



O.P.No.422 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

WEB COPY

DATED: 17.10.2022

CORAM

THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

O.P.No.422 of 2018

M/s.Eagle Earth Movers,
Civil Engineering Contractor,
Rep. By its Proprietor,
Mr.U.R.Subramaniam,
No.14, S.C.S.Complex,
South Car Street,
Thiruchengodu-637 211
Namakkal District.

... Petitioner

VS.

1. The General Manager,
Southern Railway,
Part Town, Chennai-600 003.
2. The Chief Administrative Officer,
Construction, Southern Railway,
Periyar E.V.R.High Road,
Egmore, Chennai-600 008.
3. The Chief Engineer,
CE/S & RB/CN
Construction, Southern Railway,
Periyar E.V.R.High Road,
Egmore, Chennai-600 008.



O.P.No.422 of 2018

Rs.12,45,07,150/-, as per the letter of acceptance dated 07.10.2009, and the petitioner entered into an agreement dated 08.12.2009. The original currency of contract was for a period of 12 months, i.e. the work was to be completed on or before 06.10.2010. The admitted position is that the scope of work under the contract was modified, multiple extensions of time were granted and work was eventually completed in July 2012. As against the estimated contract price, the value of work executed by the petitioner was Rs.13,14,90,719/-.

2. Disputes arose between the parties with regard to amounts due and payable by the respondents to the petitioner. The arbitral tribunal was constituted after the petitioner filed a petition under Section 11 of the Arbitration and Conciliation Act 1996 [the Arbitration Act]. Before the arbitral tribunal, the petitioner raised seven claims for an aggregate sum of Rs.2,43,04,882/-, which sum excluded two unquantified claims. These claims included a claim of Rs.6,42,750/- towards the final bill, a claim of Rs.65,42,399/- towards refund of security deposit, claims towards prolongation costs and claims for damages and costs of arbitration.



O.P.No.422 of 2018

3. In response to these claims, the respondents filed a counter statement. Apart from denying the claims of the petitioner, the respondents made a counter claim for a sum of Rs.86,53,285/- towards vitiation. Upon considering the pleadings, the arbitral tribunal framed 14 issues, which are set out at paragraph 28 of the arbitral award dated 04.01.2018(the Award). The petitioner examined one witness as C.W.1 and exhibited 15 documents as Exs.C-1 to C-15 and the respondent also examined one witness as R.W.1 and exhibited 10 documents as Exs.R1 to R-10. Each witness was cross examined by learned counsel for the counter party. By the award, the arbitral tribunal rejected all the claims of the petitioner and the counter claim of the respondents.

4. Oral arguments on behalf of the petitioner were made by Mrs. Aparna Devi, learned counsel, and on behalf of the respondents by Mr.P.T.Ram Kumar, learned counsel.

5. The petitioner assailed the Award both on the ground of delay in the pronouncement thereof and on the merits. As regards the delay in



O.P.No.422 of 2018

pronouncing the Award, learned counsel pointed out that arbitral proceedings were concluded originally on 02.10.2015. By referring to the minutes of the meeting held on 02.10.2015, learned counsel pointed out that it is recorded therein that arguments were concluded and that orders were reserved for passing the award. After 02.10.2015, learned counsel contends that the parties did not hear from the arbitral tribunal in spite of the lapse of about 1 ½ years. In order to ascertain the status, by communication dated 15.03.2017, the petitioner requested the arbitral tribunal to re-open the proceedings. Pursuant thereto, a hearing was held on 22.04.2017 and the award was reserved after the said hearing. According to learned counsel for the petitioner, no new material was placed before the arbitral tribunal, either by way of clarification or otherwise, at the hearing on 22.04.2017. Eventually, the Award was pronounced about eight months later on 04.01.2018. Learned counsel for the petitioner contended that the Award is vitiated by the inordinate delay in pronouncing the same. In support of this contention, learned counsel placed before the Court the order of this Court in *K.Dhanasekar v. Union of India (Dhanasekar)(2020) 1 MLJ 169*, wherein an arbitral award was set aside on account of the unexplained delay



of three years and seven months. On the same issue, learned counsel also placed reliance on the judgment of the Delhi High Court in *Director General Central Reserve Police Force v. Fibroplast Marine Pvt. Ltd. in O.M.P. No.(Comm) 511 of 2019 dated 04.05.2022*. In order to demonstrate that the arbitral tribunal is likely to lose track of events that transpired during the course of the arbitral proceedings if there is considerable delay, learned counsel referred to the minutes of proceedings [page 409 of the typed set] wherein it was recorded that the transportation costs would be borne by the petitioner herein/claimant therein and, thereafter, the operative portion of the award at page 457 of the typed set wherein such transportation costs were lost sight of by the arbitral tribunal. Likewise, learned counsel contended that the submissions made by parties, including on merits, would also have been lost sight of due to the lapse of time.

6. Turning to the merits of the dispute, learned counsel focused attention on the rejection of the claim for amounts outstanding against the final bill and the claim for refund of the security deposit. Learned counsel pointed out that the scope of work under the contract was admittedly revised and work relating to three ROBs, which had to be executed about **15 kms**



O.P.No.422 of 2018

away from the original project site, were included in the revised scope of work. According to learned counsel, the vitiation clause could not have been applied but for this substantial variation in the original scope of work. With regard to the application of the vitiation clause, learned counsel contended that the petitioner was unaware of the rates quoted by the L2 and L3 bidders in relation to the additional scope of work.

7. The next contention of learned counsel was that the arbitral tribunal erred patently in accepting the objection of the respondents herein that the claims are excepted matters as per clause 63 of the General Conditions of Contract (GCC) in course of final disposal. According to learned counsel, such objections should have been raised by the respondents in reply to the notice under Section 21 of the Arbitration Act or, at any rate, in course of the Section 11 proceedings before this Court. Even otherwise, learned counsel contended that the arbitral tribunal should have determined whether these are excepted matters by framing a preliminary issue. As a consequence of deciding that these claims fall within the scope of excepted matters, in course of final disposal, it was submitted that the petitioner has lost the opportunity of making these claims by way of a civil suit. Therefore,



learned counsel contended that interference is called for and that the Award is liable to be set aside.

8. Mr.Ram Kumar made submissions in response and to the contrary. He opened his submissions by pointing out that the contract was executed over an extended period upon the petitioner applying for and being granted about seven extensions. By referring to the requests for extension, by letters dated 04.01.2011, 24.02.2011, 13.06.2011, etc., he pointed out that the petitioner cited many reasons attributable to himself while seeking extension and that extensions were granted by executing rider agreements subject to the same terms and conditions as contained in the original agreement and on condition that no increase in rates would be granted on account of the extensions.

9. With regard to the variation in scope of work, learned counsel pointed out that the petitioner expressly consented to the execution of additional work under communication dated 13.05.2010 [Ex.R3], whereby the petitioner agreed to execute the three ROBs at the rates and as per the



O.P.No.422 of 2018

terms and conditions of the contract. As regards the vitiation clause, Mr.Ram Kumar submitted that the said vitiation clause admittedly forms part of the special conditions of contract (SCC). The said vitiation clause was not objected to at any time by the petitioner until the final bill stage. By referring to the counter statement of the respondents before the arbitral tribunal, he pointed out that the respondents expressly referred to the vitiation clause and stated that the total amount arrived at by operating the vitiation clause is Rs.86,53,285/-, which is liable to be recovered from the petitioner/contractor. By referring to the reply statement of the respondents before the arbitral tribunal, he pointed out that the vitiation statement was made available to all the tenderers at the time of opening of tenders. Therefore, he submitted that the contention of learned counsel for the petitioner to the effect that the petitioner was unaware of the rates quoted by L3 and L4 tenders is incorrect.

10. With regard to the contention on excepted matters, he submitted that the respondents referred to clause 63 in the counter statement so as to contend that the claim relating to vitiation is an excepted matter. According



O.P.No.422 of 2018

to learned counsel, the said contention could not have been raised in the course of Section 11 proceedings as per the law applicable at the relevant point of time. By referring to a recent judgment of the Hon'ble Supreme Court in *Indian Oil Corporation Limited v. NCC Limited* 2022 SCC OnLine SC 896, he pointed out that it is now possible for a party to raise an objection on the ground that the dispute proposed to be referred to arbitration deals with excepted matters. With regard to the law on excepted matters, he relied upon the judgments in *Harsha Constructions v. Union of India* (**Harsha Constructions**), (2014) 9 SCC 246, particularly paragraph 19 thereof; *Mitra Guha Builders (India) Company v. Oil and Natural Gas Corporation Limited* (2020) 3 SCC 222, particularly paragraphs 7 and 26 thereof; and *General Manager, Northern Railway and Another v. Sarvesh Chopra* (**Sarvesh Chopra**), (2002) 4 SCC 45, particularly paragraphs 18 and 19 thereof.

11. With this background, he turned to the relevant findings in the Award. He pointed out that the arbitral tribunal recorded its findings in paragraph 38 onwards and concluded in paragraph 48 that claims relating to



O.P.No.422 of 2018

clause 44 of the SCC fall within the scope of excepted matters as per clause 63 of the GCC. On the said basis, he submitted that Issue Nos.1 and 3 to 6 were decided in favour of the respondents and against the petitioner. As regards other issues, upon holding that they are not excepted, he concluded that the arbitral tribunal decided the said issues against the petitioner after examining the evidence on record with regard to the reasons for delay. Since the arbitral tribunal concluded that issues relating to vitiation are excepted, he pointed out that the counter claim of the respondents was also rejected.

12. The contentions of the contesting parties raise issues both on delay and on the merits. The contentions based on delay are dealt with first. Learned counsel for the petitioner contended that the Award is vitiated on account of the fact that the arbitral tribunal took about 33 months to pronounce the Award. The minutes of the 11th sitting of the arbitral tribunal is before the Court and this discloses that arguments were originally concluded on 02.10.2015. The communication of 15.03.2017 from the petitioner is also on record. This communication reads as under:



O.P.No.422 of 2018

WEB COPY

“I humbly request to re-open the Arbitral proceedings in respect of the above Agreement, as I want to submit some clarifications with regard to the dispute and also to circulate a Judgment. It is further submitted that one Arbitration hearing may be held at any convenient day of the parties and 'His Lordship'.

From this communication, it is evident that a request to reopen the arbitral proceeding was made by the petitioner herein. The said request was acceded to by the arbitral tribunal, as is evident from the communication from the arbitral tribunal fixing a hearing on 22.04.2017. The minutes of the hearing on 22.04.2017 is on record and the said minutes indicate that both parties provided clarifications to queries raised by the tribunal and made additional submissions. These documents indicate beyond doubt that arbitral proceedings were re-opened and eventually concluded on 22.04.2017. Hence, the contentions relating to delay should be viewed in this factual context. After concluding proceedings on 22.04.2017, the Award was pronounced on 04.01.2018. Therefore, the arbitral tribunal has taken about 8 months to pronounce the Award. While the appropriate length of time to



O.P.No.422 of 2018

pronounce a verdict in any legal proceeding, including arbitration, is about 3 months, the question that arises for consideration is whether the lapse of 8 months before the Award was pronounced vitiates the Award. Learned counsel for the petitioner relied upon the earlier judgment of this Court in ***Dhanasekar***. In ***Dhanasekar***, the award was set aside on the ground of the lapse of 3 years and 7 months from the date of reserving the award. Therefore, the said judgment does not advance the cause of the petitioner. Two further aspects are relevant: both parties submitted written submissions before the arbitral tribunal and, therefore, the tribunal had the benefit of examining the written submissions while preparing and pronouncing the Award; and the petitioner is unable to point out any significant or serious flaw in the Award on account of the lapse of time. Therefore, the contention based on delay is rejected.

13.Turning to the merits of the Award, the petitioner assails the Award largely in respect of the rejection of the claim in respect of the final bill and for refund of the security deposit. Both these claims were rejected on the ground that the vitiation clause was operated by the respondents and



O.P.No.422 of 2018

that the decision in relation to the operation of the vitiation clause is an excepted matter. The vitiation clause should be examined along with the clause on excepted matters before drawing conclusions as to whether the Award calls for interference. Clause 44, which deals with vitiation, is set out below:

“Clause 44.0-VITIATION CLAUSE:

“44.1. In the event of Vitiating occurring due to increase or decrease in quantities among the first, second and third lowest valid tenderers, the vitiation shall be to contractor's account. The total value of the work done shall be calculated at the rate offered by those tenderers and the amount payable shall be limited to the lowest aggregate value as worked out.

44.2. Vitiating as above shall be worked out as a whole for Agreement including all variations in quantities”.

Clause 63 of GCC deals with excepted matters. The said clause is as under:



WEB COPY



O.P.No.422 of 2018

“Clause 63 – Matters finally determined by the Railway:- All the disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after their completion and whether before or after the determination of the contract, shall be referred by the Contractor to the Railway and the Railway shall within 120 days after receipt of the Contractor's representation make and notify decisions on all matters referred to by the Contractor in writing provided that matters for which provision has been made in clauses 8(a), 18, 22(5), 39, 43(2), 45(a), 55, 55-A (5), 57, 57-A, 61(1), 61(2) and 62(1)(B), of the General Conditions of Contract or in any clause of the Special Conditions of the Contract shall be deemed as “excepted Matters” and the decisions of the Railway authority, thereon shall be final and binding on the Contractor; provided further that “excepted Matters” shall stand specifically excluded from the purview of the Arbitration clause and shall not be referred to Arbitration.”



14. On examining clause 63, it appears that matters dealt with in specific clauses of the GCC are excepted and all matters relating to any clause of the SCC are excepted. The admitted position is that clause 44.0 is contained in the SCC. Upon considering these two clauses and clause 42, which deals with modification of the contract, the arbitral tribunal recorded the finding in paragraph 44 that the petitioner agreed to execute three additional ROBs at the rates specified in the contract. Paragraph 44 is relevant in this regard and it reads as under:

“44. It is contended by the claimant that the consent letter (Ex.R3) obtained from the claimant by the Railway itself proves that the construction of the additional ROBs fell beyond the scope of the contract and not governed by the terms and conditions of the original contract especially for application of rates quoted by L2 and L3 tenderers in terms of clause 44.0 of SCC. This contention is liable to be rejected on the face of it in the light of the contents of Ex.R-3 Consent letter. In Ex.R-3 the claimant has unequivocally agreed to execute the ROBs not only at the accepted agreement rates but also on the terms



WEB COPY



O.P.No.422 of 2018

and conditions of contract under the agreement No.114/CN/2009 dt. 08.12.2009 (subject agreement). Therefore it is not open to the claimant to contend that the 4 additional ROBs are not governed by the terms and conditions of the original contract and clause 44.0 of SCC is not applicable.”

15. In paragraph 45, the arbitral tribunal examined the evidence on record and concluded on that basis that the L2 and L3 tenderers had quoted their rates for reinforced cement concrete retaining wall (the RCC retaining wall) under BSR Items 511 bi and 511 di in Annexure – A of the tender. Thereafter, the arbitral tribunal noticed that the petitioner had given consent to execute the RCC retaining wall by signing the Interim Variation Statement (Ex.R-4) and for the deletion of the reinforced earth retaining wall. Upon evaluating the evidence on this matter, the tribunal concluded that the vitiation clause becomes applicable. After recording that the vitiation clause is applicable, the arbitral tribunal proceeded to examine whether clause 44.0 of SCC will fall within the scope of excepted matters and, if so, whether the tribunal could determine an excepted matter. For



such purpose, relevant judgments on excepted matters, such as **Harsha Constructions** and **Sarvesh Chopra**, were examined. Eventually, the arbitral tribunal held as under, in relevant part, in paragraphs 48 and 49:-

“48. For the aforesaid reasons it is held that Clause 44.0 of the Special Conditions of Contract is applicable to the present dispute and consequently clause 63 of the General conditions of Contract is also applicable and therefore this dispute falls within the ambit of “Excepted Matters”.

49. For the foregoing reasons Issue Nos.1 and 3 to 6 are answered against the claimant and in favour of the respondents and consequently Claim No.1 of the claimant is rejected. As Claim No.1 has been rejected this Tribunal cannot order refund of the Security Deposit and therefore Claim No.2 is also rejected.”

16. The above conclusions of the arbitral tribunal are based on a reasonable construction of clauses 42 and 44 of the SCC and clause 63 of the GCC. The conclusions drawn by the tribunal are also based on a



O.P.No.422 of 2018

reasonable appraisal of the evidence adduced by the parties before the
arbitral tribunal.

17. Learned counsel for the petitioner contended that the arbitral tribunal should have framed a preliminary issue with regard to the excepted matters and decided the said issue at an earlier point of time. Under the Arbitration Act, the arbitral tribunal is conferred considerable latitude with regard to the manner of conducting the arbitral proceedings. The petitioner also contended that it lost the opportunity of raising claims in relation to excepted matters by way of a suit. There is nothing on record to indicate that the petitioner requested the arbitral tribunal to frame a preliminary issue as regards the objection that certain claims fall within the scope of excepted matters. Even otherwise, it is open to the petitioner to file a civil suit as regards claims relating to excepted matters by relying upon Section 14 of the Limitation Act 1963. If such claim is made, however, it is for the receiving court to decide the same.



O.P.No.422 of 2018

18. For all these reasons, the petitioner has failed to make out a case for interference with the Award. Hence, O.P.No.422 of 2018 is dismissed without any order as to costs.

17.10.2022

Index : Yes
Internet : Yes
kal/rrg



WEB COPY



O.P.No.422 of 2018

SENTHILKUMAR RAMAMOORTHY, J

kal/rrg

O.P.No.422 of 2018

17.10.2022