IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **10.10.2022**

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THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

Arb.O.P.(Com.Div)No.523 of 2022

1. M/s.Bharat Sanchar Nigam Limited
   Rep by its Chief General Manager,
   Chennai Telephones,
   No.78, Purasaiwalkam High Road,
   Chennai 600 010

2. The Deputy General Manager (North West)
   Bharat Sanchar Nigam Limited
   Presently at No.22, Kelly's Road,
   Chennai-600 010. ... Petitioners

vs.

The RITES Ltd.
(A Govt of India Enterprises – Ministry of Railway)
Represented by its Senior Deputy General Manager,
No.758, Mount Chamber, 1st Floor,
Anna Salai, Chennai-600 002. ... Respondent

PRAYER: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, pleased to set aside the award dated 13.06.2022 passed by the Sole Arbitrator viz Hon'ble Justice K.Mohanram, Former

Judge of Madras High Court and pass such further or other order or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioners : Mr.T.Ravi Kumar

For Respondent : Mr.S.Amalaraj

ORDER

Pursuant to a tender floated by the petitioner in January 2001, a contract for the erection of distribution points (DPs) and to upgrade pillars was awarded to the respondent by the petitioners. A dispute arose with regard to the non-payment of bills issued by the respondent for work carried out under the said contract. The said dispute was referred for arbitration and an award dated 13.03.2013 was pronounced in relation thereto. The said award was challenged by the respondent herein by filing O.P.No.784 of 2013. The said petition was allowed by order dated 25.01.2017 and the award was set aside. Pursuant thereto, a petition under Section 11 of the Arbitration and Conciliation Act 1996 (the Arbitration Act) was filed by the respondent and the arbitral tribunal was constituted by order dated

07.12.2018. The said arbitral proceedings culminated in the award dated 13.06.2022 [the Award], which is assailed herein.

2. Before the arbitral tribunal, the respondent made claims in respect of 62 bills for labour, material and service charges. In the aggregate, a principal sum of Rs.1,40,09,657/- was claimed. Interest and costs were also claimed. The petitioners herein opposed the claims by filing a counter statement. The respondent herein adduced evidence before the arbitral tribunal by examining four witnesses as CW1 to CW4. A total of 118 documents were exhibited by the respondent as Exs.C1 to C118. The petitioners herein did not adduce oral evidence but marked 12 documents as Exs.R1 to R12.

3. Eventually, by the Award, the petitioners were directed to pay to the respondent a sum of Rs.58,61,984/- with interest thereon at 12% per annum from 01.07.2004 till the date of the Award. In addition, the petitioners were directed to pay further interest on the aggregate amount of Rs.1,26,03,265/- if the same is not paid within a period of three months

from the date of Award at 12% p.a. until the payment thereof. Costs of Rs.5,49,210/- were also awarded.

4. Oral arguments on behalf of the petitioners were advanced by Mr.T.Ravi Kumar, learned counsel, and on behalf of the respondent by Mr.S. Amalaraj, learned counsel.

5. Mr.T.Ravi Kumar assailed the Award on the ground that the contract was awarded on turnkey basis in relation to a specific quantity of DPs and pillars. By relying upon the communication dated 05.12.2001 from the petitioners to the respondent, he pointed out that the approval was restricted to 8500 DPs and 250 pillars. Therefore, he submitted that the respondent was not entitled to execute excess quantities, without approval, and make claims in relation thereto. By referring to the Award, particularly paragraph 13 thereof, he submitted that the arbitral tribunal committed the patent illegality of concluding that it is an item rate contract. The next contention of learned counsel was that the petitioners had made a claim in relation to the use of PVC pipes. With specific reference to paragraph 26 of

the Award, he pointed out that the arbitral tribunal concluded that the respondent had not used PVC pipes of the specification stipulated in the agreement. In spite of recording such conclusion, he contended that the arbitral tribunal proceeded to erroneously award the claim at the rate of Rs.16/- per metre. The third contention of learned counsel was that interest was awarded at 12% per annum from 01.07.2004. After pointing out that the contract does not provide for or specify the rate of interest, he also pointed out that the first round of arbitration was concluded by award dated 13.03.2013. After the said proceedings were set aside in January 2017, the Section 11 petition for the constitution of an arbitral tribunal for *de novo* arbitration was filed only on 07.12.2018. In addition, he pointed out that the parties were also engaged in negotiations towards an amicable settlement. Therefore, he contended that interest should not have been awarded or, at the minimum, the period running from 2003-2007 should have been excluded while awarding interest. In support of the submission on interest, learned counsel for the petitioners relied upon the judgment of the Hon'ble Supreme Court in *Union of India v. Manraj Enterprises* ***(Manraj Enterprises)****(2002) 2 SCC 331*, particularly paragraph 13 thereof, to contend that interest should not have been awarded in the case at hand. For all these reasons, learned counsel for the petitioners submitted that the Award is liable to be set aside.

6. Mr.S.Amalaraj opened his submissions by focusing on the Award on interest. After pointing out that the contract does not bar the payment of interest, he submitted that the petitioners did not challenge the claim of interest except on the ground that the respondent is not entitled to the principal claim. With regard to the service charges claim, he referred to paragraph 12 of the Award and pointed out that the respondent herein had, in course of arbitral proceedings, restricted its claim on the basis of the service charge rates, as revised by the petitioners herein, and that the Award was made on that basis. After referring to the 62 bills in respect of which the statement of claims was submitted, learned counsel pointed out that the claims were eventually restricted to the bills produced by the petitioners herein. All these bills were issued on the basis of the check list prepared by the petitioners, the details entered in the measurement book after the work was inspected by the employer and also based on the acceptance test reports

of the petitioners. With regard to the award of the claim towards PVC pipes at Rs.16/- per metre, he submitted that the claim was not only towards supply but also towards labour, including fixing and jointing. In the context of the fixation of the rate at Rs.20/- per metre in the contract, he submitted that the arbitral tribunal adopted a rough and ready method in fixing the rate of Rs.16/- per metre after noticing that the respondent had deviated from the specifications in the factual context of non-availability of materials of the prescribed specification. On this issue, he also relied upon Exs.C112 to C118, which were bills for identical work executed by other contractors for the petitioners and were paid in full by the petitioners. He concluded his submissions by pointing out that no claim was made with regard to night work and that, therefore, the arbitral tribunal did not decide claim No.4.

7. Upon taking into account the rival contentions, the question that arises for consideration is whether the petitioners have made out a case warranting interference with the Award under Section 34 of the Arbitration Act. After considering the pleadings of parties, the arbitral tribunal framed eight issues, which are set out in paragraph 5 of the Award. The first issue

pertains to the restriction of service charges for the year 2002-2003 to 7.7% and 2.9% by the petitioners herein. On this issue, the tribunal entered its finding at paragraph 12 by taking note of the concession made by learned counsel for the respondent herein that the claim is being restricted to 7.70% and 2.90%. As such, the conclusion on this issue is unexceptionable.

8. Learned counsel for the petitioners focused attention on the alleged execution of additional quantity of work by the respondent by relying on the approval granted on 05.12.2001 for the erection of 8500 DPs and for upgrading 250 pillars. He also pointed out that the relevant contract is on turnkey basis and not on item rate basis. Learned counsel for the respondent submitted that the respondent did not exceed the quantity specified in the communication of 05.12.2001. Instead, he stated that the length of DPs was not specified in the contract and contended that the claims arose from the fact that the actual length, as executed, was greater than that envisaged by the petitioners herein. In order to determine this issue, it is necessary to examine the relevant terms of the agreement. The agreement uses the label turnkey project. However, such label is not conclusive and the terms of the

contract should be construed to determine the nature of the contract. Clause 1 of the agreement specifies the scope of work. Clause 3 thereof deals with project costs. Clause 3.2 is relevant and reads as under:

> "3.2 Payment to Consultant (RITES Ltd.) shall be made on the basis of actual quantities of works executed and measured jointly by Consultant (RITES Ltd.) and Chennai Telephones (BSNL) at the approved tender rates plus the admissible service charges."

9. On perusal of Clause 3.2, it is evident that payment is required to be made on the basis of actual quantity of work executed and measured jointly by the petitioners and respondent herein. Based on such quantity, payment is to be made at the approved tender rates plus admissible service charges. Thus, the contract is in the nature of a measure-and-pay contract in contrast to a lump-sum contract. A turnkey contract is typically awarded on lump-sum basis because this contracting model is usually, albeit not necessarily, used by an employer which does not have the requisite domain knowledge or expertise internally to assess the quantity of work and, therefore, opts for a fixed price for the specified scope of work either with

or without provision for price escalation. The service charges are specified in clause 3.3. Clause 1.10 of the contract provides for the maintenance of a measurement book containing details of trenching, cable laying and first fitting, etc. Upon taking into consideration the above clauses, the arbitral tribunal recorded the finding that it is an item rate contract. Paragraph 13 of the Award which deals with this issue reads, in relevant part, as under:

> "... A perusal of Clause 1.10 shows that the Claimant has to maintain M.Book for measurements of the work done. The M.Book should contain details of trenching, cable laying and first fitting in meters. As regards other items like DP Erection it will be indicated by number / quantity. In an item wise contract the contractor will be paid only for the items / quantity of work carried out by them which are mentioned in the M.Book and other documents certified by the concerned officials of BSNL. Further in this case, the respondents have not furnished the details of the excess quantum of work said to have been carried out by the Claimant nor have they pointed out with reference to the various bills submitted by the Claimant that in respect of any particular work

> the quantum has been exceeded. As pointed out by the learned counsel for the Claimant the Respondents have not rejected the bills or restricted the payments on the ground of excess claim. In the light of the above, this Tribunal comes to the conclusion that the Claimant on its own accord have not exceeded the works exceeding the quantum of work mentioned in Tender / Contract. Accordingly this issue answered in favour of the Claimant and against the Respondents."

The above conclusion of the arbitral tribunal is based on a reasonable construction of the relevant contract. Therefore, I see no reason to interfere with the Award in this respect.

10. The petitioners also challenged the Award in relation to the claim towards PVC pipes and the award thereof at the rate of Rs.16 per metre. The admitted position is that the contract specified that PVC pipes of 1.5 mm wall thickness should be used by the respondent. Equally, it is admitted that PVC pipes of 1.5 mm were not used on account of non-availability. The arbitral tribunal noticed the oral evidence of CW4 to the effect that PVC

pipes of 1.5 mm wall thickness were unavailable and that only pipes of 1 mm wall thickness were available in the market. The arbitral tribunal also took note of CW4's oral evidence that the PVC pipes used by the respondent herein are appropriate for electrical conduits and fit for the intended purpose of the petitioners herein. After taking into account the rival contentions on this issue, the arbitral tribunal recorded its finding in paragraph 26 of the Award. The said paragraph is set out below:

> "26. Countering the said submissions the Learned counsel for the Respondents contended that when the contract specifically provides that a particular type of ½ inch dia PVC PIPE is to be used the same should have been used by the claimant and admittedly such pipes have not been used and therefore the claimant is not entitled to claim at the rate of Rs.20/- per meter. But the Learned Counsel is not disputing the quantity of work carried out by the claimant in the light of the entries contained in the M-Books, check lists, AT Test Wing Reports etc., The Learned counsel for the Respondents is not able to justify as to why payments were not made in respect of other 'sub

office fittings' simply because the specified ½ inch dia PVC Pipes were not used and the Learned counsel in the light of Clause 3.2 of the agreement is not able to contend that the claimant has exceeded the quantity of work. When Clause 3.2 of the agreement does not specify any minimum or maximum quantities to be used and the agreement itself is an Item based contract, the Respondents are bound to pay on the basis of the quantities used for execution of the work and for the length of the pipes etc. used by the claimant. In the light of the above, this Tribunal is of the considered view that the Respondents are not justified in not paying the amounts claimed in the various Bills. But at the same time it has to be pointed out that when admittedly the claimants have not used the ½ inch dia PVC Pipe of the quantity specified in the agreement the claimant cannot claim at the rate of Rs.20/- per meter. Therefore this Tribunal is of the considered view that a sum of Rs.16/- per meter of work can be paid to the claimant and that will meet the needs of Justice."

11. Learned counsel for the petitioners assailed the Award as regards this claim on the ground that the admitted position was that the respondent did not use PVC pipes of the stipulated specification. On closely examining paragraph 26 of the Award, it is evident that the arbitral tribunal took into account the fact that the petitioners did not dispute the quantity of work carried out by the respondent, as evidenced by the M book, check lists and AT Test Wing Reports. Thereafter, the arbitral tribunal proceeded to record that non-payment is not justified after work was executed and put to use. In that context, the arbitral tribunal awarded the claim at the rate of Rs.16/- per metre. There is little by way of express reasoning in support of awarding Rs.16/- per metre. However, the arbitral tribunal has drawn this conclusion in the context of the contractual stipulation of Rs.20/- per metre after noticing the evidence of CW4 that PVC pipes of the contractual specification were unavailable in the market and that the pipes deployed by the respondent were fit for purpose. In the overall facts and circumstances, it cannot be said that the Award on this claim is perverse so as to warrant interference under Section 34 of the Arbitration Act. Therefore, the challenge on this ground is rejected.

12. The challenge on the award of interest remains to be considered. Both parties agree that the contract does not contain a clause dealing with or prohibiting grant of interest. Learned counsel for the petitioners relied upon the judgment of the Hon'ble Supreme Court in ***Manraj Enterprises,*** particularly paragraph 13 thereof, to contend that interest should not have been awarded in the case at hand. In ***Manraj Enterprises*****,** the Hon'ble Supreme Court was dealing with clause 16(2) of the general conditions of contract in a Railways contract which prohibited payment of interest on sums due and payable under the contract. Since the present contract does not contain a clause prohibiting payment of interest, the said judgment does not advance the cause of the petitioners. Section 31(7) of the Arbitration Act empowers the arbitral tribunal to award interest in the pre-reference, *pendente lite* and post-award period, provided the relevant contract does not prohibit the grant of interest. The arbitral tribunal has awarded interest at the rate of 12% p.a.. Keeping in mind the rates of interest prevailing at the relevant point of time, it cannot be said that the rate of interest is exorbitant so as to warrant interference. Learned counsel for the petitioners also contended that a particular period should have been excluded while

awarding interest. The basis of this contention was that this is the second round of arbitration. Interest is the time value of money and the admitted position in this case is that the respondent has not been paid amounts claimed under the bills until date. In such facts and circumstances, the award of interest at the rate of 12% p.a. from 01.07.2004 cannot be faulted. Therefore, the challenge on this ground is also rejected.

13. In the result, Arb. O.P.No.523 of 2022 is dismissed without any order as to costs.

10.10.2022

Index : Yes/No
Internet : Yes/No
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SENTHILKUMAR RAMAMOORTHY, J

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