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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.09.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE P.D.AUDIKESEVALU

O.S.A.No.212 of 2019

The Project Director,
Tamil Nadu Road Sector Project,
TNMB Complex-I Floor,
171, South Kesavaperumalpuram,
Off Greenways Road,
R.A.Puram, Chennai - 600 028.

... Appellant/Appellant

.Vs.

JSR Constructions Pvt. Ltd., Bangalore,
Rep. by Power of Attorney Holder
R.Paneerselvam,
114-G1, Green House Apartments,
Mc Donalds Road,
Cantonment, Trichy - 620 001.

... Respondent/1st Respondent

PRAYER:-

Appeal under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent against the judgment and decree dated 30.4.2019 passed by the learned Single Judge on O.P.No.228 of 2014.

Prayer in O.P.No.228 of 2014:-

To set aside the arbitration award dated 23/11/2013 in respect of Claims 1, 2, 3, 4, 5(i) and interest passed by its Arbitration Tribunal.

For the Appellant : Mr.R.Shunmugasundaram
Advocate-General
Assisted by
Mr.A.Edwin Prabakar
Government Advocate (CS)

For the Respondent : Mr.D.Balaraman



defects may have been noticed and it is the appellant's case that despite the contractor being obliged to remove the defect within a period of one year of it being pointed out, as envisaged in the contract, no endeavour was made by the contractor here to address the defect or attempt to rectify the same. The appellant says that since the appellant had to take steps, inter alia, by engaging another contractor to take care of the defective workmanship of this contractor, considerable sums were expended and there was no basis to the arbitral tribunal absolving the contractor of the liability on such count.

7. The discussion on such aspect is found in paragraph 9.3 and thereafter in the majority award. The substance of the dispute was that the contractor claimed that it was an anomaly in the design of the bridge that led to what the employer perceived to be a fault and the contractor was required to make the construction in accordance with the design supplied by the employer. The correspondence in such regard have been noticed and re-produced in the award and it appears that upon the disputes arising between the parties herein, expert opinion was sought from the Indian Institute of Technology, Chennai. The report of the IIT has been copiously referred to in the award and, on the expert assessment of the specialised arbitral tribunal, it appeared that the fault lay in the design and not in the workmanship. Several pages have been expended in discussing the matter and the arbitral tribunal found that the contractor was not liable for the perceived defect.

8. In the face of such categorical finding rendered by the arbitral tribunal on the basis of an expert opinion obtained from a recognised institution as the IIT, there was little room for the arbitration court to interfere with such aspect of the matter, particularly within the limited ambit of authority available under Section 34 of the Act.

9. Accordingly, there does not appear to be any merit in the first count of challenge pertaining to the award of a sum in excess of Rs.84 lakh for the wrongful withholding by the appellant herein of the bills due and payable to the contractor in terms of the relevant contract.

10. Apropos the other ground of challenge pertaining to the first item under the fifth head of the claim, on account of overhead and loss of profit, the appellant draws the court's attention to when the papers in support of such claim may have been filed before the arbitral tribunal. The appellant refers to recording in the award as to the dates of hearing and suggests that it was only after the hearing was substantially completed that the primary evidence in support of such head of



claim was produced before the arbitral tribunal.

11. It is the appellant's underlying suggestion that pleadings and evidence should precede the hearing and the hearing is taken up at a stage after the cross-examination and if the material in support of the claim was produced in course of the hearing, the appellant was deprived the opportunity of cross-examining the representatives of the contractor in respect of the evidence produced in such regard.

12. For a start, there does not appear to be any specific ground taken in the petition under Section 34 of the Act complaining of any lack of opportunity on the part of the appellant herein to cross-examine any representative or witness called by the contractor. Indeed, it does not appear, on a reading of the judgment and order impugned, that an issue was raised as to the late filing of papers pertaining to such head of claim. At any rate, the arbitral tribunal is the master of the procedure and the award was rendered several months after the evidence in respect of the impugned head of claim was furnished. It does not appear that the appellant herein was deprived from dealing with the evidence or making any submission in such regard. At any rate, no minutes of any proceedings before the arbitral tribunal has been produced to demonstrate that the cross-examination was sought by the appellant and it was declined by the tribunal, no letter of protest issued to the arbitral tribunal by the appellant in course of the proceedings has also been disclosed in such regard.

13. When it comes to the loss of profit or cost overrun due to the delay in the completion of the work upon the employer being responsible for the delay, there is no doubt that the assessment that is made is not arithmetically accurate and there are certain guidelines to go by. This was an engineering contract and the use of Hudson's formula in engineering contracts is almost universal and is judicially recognised in this country. Of the several judgments, including those rendered by the Supreme Court and which recognise the applicability of Hudson's formula in engineering contracts, two of the more prominent may be referred to - (2015) 3 SCC 49 (Associate Builders v. Delhi Development Authority) and (2006) 11 SCC 181 (McDermott International Inc. v. Burn Standard Company Limited).

14. Further, authoritative pronouncements of the Supreme Court instruct that when it comes to loss of profit, a rough and ready estimate can be made. Approximation to the extent of 15% of the contract price is permissible in terms of such judgments. In the present case, upon applying Hudson's formula, about 18% of the value of the original contract has been assessed to be



the quantum of loss of profit for the period of delay and the figure arrived at upon applying Hudson's formula has been toned down in the majority view to about Rs.3.91 crore.

15. Considering that the value of the contract was in excess of Rs.35 crore, the quantum awarded on account of loss of profit by applying the Hudson's formula does not shock the conscience of the court or otherwise appear to be patently erroneous or manifestly arbitrary. At any rate, the challenge on this head does not appear to have been fashioned as being opposed to public policy since the law in this country recognises the entitlement of a contractor to compensation on account of loss of profit for the delay occasioned at the behest of the employer.

16. In the impugned judgment and order, the arbitration court refers to certain salutary principles which ought always to be remembered in this jurisdiction. Apart from the arbitral tribunal being the master of the procedure, the arbitral tribunal also has the final say as to the quality and the quantum of evidence before it. In exercise of the limited authority under Section 34 of the Act, the Court cannot re-assess the evidence before the Arbitrator or supplant its view for that expressed by the arbitrator, even if the other view appears more plausible to the court.

17. There does not appear any infirmity in the judgment and order impugned in it refusing to interfere with the arbitral award in this case. The specific challenge launched by the appellant herein to the two heads of claim do not meet the exalted tests required to be discharged in this jurisdiction.

18. Accordingly, O.S.A.No.212 of 2019 fails and the same is dismissed. C.M.P.No.19435 of 2019 is closed.

There will, however, be no order as to costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

bbr



To

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

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+1cc to Mr.D.Balaraman, Advocate, S.R.No.45116

O.S.A.NO.212 OF 2019

SJ(CO)
PBS/07/10/2021