

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 25th DAY OF OCTOBER 2021

THE HON'BLE MR. JUSTICE N.SATHISH KUMAR

O.P. No.719 of 2018

M/s.NTPC Tamilnadu Energy Company Ltd.,
(A Joint Venture of NTPC Ltd & TANGEDCO),
Site Office : Vallur Thermal Power Project,
PO:Vellivoyal Chavadi,
Ponneri Taluk, Chennai -600103.
represented by its AGM (Project)
– Shri A.R.Bhadran

..Petitioner

-Vs-

M/s.RPP Infra Projects Limited
No.454, Raghupathynayakanpalayam,
Poondurai Main Road, Erode -638002.
Represented by its Managing Director
Shri D.Praveen

...Respondent

Original Petition praying that this Hon'ble Court be pleased to set aside the Award of the learned Arbitral Tribunal dated 28.02.2018 rejecting the Counter claims of the petitioner in the aforesaid arbitration proceedings and thereby allow the Counter claims with interest in the manner prayed for by the petitioner in the arbitration proceedings.

This Original Petition coming on this day before this court for hearing in the presence of M/s.AL.Ganthimathi, Advocate for the Petitioner

herein and Mr.P.J.Rishikesh, Advocate for the respondent herein and upon reading the petition and award dated 28.02.2018 filed herein and when the learned Arbitrator factually recorded that there is no loss suffered and no materials available on record to prove the production of fly ash, the findings of the learned Arbitrator cannot be said to be perverse and this Court do not find any materials to take a view that the detailed award passed by the Three Member Arbitral Tribunal fall within any of the grounds contemplated under Section 34 of the Arbitration and Conciliation Act and **it is ordered as follows:-**

That the Petition in O.P.No.719 of 2018 be and is hereby dismissed.

2. That there shall be no costs of this suit.

WITNESS THE HON'BLE MR.JUSTICE SANJIB BANERJEE,
THE CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS
THE 25th DAY OF OCTOBER 2021.

Sd./-

ASSISTANT REGISTRAR (O.S-II)

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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KY

23.12.2021

O.P. No.719 of 2018

ORDER

DATED : 25.10.2021

THE HON'BLE MR. JUSTICE
N.SATHISH KUMAR

FOR APPROVAL: 05.01.2022

APPROVED ON: 05.01.2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.10.2021

CORAM

THE HON'BLE MR. JUSTICE N.SATHISHKUMAR

O.P.Nos. 1064 and 719 of 2018

O.P.No. 1064 of 2018

M/s.RPP Infra Projects Limited

(A Company registered under the provisions of
the Companies Act, 1956)

Having its office at No.454, Raghupathynayakanpalayam,
Poondurai Main Road,
Erode -638002.

Represented by its Director A.Nithya.

.. Petitioner

Vs

NTPC Tamil Nadu Energy Company Limited,

Vallur Thermal Power Project

Vellivoyal Chavadi Post,

Ponneri Taluk,

Chennai -600103.

.. Respondent

O.P.No. 719 of 2018

M/s.NTPC Tamilnadu Energy Company Ltd.,

(A Joint Venture of NTPC Ltd & TANGEDCO),

Site Office : Vallur Thermal Power Project,

PO:Vellivoyal Chavadi,

Ponneri Taluk, Chennai -600103.

represented by its AGM (Project)

– Shri A.R.Bhadran

..Petitioner

Vs

M/s.RPP Infra Projects Limited
No.454, Raghupathynayakanpalayam,
Poondurai Main Road, Erode -638002.
Represented by its Managing Director
Shri D.Praveen

..Respondent

Prayer in O.P.No. 719 of 2018: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (as amended in 2015) to set aside the portion of the Award of the Learned Arbitral Tribunal dated 28.02.2018 rejecting the Counter Claims of the petitioner in the aforesaid arbitration proceedings and thereby allow the Counter Claims with interest in the manner prayed for by the petitioner in the arbitration proceedings.

Prayer in O.P.No.1064 of 2018: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (as amended in 2015) to set aside the Award dated 28.02.2018 passed by the Arbitral Tribunal to the extent, as aggrieved by the petitioner herein, in respect of the arbitral proceedings between the Petitioner and the Respondent.

For Petitioners	:	M/s.AL.Ganthimathi (in O.P.No.719 of 2018)
		M/s.S.P.J.Rishikesh (in O.P.No. 1064 of 2018)
For Respondents	:	M/s.S.P.J.Rishikesh (in O.P.No. 719 of 2018)
		M/s.AL.Ganthimathi (in O.P.No.1064 of 2018)

COMMON ORDER

O.P.No.719 of 2018 was filed challenging the award passed by the three member tribunal, dismissing the counter claim raised by the applicant herein.

2. O.P.No. 1064 of 2018 was filed by the claimant challenging the dismissal of the claim petition in entirety.

3. Parties are arrayed as claimed before the tribunal

4. The respondent had invited bids for supply of fly ash on short term basis from its thermal power station for taking delivery of fly ash in their bulkers or closed trucks and making all required arrangements, expenses, O & M of silo as per specifications. The claimant has become a successful bidder. As a result the respondent had issued a letter of Award (LOA) dated 20.06.2012 for the supply of fly ash at the rate of Rs.597/MT. The rate is inclusive of operation and maintenance of silo expenses etc. The scope of work of the claimant was to take delivery of the fly ash from the designated delivery point which is the ash silo chute of 1500 MT capacity which is to be built, owned and operated by the claimant for the period of two years from the installation of silo and dismantled and taken back later. The allotted quantity of fly ash shall be six lakhs MT for the first year and seven lakhs MT for the second year. As per the contract, the claimant shall erect the silo by 19.09.2012 and take delivery of fly ash up to two years.

The contract period of taking delivery of fly ash is only up to 19.09.2014. Clauses 45, 46 and 47 of the special conditions of contract governs the parties in respect of their obligations.

5. It is the case of the claimant that they commenced their work and completed its design for the construction of silo. It was decided to have three silos of 500 MT each and completed the substantial portion of all the three silos on 23.10.2013. As there was no sign from the respondent to complete their scope in the near future, it was felt that no useful purpose will be served by further investment on this. According to the claimant, the delay can only be attributable to the respondent. The major reasons for delay in completing the silos are as follows;

1. Allocation of land was not done i.e site was not identified by the respondent, shifted the site frequently and there was no timely decision on this.

2. After finalising the site, debris (i.e. Steel Waste and other materials) were not cleared for long time (it took almost two months)

3. The allotted site was actually in between complicated steel structure and pipe lines and further the clearance for putting pile foundation was not given in correct time.

4.The claimant had to immediately purchase all the steel needed for the approved design of silo and all the steel were unloaded to the claimant's nearest site (NTECL Township site) since there was no place available to do fabrication in designated site.

5.At the site, one side was pipe rack and the other side was BHEL materials and all were dumped (crawler crane) and hence no approach was available for constructing the third silo in time.

6. Out of three silo (3 * 500 MT), two were erected with available approach, the fabrication of third silo completed in time, but there was delay in erection of the 3rd silo due to non-availability of the approach. Further BHEL's debris were also dumped at the site.

6. Hence it is the contention that despite hindrances and delay caused by the respondent, the claimant had completed the erection of 3 silos as early as March 2014 and ready to take delivery of fly ash. Whereas, the reasons best known to the respondent, they were unable to perform their part of the contract i.e. Lay dry ash pipe line, which would enable the claimant to collect and sell the fly ash. Despite the request made by the claimant to lay the dry ash pipeline from 'A' Pass to ESP-1 to the silo free of cost provided all pipes, fittings clamps valves and supporting structural steels are provided by the respondent, the respondent caused the delay. Hence the dispute arose and the matter was referred to the arbitration. The claimant has made the following claim;

- i. Claim No.1 : Towards loss incurred for erection of silo including the cost of weigh bridge including interest : Rs.5,93,47,316/-
- ii. Claim No.2 : Back Guarantee Charges Rs.1,15,45,500/-
- iii. Claim No.3 : Claim for Rs.7,76,10,000/- towards loss of profit at 10%.

7. The respondent disputed the claim and submitted that the construction of silo to be made by the claimant as per Clause 45 of the special condition. The total investment for construction of silo shall be made by the claimant and after the completion of contract period of two years, the claimant shall dismantle and take back the silo. The allegation that the respondent had shifted the location is denied and the claimant has delayed the work from the inception. As a matter of fact, the respondent had installed equipment like buffer hopper, air lock vessel, vacuum pump etc for evacuation of fly ash from the ESP and ash transportation equipment like transport air compressor to convey dry ash to the silo. The respondent has also procured all pipe, fittings, valves etc., to transport ash to the silo. Hence it is the contention that the entire delay was attributed to the claimant. As the claimant has not honoured their contractual commitment to evacuate ash and had put operation of the Plant in strain, the respondent found it difficult to make arrangements for disposal of the ash generated. In

view of the breach of contract by the claimant in not constructing the silo, the respondent has made a counter claim for a sum of Rs.77,61,00,000/- towards loss of revenue due to failure in lifting fly ash within a prescribed period, and a sum of Rs.2,34,375/- due to power loss and a sum of Rs.1,93,230/- towards construction of pedestals for laying the pipeline. And also counter claims are claimed by the respondent towards (a) occupation of respondent's site, (b) compensation for breach of contract, etc., Based on the pleadings, following issues are framed by the tribunal;

1. Whether the claims of the claimant are beyond the purview of Arbitration?
2. Whether time is the essence of the contract?
3. Whether the claimant M/s.RPP Infra Projects Ltd is bound by the terms and conditions of Letter of Award dated 20.06.2012 issued by the respondent – NTECL to the claimant for the contract for the work of construction of temporary silo of maximum capacity of 1500 MT and taking delivery of fly ash after installation of temporary silo?
4. Which of the parties to the contract have committed breach of the terms of the contract?
5. What is the scope of the work of the claimant under the subject contract?
6. Whether the respondent performed their scope of the work in terms of the contract?
7. Was not the respondent under an obligation to identify the location for construction of silo for fly ash?
8. Whether the delays which hindered the project attributable to the

respondent as contended by the claimant?

9. Whether the claimant is entitled for the claims made under various heads in para 29 of the claim statement ?
10. Whether the respondent is entitled for the counter claims under six heads in para 8 of the counter claim?
11. Whether the claimant is entitled to interest, if so on what amount, any for what period and under what rate?
12. Whether the respondent is entitled to interest, if so on what amount, and for what period and under what rate?
13. Whether the claimant/respondent is entitled to cost?
14. To what other reliefs, the parties are entitled to?

8. On the side of the claimant, Mr.P.Arul Sundaram, Managing Director was examined as CW1 and through him 12 documents have filed ad Exs.C1 to C21. On the side of the respondent, no witness was examined and marked documents as Exs.R1 to R17. Based on the materials and documents, the learned Arbitrator factually recorded the finding to the effect that both sides have committed breach of contract and the entire project was ended. The delay was attributed both to the claimant as well as respondent and rejected the claim as well as counter claim in entirety. It is also held by the learned Arbitrator that the respondent has not substantiated by any materials to claim damages and rejected the counter claim also. Though the petition has been filed, challenging the rejection of claim in O.P.No. 1064 of 2018, the learned counsel for the applicant fairly submitted that as far as rejection of claim Nos. 1 & 3, he cannot have better case since the award is

well balanced on the basis of the factual findings. It is only the contention of the learned counsel that as far as rejection of claim No.2, the learned tribunal having found that the delay is attributable to the respondent and they have not laid the pipeline to remove the ash, the bank guarantee charges incurred by the claimant ought to have been allowed by the learned Arbitrator.

9. As far as rejection of the counter claim is concerned, the learned Arbitrator factually found that there is no evidence produced by the the respondent either oral or documentary to prove that when exactly the commercial production was commenced and what was the damages suffered by them. While rejecting the counter claim, the learned Arbitrator also considered the entire scope of Section 73 of the Contract Act, therefore, the same does not require any interference by this Court.

10. Whereas the learned counsel appearing for the applicant in O.P. No. 71 of 2018 which has been filed merely as against the rejection of the counter claim submitted that when the tribunal has found that three silos have not been constructed as per the agreement by the claimant, the delay was attributable to the claimant and the counter claim ought to have been allowed. The same has not been done by the learned Arbitrary Tribunal and

hence prayed for set asiding the award.

11. I have perused the entire award. Though the letter of Award (LOA) has been issued for the purpose of erection of silo in order to remove the fly ash, it is relevant to note that Clause 45,46 & 47 are special conditions of the contract. The scope of the work of the claimant and respondent is as follows;

45. Scope of Buyer / Claimant :

(a) The buyer shall make the pile foundation, structure and install the Silo around 1500 MT capacity along with ash evacuation arrangements, at the identified location of NTECL site.

(b)The required investment, design, engineering, work execution shall all be done by the buyer.

(c) Materials, manpower, tools, tackles, plants for the construction work shall be arranged by the buyer.

(d) Necessary gate passes for movement of men and materials shall be arranged by the buyer.

(e) The total water requirement for the construction works

shall be arranged by the buyer.

(f) In case of ash spillage anywhere along the routine including silo area, the same is to be cleared by the buyer day to day basis as per instruction of engineer in charge.

(g) Any damage caused to roads / approaches, any other facilities of NTECL, by the buyers, should be rectified by the Buyer at their own cost. If the rectification/ repairs are not carried out, NTECL may arrange to do the rectification / repair works and charge the buyers additionally, for the expenditure incurred.

(h) The total construction works right from pile foundation upto the completion of silo with evacuation arrangements shall be completed within fixed time frame of not more than 3 (three) months from the date of issue of letter for silo construction by NTECL.

46.SCOPE of NTECL / respondent:

a) NTECL would be in a position to make available allocated quantity at present from NTECL, Vallur Thermal Power Station subject to availability, Force Majeure conditions and unplanned outage.

b) The NTECL reserves the right to supply the quantity not lifted by the buyers to any other party at the sole discretion of the supplier. NTECL will install the ESP ash hopper evacuation system including buffer hopper, vacuum pumps, transport air compressor.

c) NTECL shall install the evacuation system of dry fly ash upto the temporary silo.

d) NTECL shall arrange to give the general plant layout, the identified location of the proposed temporary silo, approach to the silo and other relevant details like soil details to buyer.

e) NTECL shall make available the area identified for temporary silos to buyers.

f) NTECL shall allow the movement of construction materials related to silo installation through gate passes.

g) NTECL shall provide power required for the installation of silos.

h) NTECL shall ensure the availability of road for movement of bulkers/ trucks from main gate to temporary silo.

i) Only authorized persons of the buyer will be allowed to enter the project premises by NTECL based on the gate passes. In this respect NTECL has the full right to allow or disallow the persons of the buyer to enter the NTECL project premises.

47.Nature of Silo:

The silo constructed by the buyers will be of temporary in nature and will be used for only two years from the first off take of fly ash from that temporary silo.

Further it is the sole obligation and responsibility of the respondent to identify the location for the silo fly ash construction.

2.8 The case of the claimant is that it was ready to perform its scope of work by mobilizing labour and material to construct the silo within the 31 month period. The claimant commenced its work and completed its design for the construction of silo. The silo was designed by M/s Aquatherm Engineering Consultants India Private Limited as early July 2012. It was decided to have three silos of 500 MT each. The claimant completed the substantial portion of all the 3 silos on 23.10.2013. Since, there was no sign from the respondent to complete their scope in the near future it was felt that no useful purpose will be served by further investment on this. Some petty works were not completed and the claimant was in a

position to complete the balance work and commission the silos within a short notice. The delay can only be attributable to the respondent. The major reasons for delay in completing the silos are as follows:

1.Allocation of land was not done i.e site was not identified by the respondent, shifted the site frequently and there was no timely decision on this.

2.After finalising the site, debris (i.e. Steel Waste and other materials) were not cleared for long time (it took almost two months)

3.The allotted site was actually in between complicated steel structure and pipe lines and further the clearance for putting pile foundation was not given in correct time.

4.The claimant had to immediately purchase all the steel needed for the approved design of silo and all the steel were unloaded to the claimant's nearest site (NTECL Township site) since there was no place available to do fabrication in designated site.

5.At the site, one side was pipe rack and the other side was BHEL materials and all were dumped (crawler crane) and hence no approach was available for constructing the third silo in time.

*6. Out of three silo (3 * 500 MT), two were erected with available approach, the fabrication of third silo completed in time, but there was delay in erection of the 3rd silo due to non-availability of the approach. Further BHEL's debris were also dumped at the site.”*

12. The learned Arbitrator keeping in mind all the contract governing parties and considering various documents, has factually recorded that though the time was fixed in the contract to complete the work, the learned Arbitrator has found that the time is not an essence of contract and answered to the issues one by one particularly, with reference to the various documents. The learned Arbitrator has factually found that the claimant has not erected the silo as alleged. Similarly, the learned Arbitration has also recorded that the respondent was in a position to make available the allocated quantity of fly ash generated as per the terms of the contract. In paragraphs 11.1 to 11.10 and 15.1 to 15.4, the learned Arbitrator has analysed all the documents and recorded that the claimant had not performed its scope of work under the contract and committed breach of the terms of the contract. Accordingly, found that the issue nos 4 & 5 are against the claimants. Similarly, the learned Arbitrator also found that paragraph nos. 14.1 to 14.7 in issue nos. 6 & 8, the respondent has also not performed their obligation and the delay which hindered the project are

attributable both to the claimant as well as to the respondent. In paragraph 17.5, factually recorded that the claimant was not inclined to complete the silo construction work and take delivery of the fly ash as per the terms of the contract, as per the letter dated 19.12.2014, which is also reiterated by the claimant in Exhibit R16.

13. After analysing the various documents, the learned Arbitrators have found that the claimant is not entitled to any amount as claimed by them. In paragraph 18.2, the learned Arbitrator has given a specific reason for rejection of claim no.2, which has been emphasised before this Court. When the Arbitrators found the reason for rejection and interpreted the contract after analysing various documents, this Court sitting under Section 34 of the Arbitration and Conciliation Act, 2015 cannot supplant his own reasons than the reasons arrived by the learned Arbitrator. Merely because other views are also possible, the same cannot be a ground to interfere the award as far as rejection of the claim no.2. As for as other claims, no arguments put forth by the applicant. Accordingly, I do not find any merits in the application filed challenging the award dismissing the claim in entirety.

14. With regard to the counter claim aspects, the learned

Arbitrator found that the respondents has not produced any evidence either oral or documentary to prove when exactly commercial production of plant commenced for removal of fly ash. In para 14.7 the learned Arbitrator has found that even after more than 15 months from the date of LOA, the respondents has not laid dry ash pipeline as per Clauses 46(2) of the contract which is necessary for taking delivery of fly ash from the silo and recorded factually that the respondent was not in a position to make available quantity of fly ash as terms of the contract. The learned Arbitrator has also factually recorded that the respondent has not taken any steps to mitigate the damages and the primary obligation of the respondent to lay a dry ash pipeline up to the silo as per 46 (c) of the contract has not been done. The respondents themselves could have made use of the silos for evacuating the fly ash generated from its Plant and sold the fly ash available with it to 3rd parties as per the contract. However, they failed to take steps referred above and finally dismissed the counter claim. When the learned Arbitrator factually recorded that there is no loss suffered and no materials available on record to prove the production of fly ash, the findings of the learned Arbitrator cannot be said to be perverse.

15. Considering the entire findings and entire award, this Court do not find any materials to take a view that the detailed award passed by the

Three Member Arbitral Tribunal fall within any of the grounds contemplated under Section 34 of the Arbitration and Conciliation Act.

16. In fine, the award passed by the learned Arbitral Tribunal dated 28.02.2018 is confirmed. Accordingly, both the Original Petitions are dismissed. No costs.

Sd./-N.S.K.J
25.10.2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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