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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.08.2021

CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
AND
THE HONOURABLE MR.JUSTICE P.D.AUDIKESAVALU

O.S.A.No.132 of 2018

Indian Maritime University,
Represented by Registrar,
(Formerly known as National Maritime Academy)
East Coast Road, Uthandi,
Chennai - 600 119. ...Appellant

Vs

1.M/s.S.R.S. Projects (P) Ltd.,
4-B, Lakshmipuram,
Gandhi Road, Salem - 636 007.

2.Hon'ble Mr.T.Somasundaram,
Presiding Arbitrator (Judge Retd.),
No.1/688, 15th Street, H-Block,
Anna Nagar, Chennai - 600 040.

3.Hon'ble Mr.P.Shanmugam,
Arbitrator (Judge Retd.),
No.288-B, TTK Road,
Teynampet, Chennai - 600 018.

4.Thiru.K.A.Mathew,
Arbitrator (Retd. I.A.S.Officer),
No.1077, Abhyam Officer Colony,
Anna Nagar (West Extn.),
Chennai - 600 101. ...Respondents

PRAYER : Original Side Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of Letters Patent praying to set aside the Judgement and Decree dated 06.11.2017 made in O.P.No.428 of 2015.

For Appellant : Mr. K.R.Tamizh Mani

For Respondents: Mr.V.P.Sengottuvel for R1

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JUDGMENT

(Judgment of the court was delivered by N.KIRUBAKARAN.J.,)

The matter was heard through "Video Conference".

2. The appellant is the petitioner in O.P.No.428 of 2015 filed to set aside the award dated 07.03.2013, passed by the learned Arbitral Tribunal in the matter of the Arbitration Proceedings arising out of Land Filling of 106 Acres of Indian Maritime University Site, Chennai, under Contract No.HMA/IMU/T.001/2008/EC, dated 13.02.2009.

3. On hearing both the petitioner and the first respondent and their counsel, the said O.P.No.428 of 2015 was dismissed by observing that no ground has been made out for interference in the award. It was further observed that the Tribunal has considered in detail the merits and the conclusions arrived at both on the claim of the reimbursement of Toll Fee as well as the claim for interest on delayed payments are based on evidence and on proper interpretation of the agreement, constituted a possible and acceptable view, which does not call for any interference. Aggrieved by that, the petitioner preferred this appeal before this forum.

4. Points for consideration:

(i) Whether the Hon'ble Judge failed to consider that there was no material evidence by the contractor in respect of the claim of Toll Fee without which the Arbitrator erroneously passed the award and the same also confirmed by the Hon'ble Judge is unsustainable one?.

(ii) Whether the interpretation placed by the Arbitrators on the vital clause of agreement between the parties is completely wrong and the Hon'ble Judge failed to appreciate that even on a cursory and plain reading of clause 57.1 and 57.2 of the Contract Ex.P9, totally bars the claim of any interest what so ever?;

5. Brief facts of the case are as follows:

The appellant (Indian Maritime University) has been set up by the Government of India by an Act of Parliament during November, 2008. Department of Shipping, Government of India acquired 300 Acres of land at Sozhinganallur/Semmanacheri Panchayat Union. Out of 300 Acres of land, 106 Acres were earmarked for setting up of IMU as per the CMDA regulations. The said land was planned to be filled up with 3 meters from the existing level, accordingly, tenders were invited. M/s.SRS Projects Limited/first respondent herein was the successful tenderer. Though at the time of calling for the tenders, there was no tolls and levy was introduced, the Contractor informed the appellant/University that the Toll Fee should be reimbursed. An agreement (Ex.C.9) was entered between the contractor and the appellant on 13.02.2009. Accordingly, the work was commenced on 13.03.2009 and work was completed on 18.09.2009 and the site was handed over to IMU.

6. The facts reveal that the dispute between the appellant and the first respondent are only with regard to the reimbursement of Toll Fee paid on the amount of Rs.1,40,72,586/- along with interest at the rate of 18% per annum and also claimed interest at the rate of 18% per annum for a sum of Rs.1,29,25,652/- which are all the delayed payments made by the IMU. Since the appellant refused to pay those claims as per the arbitration Clause, the dispute was referred to arbitration by invoking clause 75.3 and this fact was admitted by both the parties.

7. After hearing both parties, the Tribunal passed an award by accepting the claim relating to the reimbursement of Toll Fee and also accepted the claim for interest on delayed payment, however, not granted the interest at 18% from the date of claim till realisation by the contractor.

8. Aggrieved by that, the IMU preferred O.P.No.428 of 2015 and the contractor preferred O.P.No.484 of 2015 before the Hon'ble Judge.

9. On hearing both sides, the Hon'ble Judge confirmed the award passed by the Arbitrator with regard to the reimbursement of Toll Fee as well as interest on delayed payment thereby dismissed O.S.No.428 of 2015 by confirming the award however declined to enhance the rate of interest from 12% per annum to 18% per annum till realisation as claimed by the Contractor. Accordingly, both O.P.Nos.428 of 2015 and 484 of 2015 are dismissed. Aggrieved by that, the IMU preferred O.S.A.No.132 of 2018 before this forum.

10. At the time of the arguments, the learned counsel for the appellant submits though their engineer had recommended the payment of Toll charges (Exs.C7 and C8) but through their rejection letter dated 24.08.2010(Ex.R90) the employer (IMU) observed that the documents submitted are insufficient for consideration of Toll claim.

11. Relying on clause 4 of the contract, the learned counsel disputed the very liability of the first respondent to

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reimburse Toll Fee to the claimant and submitted that the Toll levy is included in the rate quoted by the claimant and therefore the claimant is not entitled to the reimbursement of Toll Fee paid by them.

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12. Relevant portion in Clause 4 of Section II of the contract (Ex.C9) reads as under:

> "The rate quoted shall be inclusive of all taxes, levies, duties, cost of insurance etc., apart from the cost of materials to be procured by the contractor and also labour, tolls plants, fuel, consumables and transporting works and temporary works, etc."-

13. Further, in support of his contention, the learned counsel for the appellant relied on the decisions of the Hon'ble Supreme Court in (i) (2007) 8 SCC 466 - Numalingarh Refinery Limited vs Daelim Industrial Company Limited; (ii) (2012) 5 SCC 306 - Rashtriya Ispat Nigam Ltd., vs Dewen Chand Ram Saran.

14. By way of reply, the learned counsel for the claimant, relying on clause 53.1, submits that the contractor can claim any additional payment which cannot be prevented by invoking clause 4 of the contract by the IMU considering that:

53.1 speaks as follows:

> "Notwithstanding any other provisions of the contract, if the contractor intends to claim any additional payment pursuant to any clause of those conditions or otherwise, he shall give notice of his intention to the Engineers within 30 days of the event giving raise to the claim has first arisen."

15. As per Clause 53.1, the contract begin with a non-obstante clause and notwithstanding anything in any other provision of the contract including clause 4, the contractor can claim any additional payments, pursuant to a clause in the contract or even otherwise by giving notice of his intention to the engineer within 30 days even after giving rise to the additional claim that has initially arisen. Accordingly, the claimants gave notice of their intention to claim to IMU through the letter marked as (Ex.C8). But the appellant has not sent any reply objecting to the claim for post tender levy of Toll Fee. On 22.06.2009, the claimant made a claim of reimbursement of toll fee. The letter marked as (Ex.C14) which was made as per Clause 53 of the general condition of the contract, which deals with claim for additional payments through letter Exs.C17 and C.19. Considering the contemporary records the engineer of IMU recommended for payment of Toll Fee. Further Ex.R30 is the final bill submitted

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by the claimant before the Engineer, CRN and Ex.R31 is the recommendation of the final bill by CRN. The recommendations of the Technical Committee regarding the Toll levy, reads as follows:

> " The toll levy claim which is a post tender factor can also be admitted for reimbursement subject to production of documentary proof by the contractor for payment".

16. Furthermore, on perusal of the records, it reveals that to prove the payment of the Toll Fee, the claimant annexed consolidated statement of Toll charges and the documents and also enclosed details of trucks and trips decoded documents relating to transportation from Melakottaiyur and ponmar lakes. Those documents are marked as Exs.C15, C16, C20 and C21.

17. By relying on all those documents, the learned counsel for the claimant submitted that after detailed scrutiny of the documents submitted by him, the (CRN) committee recommended the claim Toll Fee claim to (IMU). Therefore, with the help of all these documents, the claimant proved that he paid the Toll Fee charges during the contractual period.

18. As discussed above, as per Section 53(i), by way of additional claim, the contractor is entitled to claim Toll Fee, which cannot be barred by Section 4, as submitted by the appellant herein. However, as pointed out by the claimant, by letter dated 12.01.2009 (Ex.C8), the contractor reserved their right to claim the post tender levy of Toll Fee and the appellant also not objected the said claim. Therefore, now the appellant is not entitled to raise objection by invoking Clause 4 of the contract. Both legally and factually, this fact was rightly appreciated by the Arbitrator, while deciding the issue Nos.1 to 5 and the same was also appreciated by the learned Single Judge in O.S.No.428 of 2015, which calls for no interference by this Court.

19. Another objection raised by the appellant is that the contractor is not entitled to claim interest for the delayed payments said to be made by the IMU by relying on clause 57 of general condition of the contract Ex.C9, which reads as follows:

57.1 Payment Terms:

> 57.1 The Contractor shall submit to the Engineer once in 15 days a statement on the standard printed form to be had on application to the work executed up to the endo of the fortnight (if such) value shall justify the issue of an interim certificate together with statements of earth received at site in trucks with their volumes and total quantities reduced by 20% of voids to enable to

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verify and cross check the quantities filled and compacted at site. The contractor will submit bills for a minimum value of Rs.2 Crores and will be paid on the certificate of the Engineer, and after scrutiny of Engineer NMA or NMA's authorized representative, the amount due him on account of the estimated contract value of the permanent work executed up to the end of the previous bill amount together with such amount (if any) as the Engineer may consider proper on account of materials on the site subject to a retention of the percentage named in the tender until the amount retained shall reach the limit of Retention money/Security Deposit named in the tender. All amount due to the NMA by the contractor if outstanding on account of supply of any materials, electricity, water, services rendered in connection with the contract, repairs or rectifications to work etc, shall be adjusted from the bills of any amount due to the contractor by the NMA by way of outstanding depositors etc.

57.On receipts of bills an ad hoc payment of 75% of the bill amount will be released within a period of one week. The date on which a cheque of payment is handed over the contractor by the employer will be considered as the date of payment for all purposes. The balance amount of bill be paid within 18 days of submission of bill. Client will pay within a week of certificate from the engineer. Delay in making such payments by the Employer due to exceptional circumstances shall not mollify or vitiate in any way or other, the conditions of the contract and the contractor shall have no claim on this account. The employer will not pay any interest on account of any delay in the payment to the Contractor under any point of time and Contractor cannot prefer any claim on this account.”

20. A reading of clause (57.2) would show that the client will pay within a week of certificate from engineer and if there is any delay in making such payment due to the exceptional cases, the employer need not pay any interest for any delay arise due to exceptional circumstances. Furthermore, the said clause 57.2 implies that delay in making payment by the employer due to exceptional circumstances shall not nullify or vitiate the conditions of the contract. The contractor submitted with Ex.R2 statement setting out the particulars of the date of the claim, the date of the recommendation of the (CRN) and the date of payment with delay. Even on perusal of

Ex.R31, there is delay of 123 days for issuing the certificate by the engineer and also produced the details of the date of bill recommendation and payment (Ex.R12) through which he proved the bill payment made by IMU and all these delays was happened due to administrative reason which cannot be deemed exceptional circumstances. Therefore, clause 57.2 not supported the IMU rather it support of the claim of the contractor.

21. However, the learned counsel for the appellant relied upon the judgment in (2016) 6 Supreme Court Cases page 36 in Union of India Vs. Ambica Construction, wherein it has been held as under:

> "A.Arbitration Act, 1940 - Ss. 13, 29, 30, 33 and 34 - Powers of arbitrator to award interest pendente lite - Award of interest pendente lite by arbitrator if barred by agreement - construction of agreement to determine the same - Principles summarised - Held, award of pendente lite interest depends upon nature of ouster clause in each case - it also depends on several factors such as overall intention of agreement, phraseology used in the agreement, clauses conferring power relating to arbitration, nature of claim and dispute under reference and on what items power to award interest is expressly excluded and for what period - further held, bar to award interest on delayed payment by itself cannot be inferred as express bar to award interest pendente lite by arbitrator since ouster of power of arbitrator has to be considered on various relevant aspects - However, if contract expressly prohibits award of interest pendente lite, arbitrator has no power to award such interest.

Based upon the above proposition the arguments advanced by the learned counsel for the appellant that the Arbitrator travelled beyond the scope of contract and erroneously awarded the interest as claimed by the contractor is unsustainable one and prayed to set aside the award.

22. But as discussed above, the appellant was not able to explain why such delay was happened on their part to make the payments to the claimant. On the other hand, the claimant was able to establish that such delay was not come under the category of exceptional circumstances. Therefore, the claimant is entitled for interest as per clause (57.1, 57.2) for the delayed payment as rightly held by the Arbitrator as well as confirmed by the Hon'ble Single Judge which is sustainable in law. Accordingly, issue No.2 answered.

23. With regard to the facts on hearing both the

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parties as well as considering the documentary evidence, the Arbitrator passed award by considering the relevant clause as per the contract executed between the appellant and the respondent. Therefore, the findings given by the Arbitrator need not be interfered as per the ratio laid down by the Hon'ble Supreme Court in Steel Authority of India Ltd., vs. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63, wherein it has been held as under:

> 18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:
>
> (i) In a case where an arbitration travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a Court.
>
> (ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.
>
> (1989) 2 SCC 38 (1991) 4 SCC 93 (1990) 4 SCC 740
>
> (iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.
>
> (iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.
>
> (v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.
>
> (vi) If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not interfere with the award.
>
> (vii) It is not permissible to a Court to

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examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.”

24. Therefore, the contractor/first respondent is entitled to claim additional Toll fee as well as interest for the delayed payment as rightly concluded by the Arbitrator as well as the learned Single Judge, which calls for no interference by this Court and both the issues are answered.

25. Accordingly, this Original Side Appeal is dismissed and the judgment and decree passed in O.P.No.428 of 2015 is hereby confirmed. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

O.S.A.No.132 of 2018

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