to some extent has suffered a loss due to blockage of money which he is entitled to receive on completion of work for which measurements have been taken for each running bill. Only based on the materials and evidence available on record, the Arbitral Tribunal was of the opinion that the first respondent is entitled for 8% interest, even though the first respondent had claimed 18%. The interest amount of Rs.5,12,163/- awarded by the Arbitral Tribunal is based on a proper reasoning.

34. Insofar as the claim No. III-B2, with regard to the erratic payment of monthly bills and non payment of Secured Advance which falls under claim No. IV is concerned, the Arbitral Tribunal has rejected the said claim on the ground that only due to administrative reasons and delay, there was some delay on the part of the appellant.

35. With regard issue No. III-B, that is interest on pending final bill which falls under claim No.VI is concerned, the Arbitral Tribunal has awarded interest at 12% per annum on the pending final bill arrived by the Arbitral Tribunal at Rs.3,94,173/-. The Arbitral Tribunal has observed that as per

clause 9 of the contract, the delay of 6 months allowed for settlement of accounts should not be considered for claiming interest and therefore the interest is payable only from 24.07.2007 to 11.04.2011 for a period of 44 months 19 days which is rounded off to 441/2 months. Even though, the first respondent has claimed 18% interest under this head, the Arbitral Tribunal has awarded only 12% interest amounting to Rs.2,13,779/-. The Arbitral Tribunal has also directed the Appellants to return the 10% security deposit of Rs.92,463/- to the first respondent.

36. With regard to issue No. III- B- 4 pertaining to cost escalation which falls under claim No.VII is concerned, the Arbitral Tribunal rejected the said claim on the ground that the agreement does not provide for cost escalation.

37. The Arbitral Tribunal has directed the Appellant to pay the first respondent the following sums of money under the Arbitral award dated 11.04.2011;

| Sl. No. | Claim No. & Related Paras | Amount in Figure | In words |
|---|---|---|---|
| 1 | Claim No.1 – Issue No.II.<br>Pending Final Bill<br>Para – 24 | Rs.3,94,173/- | Rupees three lakhs ninety four thousand one hundred and seventy three only. |
| 2 | Claim No.II – Issue II – B5.<br>Difference in cost between TMT bars & Conventional bars<br>Para 29 | Rs.12,60,023/- | (Rupees twelve lakhs sixty thousand and twenty three only) |
| 3 | Claim No.III Issue No.III B1-<br>Detention of bill amount in running bills for use of TMT bars<br>Para – 37 | Rs.5,12,163/- | (Rupees five lakhs twelve thousand one hundred and sixty three only) |

| Sl. No. | Claim No. & Related Paras | Amount in Figure | In words |
|---|---|---|---|
| 4 | Claim No.IV Issue No.III B-2: Erratic payment on monthly bills & non payment of Secured Advance Para - 38 | Disallowed | - |
| 5 | Claim No.V issue No.III - A uncovered Field Establishment and over head charges during extended period. Para - 33 | Rs.1,80,458/- | Rupees one lakh eighty thousand four hundred and fifty eight only |
| 6 | Claim No.VI - Interest on Pending Final Bill and S.D - Issue III B-3. Para - 40 | Rs.2,13,779/- | Rupees two lakhs thirteen thousand seven hundred and seventy nine only |
| 7 | Claim No.VII - Cost escalation similar to 10 CA issue No.III - B-4 Para - 42 | Disallowed | -- |
| Total | | Rs.25,60,596/- | Rupees twenty five lakhs sixty thousand five hundred and ninety six only |

38. Arbitral Tribunal has given justifiable reasons for passing an Arbitral award in favour of the first respondent in respect of claim Nos.I, II, III, V & VI totally amounting to Rs.25,60,596/-. Out of the total (7) claims made by the first respondent, the Arbitral Tribunal has allowed only five claims that too, partially.

39. Admittedly, insofar as the claim No.I, where the Arbitral Tribunal has awarded a sum of Rs.3,94,173/- in favour of the first respondent, no challenge was made by the Appellants in A.O.P.No.56 of 2011 filed under section 34 of the Arbitration and Conciliation Act, 1996. While adjudicating claim No.I, the

Arbitral Tribunal has given a categorical finding that the completion of the work by the first respondent was unnecessarily delayed only due to the Appellants.

40. The Arbitral Tribunal has observed while adjudicating claim No.I that following lapses have been noticed on the part of the Appellants:

(a) Delay in deciding the request made by the first respondent through its various letters for a higher rate since TMT bars were used instead of conventional bars.

(b) Market rate beyond 30% permissible limit for deviation.

(c ) delayed running bill

(d) delay in modification of structural roof design

(e) delay in finalizing colour scheme and delay in finalizing the Ceramic tiles

(f) blockage of huge amount from bill to bill

(g) Road cutting by P.W.D.for sewerage scheme work resulting in delay of completion of work.

41. The Appellants have accepted the delay on their side in their statement of defence under reply to claim No.I stating that " The Hindrance period has been taken into account as a departmental one".

42. The Arbitral Tribunal has also taken note of the fact that in the statement of defence filed by the Appellants before the Arbitral Tribunal, with regard to claim No.I, where the Appellants have accepted the delay on their part by stating that "The Hindrance period has been taken into account as a departmental one". Only based on the evidence available on record, the Arbitral Tribunal has given the aforesaid findings against the Appellants. The Appellants have also not challenged in A.O.P.No.56 of 2011 the findings given by the Arbitral Tribunal referred to supra with regard to claim No.I made by the first respondent.

43. As seen from the issues framed by the Arbitral Tribunal with regard to the claims made by the first respondent, the Arbitral Tribunal has given sound and justifiable reasons for awarding the same under each of the claims and for disallowing two of the claims out of the seven claims. Only based on the materials and evidence available on record, the Arbitral Tribunal has passed the Arbitral Award dated 11.04.2011 in favour of the first respondent. The learned Principal District Court has also rightly dismissed the application filed by the Appellants challenging the Arbitral Award dated 11.04.2011 under section 34 of the Arbitration and Conciliation Act.

44. The law as regards the scope of interference of an Arbitral Award is now well settled by the Hon'ble Supreme Court in the case of Associate Builders v. Delhi Development Authority reported in (2015) 3 SCC 49 in which the Hon'ble Supreme Court held among other things that the merits of the Award can be examined only under the broad umbrella of public policy. The Hon'ble Supreme Court relied on previous judgments such as Renusagar, Saw Pipes, McDermott International and ONGC and set out what would constitute the fundamental policy of India. The Hon'ble Supreme Court held that this term fundamental policy of India includes factors such as:

(a) disregarding orders of superior courts;

(b) judicial approach, which is the antithesis to arbitrary approach; and

(c) the principles of natural justice.

With reference to the ground of perversity, the Hon'ble Supreme Court held that an award will be perverse if:

(i) it is based on no evidence;

(ii) the arbitral tribunal took into account something irrelevant to the decision at which it arrived; or

(ii) the arbitral tribunal ignored vital evidence in arriving at its decision.

45. Thereafter in the case of Ssangyong Engineering and Construction Company Limited vs. National Highways Authority Limited (NHAI) reported in (2019) 15 SCC 131 the Hon'ble Supreme Court while interpreting section 34 of the Arbitration and Conciliation Act held as follows:

(a) The interpretation of the term 'public policy of India' was narrowed by the 2015 amendment and the amendments to Section 34 of the 1996 Act, especially the removal of the wide interpretation of the term, were substantive in nature. Thus, the post-amendment position does not apply to applications relating to Section 34 which were instituted before the 2015 amendment, unless otherwise agreed by the parties.

(b) 'Public policy of India' now means the 'fundamental policy of Indian law', as explained in Associate Builders case (ie, the Renusagar understanding of 'fundamental policy of Indian law' applies). This means that the law set out in ONGC vs. SAW PIPES by the Hon'ble Supreme Court no longer applies. However, the principles of natural justice, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 act, remain grounds on which an award can be challenged, in keeping with Associate Builders.

(c) 'Public policy of India' is now constricted to mean that a domestic award must be:

(i) contrary to the fundamental policy of Indian law, as understood in Associate Builders; or

(ii) against the basic notions of justice or morality, as understood in Associate Builders.

(d) Insofar as domestic awards are concerned, an additional ground is now available under Section 34(2A), under the 2015 amendment act. For this ground to apply, there must be patent illegality appearing on the face of the award. Such illegality must go to the root of the matter and must not amount to mere erroneous application of the law. In short, the contravention of a statute which is not linked to public policy or public interest will not lead to the setting aside of an award on the ground of patent illegality.

(e) The Supreme Court explained the concept of patent illegality following the 2015 amendment and expanded its ambit through an interpretation of Section 28(3) of the 1996 act. If an arbitrator looks beyond the contract and deals with matters outside their jurisdiction, they will commit an error of jurisdiction.

(f) Reappreciation of evidence, which falls under the appellate courts' jurisdiction, is not permitted under the ground of patent illegality.

(g) While no longer a ground for challenge with respect to the public policy of India, if a decision is perverse, it will amount to patent illegality. Thus, a finding based on no evidence or an award which ignores vital evidence will be perverse and liable to be set aside on the ground of patent illegality.

46. In the case on hand, none of the parameters laid down by the Hon'ble Supreme Court in the aforementioned decisions for setting aside the Arbitral Award has been satisfied by the Appellants.

47. Insofar as the decisions relied upon by the learned counsel for the Appellants namely (a) A decision of the Hon'ble Supreme Court in the case of Rajasthan State Mines and Minerals Ltd., vs. Eastern Engg. Enterprises and another reported in (1999) 9 SCC 283; (b) A decision of the Hon'ble Supreme Court in the case of Food Corporation of India vs. Surendra, Devendra & Mahendra Transport Co. reported in (2003) 4 SCCC 80; (c) A decision of the Hon'ble Supreme Court in the case of Ramesh Kumar and another vs. Furu Ram and Another reported in (2011) 8 SCC 613; (d) A decision of the Hon'ble Supreme Court in the case of Ramachandra Reddy & Co. vs. State of A.P. and others reported in (2001) 4 SCC 241; (e) State of Rajasthan and Another vs. Ferro Concrette Constructions Private Limited reported in (2009)

12 SCC 1 are concerned, they are decisions rendered under the Arbitration Act, 1940 and not under the 1996 Act.

48. The Hon'ble Supreme Court in the case of Sundaram Finance Limited vs. NEPC India Ltd., reported in (1999) 2 SCC 479 held that the provisions of the Arbitration and Conciliation Act, 1996 have to be interpreted and construed independently and infact, reference to the 1940 Act may actually lead to misconstruction. The relevant paragraph of the aforesaid decision is extracted hereunder:

> "9. The 1996 Act is very different from the Arbitration Act, 1940. The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words the provisions of 19% Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act."

49 As held in the decisions referred to supra, this Court cannot re-appreciate the evidence available on record. Only based on the evidence available on record and by giving justifiable reasons, the Arbitral Tribunal has passed an Arbitral Award dated 11.04.2011 in favour of the first respondent. This Court does not find any perversity in the findings of the Arbitral Tribunal. The learned Principal District Judge, Puducherry while exercising powers under section 34 of the Arbitration and Conciliation Act, 1996 has also rightly dismissed the application filed by the Appellants.

50. For the foregoing reasons, this Court does not find any infirmity in the impugned order passed by the learned Principal District Judge, Puducherry dismissing the application filed by the Appellants under section 34 of the Arbitration and Conciliation Act, 1996.

51. In the result, the order dated 23.09.2014 passed in A.O.P.No.56 of 2011 by the learned Principal District Judge, Puducherry is hereby confirmed and this Civil Miscellaneous Appeal is dismissed. No cost.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

The Principal District Judge,
Puducherry.

+1cc to Mr.N.Thiagarajan, Advocate Sr.53800

C.M.A.No.2860 of 2015

cp[co]
srg 17/11/2021