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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.11.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE P.D.AUDIKESSAVALU

OSA (CAD) No.107 of 2021

G.A.Projects Pvt. Ltd
No.3, K.H. Road
Ennore
Chennai 600 057.

..Appellant

Vs.

Kamarajar Port Ltd
3rd Floor, Jawahar Building, 1
7, Rajaji Salai
Chennai 600 001.

..Respondent

Appeal filed under Section 13(1) of Commercial Courts Act against the order dated 14.09.2021 in Arb. Appln. (Comm.Div) No.167 of 2021 and allow the present OSA to the extent the Independent Expert / Engineer has been appointed to assess the subject road.

This Judges summons filed under order XIV Rule 8 R/w section 9 of the Arbitration and Conciliation Act 1996 pleased to appoint a subject matter expert (SME) Independent Engineer to ascertain the condition of the subject road, assess the damage caused to the road and also submit an estimate of the rectification of the road required and expenses thereof which report may be submitted before the Arbitral Tribunal, within a time limit.

For the Appellant : Mr.Om Prakash
Senior Counsel
for Ms.Tanya Kapoor

J U D G M E N T
(Delivered by the Hon'ble Chief Justice)

The appeal is directed against an order dated September 14, 2021 passed on an application under Section 9 of the Arbitration and Conciliation Act, 1996.



2. The grievance of the appellant contractor is that some five years after a road was constructed and made over by the appellant to the respondent employee, the Arbitration Court has appointed experts to look into the condition of the road. The appellant asserts that no inspection conducted now will reveal the nature or character of the road that was constructed and made over by the appellant to the respondent in the year 2016.

3. The contract between the parties envisaged the construction of some internal roads by the contractor. The contract was time-bound and it is the appellant's contention that following the delay on the part of the employer in releasing the land and in taking other measures, the contractor was constrained to terminate the contract and make a demand for the payment due to the contractor.

4. In terms of the arbitration agreement between the parties, a reference was instituted, in which the employer also carried a counter-claim. The Arbitrator allowed a substantial part of the appellant's claim which came to be challenged in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 and succeeded, primarily on the ground that two documents may not have been appropriately considered or due opportunity given to the employer to deal with the same. The Arbitration Court also referred to Clause 22 of the agreement that pertained to a default period during which the contractor would be liable to repair the road. The appellant's endeavor to have the order setting aside the award annulled failed in the appeal. Admittedly, the parties have carried the disputes to a de novo reference.

5. The appellant submits that it is utterly futile to make any attempt to inspect the present condition of the road. According to the appellant, no expert would be able to assess what the condition of the road may have been in the year 2016 by looking at it or inspecting the same in the year 2021. The appellant also refers to the contract requiring an engineer to be appointed and for the engineer to oversee the work done by the contractor. According to the appellant, the engineer had required several tests to be undertaken and over 2200 tests had been undertaken in course of the work done by the appellant. In certain cases, these tests reflected perceived anomalies or defects on the part of the contractor and this, according to the appellant, formed the basis of the counter-claim which was taken by the employer before the Arbitrator. The appellant also says that if the results of any tests were disputed by the contractor, the contract envisaged a joint inspection to be conducted. It is, in such circumstances, that the appellant says that the order impugned appointing independent experts from the IIT and from the Civil Engineering Department may not be appropriate.



6. At the end of the day, what is to be assessed in course of the fresh reference is the extent of the work which has been done by the appellant and the liability of the employer in such regard. In addition, if there are any counter-claims, the same have to be looked into. It is necessary, for such purpose, that the condition in which the roads were handed over by the appellant to the employer must be looked into. While it is difficult to imagine for a lay person as to what an expert would look into a road five years after its installation, but that is why the expert is considered to be the expert in the field. There does not appear to be any perverse exercise of the discretion clearly available with the Arbitration Court. However, whatever objections the appellant may have against the report or reports filed by the experts may be canvassed before the Arbitral Tribunal in accordance with law. It must not be forgotten that the final assessment will be made by the Arbitrator and if any piece of the experts' opinion is not based on objective criteria in terms of the contract, including IS 456 or like parameters which are recognised in the field of road construction, it will be open to the appellant to point out the same.

7. The judgment and order impugned do not call for any interference, though the views expressed by the experts may be challenged in accordance with law by the appellant herein.

8. OSA (CAD) No.107 of 2021 is dismissed. CMP No.18256 of 2021 is closed. There will be no order as to costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

kpl

To

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

OSA (CAD) No.107 of 2021

RLD (CO)
PR (23/11/2021)