

O.S.A.Nos.197 and 198 of 2019

R.SUBBIAH, J
and
C.SARAVANAN, J

(Heard through Video-Conferencing)

By judgment dated 24.03.2021, we have dismissed the above O.S.A.Nos.197 and 198 of 2019.

2. Today, these appeals are listed under the caption "for being mentioned" at the instance of the learned counsel appearing for the respondent.

3. It is pointed out by the learned counsel for the respondent that in paragraph 51 of the judgment, it was inadvertently observed that "*Thus the specifications would not comprise of the data book which sets out the standard rates for the years during which the work was executed*". This sentence is required to be substituted with the following sentence. "*Thus, the specifications would comprise of the data book which sets out the standard rates for the years during which the work was executed.*" Similarly, in the very same paragraph, the words "over-heads and costs" may be replaced with "increase in contract price".

4. On the above contentions, we have also heard the learned Additional Solicitor General, assisted by Mr.Su.Srinivasan, learned Standing Counsel appearing for the appellant/NHAI.

5. Having regard to the submission of counsel for both sides, entire paragraph No.51 of the judgment dated 24.03.2021 in O.S.A.Nos.197 and 198 of 2019, shall stand deleted and in its place, the following paragraph is ordered to be substituted:

"51. A reading of the above Clause shows that this clause will not apply beyond a stipulated period of time fixed in the contract. But in the instant case, the learned Arbitrator has come to the conclusion that the delay was due to the Department in handing over the possession of the site free from any hindrances. Therefore, the respondent-claimant is entitled for price escalation. In any event, these are pure findings of fact and it is clearly beyond the limited scope provided under Sections 34 and 37 of the Act. But it is the submission of the learned Additional Solicitor General that even if the respondent-claimant is entitled for compensation, it should be as per the formula provided under Clause 47. But we find that, even according to the appellant/National Highways, the rates are computed as per the rates quoted in the MORT & H Data Book in 2010-2012, which corresponds to the period of execution. Thus, the

application of the MORTH standards is expressly found in the contract wherein it is stated that "Specification - The work will be carried on as per MORTH specification.". Thus the specifications would comprise of the data book which sets out the standard rates for the years during which the work was executed. This again is a matter of construction of the contract and therefore, it is purely within the realm of the learned Arbitrator. Though the original claim was Rs.33 crores, the same was scaled down before the sole arbitrator to Rs.22 crores by the claimant, as the learned Arbitrator directed that the increase in contract price and profits are to be set out and considered as a separate ground. Therefore, the respondent-claimant had reduced the amount claimed at Rs.33 crores to Rs.22 crores and this was included and considered as increase in contract price. This was also not disputed by the appellant-National Highways at any point of time. In this context, it will be useful to refer to the decision of the Honourable Supreme Court in **Assam State Electricity Board and others Vs. Buildworth Private Limited**, reported in **2017 (8) SCC 146**. In Paragraph Nos.11 to 13 therein, it has been held as follows:-

"11. The contention of the claimant was that Clause 2.3 (a) (i) applied only for the specific period mentioned in the purchase order and not for the extended period of the contract. According to the Board, a cap of Rs.9.16 lakhs was imposed under the above provision and no price escalation was permissible beyond it. The arbitrator entered the following

finding:

".....The contract is silent as to what will happen if the work agreed to be completed by 06.09.1983 cannot be completed within 6-9-1983. It has not been disputed by the respondent that the project work was completed much beyond the extended date i.e., by 06.09.1983. It is pertinent to point out here that the extension of time upto 6-9-1983 was formally granted by the respondent by a letter dated 27.03.1983. There is no formal extension of time beyond 6.9.1983 by the purchaser, but the claimant was allowed to carry out the work beyond 06.09.1983. From the records, it is found that during the period from 06.09.1983 to 27.03.1985, there is no objection as to delay nor any formal extension. Nor was the penalty clause (2.6.7) invoked. As a matter of fact, the work was carried out by the claimant with active cooperation of the respondent till 31.01.1986 when the work on TG-IV was completed and necessary payment was made to the claimant. It appears, therefore, that though there is no formal extension of time beyond 6-9-1983, the claimant was given informal extension of time up to 21-1-1986 when the work was finally completed.

12. Besides this, the arbitrator noted that by a letter dated 5-6-1983 the claimant had specifically intimated to the Board that the escalation provision contained in clause 2.3 (a) (i) would not be applicable for the extended period. No objection was raised on behalf of the Board to the above letter and on the contrary, the claimant was allowed to carry on the work beyond 6-9-1983 which was the extended date, without any objection upto 31-8-1986. The ultimate conclusion which was arrived at by the arbitrator was as follows:-

'As discussed above, the clause of price being firm cannot be extended to cover the period beyond the formal extended date i.e., 6-9-1983. Price escalation is a process which does not naturally confine itself between the date of purchase order and the extended date i.e., 6-9-1983. On the

contrary, generally market tendency is that it goes on increasing with every passing day. Therefore, it would be naive to presume that there was no price escalation between the period 6-9-1983 to 31-1-1986.

In view of the above, the respondent Board cannot deny the claimant the charge on account of price escalation taking shelter under Clause 2.3 (a) of the purchase order and Clause 31 of the specification. Provision of both the clauses is applicable only up to the formal extension date 6-9-1983 and not beyond. Having allowed the claimant to carry out the work much beyond the formal extended date i.e., from 6-9-1983 to 31-1-1986, the respondent cannot now take the stand that the claimant is not entitled to escalation price for the period he worked even though there is no formal extension of time but for intents and purposes there was an extension of time upto 31-1-1986.'

13. The arbitrator has taken the view that the provision for price escalation would not bind the claimant beyond the scheduled date of completion. This view of the arbitrator is based on a construction of the provisions of the contract, the correspondence between the parties and the conduct of the Board in allowing the completion of the contract even beyond the formal extended date of 6-9-1983 to 31-1-1986. Matters relating to the construction of a contract lie within the province of the Arbitral Tribunal. Moreover, in the present case, the view which has been adopted by the Arbitrator is based on evidentiary material which was relevant to the decision. There is no error apparent on the face of the record which could have warranted the interference of the Court within the parameters available under the Arbitration Act, 1940. The arbitrator has neither misconducted himself in the proceedings nor is the award otherwise invalid."

6. In all other respects, the judgment dated 24.03.2021 shall remain unaltered.

(R.P.S.J.) (C.S.N.J.)
08.04.2021

cs

Registry is directed to issue fresh judgment copy to the parties, after incorporating the above substituted paragraph No.51 in the judgment dated 24.03.2021

To

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

सत्यमेव जयते
WEB COPY

R.SUBBIAH, J

and

C.SARAVANAN, J

CS



O.S.A.Nos.197 and 198 of 2019

08.04.2021

WEB COPY