A.No.418 of 2022
in
C.S.No.108 of 2021

S.SOUNTHAR, J.

This application has been filed by the plaintiff seeking summary judgment and decree on the ground that the respondent/defendant has no real prospect of success in defending the suit and there is also no reason for recording the oral evidence.

2. The applicant herein filed a suit seeking recovery of Rs.27,47,69,391/- (Rupees Twenty Seven Crore Forty-Seven Lakhs Sixty-Nine Thousand Three Hundred Ninety-One only) together with interest at the rate of 18% per annum from the date of institution of the suit till the date of realisation of the compensation amount.

3. It is the case of the applicant that respondent invited tender bids for Design, Detailed Engineering, Fabrication, Manufacture, Supply, Erection, Testing and Commissioning of 400/230-110 KV AIS Substation at Rasipalayam in Tiruppur District, Coimbatore Region.

4. The applicant/plaintiff herein, (earlier known as Alstom T&D India

Limited) was declared as successful bidder and the respondent/defendant issued the Letter of Award to the applicant/plaintiff on 16th May 2014. The final contract between the applicant and the respondent was signed and executed on 12th September 2015, whereby 16th May 2014 was to be the 'Effective Date'. As per the terms of Tender, the original completion date for the work to be done under the Contract was 15th November 2015.

5. It is averred by the applicant that the entire work under the contract and the tender was delayed due to unilateral changes made by the respondent and the entire delay was solely attributable to the respondent/defendant. The applicant/plaintiff completed all the work towards the Substation by 30th September, 2016 and commissioning was delayed due to non-availability of incoming line supply source from the respondent/defendant. Finally, around August, 2017 the incoming supply line was received from the respondent/defendant and the applicant/plaintiff was able to commission the sub-station. Thus, the work was completed by commissioning of the sub-station on 30th August, 2017. The applicant/plaintiff had written a letter to respondent/defendant on 04th October, 2017 requesting to grant of Extension of Time (herein after referred to as 'EoT' for brevity) without levying any liquidated damages till 30th August 2017 as the delay in commissioning was solely attributable to the respondent/defendant.

6. The respondent granted EoT without prejudice to its rights to levy penalty for alleged delay in commissioning of work. Inspite of several reminders and letters by the applicant to respondent emphasising that delay in completing the work was only due to the reasons attributable to the respondent, by letter dated 14.10.2019 the respondent informed the applicant that EoT till 31.08.2017 had been approved with a levy of 10% of the total Contract value as liquidated damages for the delayed commissioning of work amounting to Rs.17,20,76,978/-.

7. It is also averred by the applicant that it responded to the levy of liquidated damages by the respondent by sending a letter informing the respondent that delay in completing the work was solely attributable to the respondent and hence, imposition of liquidated damages on the applicant without any reason is not acceptable. The respondent by way of reply informed the applicant that out of the total delay of 656 days, 446 days delay was attributable to the respondent and 210 delay was attributable to the applicant and hence, as per the Clause 18 of the Contract, the respondent was entitled to levy 10% of the total contract value as liquidated damages. It is also averred by the applicant that it got documents relating to the above mentioned project under Right to Information Act, 2005 from the respondent. The letters and documents received from the respondent would show that liquidated damages was wrongly imposed on the applicant, in the light

of recommendation made by the Superintending Engineer and other officials of the respondent to grant EoT from time to time without levy of liquidated damages. On these averments, the applicant/plaintiff sought for recovery of money from the respondent/defendant.

8. The respondent herein filed a written statement and resisted the suit by contending that the delay in completion of the project was not due to the alleged unilateral changes made by the respondent but due to the reasons attributable to the applicant. The applicant-company submitted a single line diagram on 01.07.2014 and 04.07.2014, the respondent by its letter dated 16.07.2014 communicated to the applicant regarding 11 observations in the drawing to attend the remarks and resubmit the projects. After receipt of revised drawing, the technical wings of the respondent observed 16 remarks which includes revival of 4 CT to 6 CT arrangement and informed the same to the applicant on 08.09.2014. After incorporating the above remarks, the plaintiff-company submitted its revised drawing only on 07.10.2014 and 08.10.2014. The delay in resubmitting the revised drawing was not explained. Finally, the drawing was approved by the respondent on 19.11.2014. As per the terms of the contract, the design of the substation is the responsibility of the applicant/plaintiff. The drawings submitted by the applicant were incomplete and did not meet the project requirement. Only because of this reason, the respondent had given remarks and accordingly, the

applicant had resubmitted its drawings on three occasions. The delay of 111 days in finalising the drawings by the applicant was taken into consideration by the respondent at the time of finalising EOT.

9. It is also averred by the respondent that as per the approved PERT Chart, the control cable schedule should have been submitted on 20.08.2014 by the applicant. However, the applicant had submitted the same only on 29.06.2015 with more than 10 months delay and because of the said reason, the approval was granted only on 07.10.2015 within the normal period of four months.

10. It is also averred by the defendant that EoT was granted by the respondent/defendatn without prejudice to its rights to levy penalty for the delayed completion of work. It is also averred by the respondent that the total number of delays in commissioning the project was 656 days. Out of which, delay to the extent of 446 days was attributable to the respondent and delay to the extent of 210 days was attributable to the applicant. The delay caused at the beginning stage namely delayed submission of drawing for approval had impacted the timely completion of the project and ultimately, resulted in delayed completion.

11. The respondent also denied averment found in the plaint that there was arbitrariness on the part of the respondent in imposing liquidated damages. The

further contention of the applicant that the respondent had acted against the advice and recommendation of its own official was denied as incorrect. It is reiterated by the respondent that the delay caused by the applicant was taken into consideration and liquidated damages was imposed accordingly.

12. Mr.Vijay Narayan, learned Senior Counsel appearing for the applicant submitted that unilateral imposition of liquidated damages by the respondent to the tune of 10% of the total cost of the project is without any reason and hence untenable in law. The learned Senior Counsel further submitted that in the written statement filed by the respondent, it is not pleaded by them what was the actual loss suffered by them due to delay in commissioning of the project and hence, they are not entitled to impose liquidated damages on the applicant. In this regard, the learned Senior Counsel relied on the judgment of the Hon'ble Apex Court in ***Kailash Nath Associates vs. Delhi Development Authority*** reported in ***(2015) 4 SCC 136***. The learned Senior Counsel further submitted that imposition of liquidated damages cannot be done by one of the party to the contract as no person can be an arbitrator in his own cause.

13. The Learned Senior Counsel further submitted that the respondent herein has not filed any counter claim seeking liquidated damages from the

applicant. The quantum of liquidated damages can be assessed only by the Court or the Arbitral Tribunal and it cannot be assessed unilaterally by the respondent. Therefore, it is the submission of the learned Senior Counsel in the absence of any counter claim by the respondent seeking recovery of liquidated damages from the applicant/plaintiff, the applicant is entitled to summary judgement.

14. The learned Senior Counsel relied on the judgment of the Hon'ble Apex Court in ***J.G.Engineers Private Limited vs. Union of India and another***, reported in ***(2011) 5 SCC 758*** in this regard. The learned Senior Counsel further by taking this Court to Paragraph No.15 of the counter affidavit filed by the respondent in A.No.1151 of 2021 submitted that the respondent agreed to pay the retention amount after deducting statutory and non-compliance deductions like Income Tax, Labour Welfare Fund, ED, ST and CST.

15. Per contra, Mr.J.Ravindran, learned Additional Advocate General appearing for the respondent by drawing the attention of this Court to Clause 18 of the Contract between the parties, submitted that the respondent is entitled to levy liquidated damages subject to the maximum of 10% of the total contract price in case of delay in project. He has also drawn the attention of this Court to Clause

32.2 of the contract, which stipulates that in case of any un-executed delay by the Contractor in the performance of his obligations, the Contractor is liable to any or all of the following sanctions, Forfeiture of Performance Guarantee/Security Deposit/Imposition of Liquidated Damages and/or Termination of the Contract for default. In most of the cases, the respondent by taking into consideration the public interest allow the contractor to complete the work by granting EoT and impose liquidated damages. The learned Additional Advocate General by taking this Court to Paragraph Nos.4 and 5 of the written statement submitted that even at the initial stage there was delay on the part of the applicant in submitting the drawing/revised drawing and the said initial delay had cascading effect on the completion of the project as a whole. He further submitted that whether there is a delay on the part of the applicant or not cannot be decided without oral evidence and hence, the applicant is not entitled for summary judgment.

16. The learned Additional Advocate General by drawing the attention of this Court to Clause 15 of the Contract submitted that in case of amount due from the applicant to the respondent, the same shall be recovered from the performance guarantee/security deposit or by adjustment from money due to the applicant from the respondent. The learned Additional Advocate General by taking this Court to the communications relied on by the applicant submitted that EoT without penalty

was subject to approval by the Competent Authority and Competent Authority in this case would be the Managing Director of the respondent who has got power to decide on the financial matters. It is submitted by the learned Additional Advocate General that the communications relied on by the applicant that the Engineers of the respondent/Corporation, who were incharge of the project recommended EoT without penalty cannot advance the case of the applicant as they possess no power to decide on financial matters. The learned Additional Advocate General in support of his contentions relied on the judgment in Northern ARC Capital Limited vs. Sambandh Finserve Private Limited reported in 2022 SCC Online Mad 2904.

17. A perusal of the pleadings of the parties would suggest that applicant claimed that the entire delay in completion of the project is solely attributable to the respondent. On the other hand, the respondent specifically claimed that out of the total delay of 656 days, the delay due to applicant is to the tune of 210 days. Therefore, it is the specific case of the respondent that due to reasons attributable to the applicant, the project got delayed by 210 days. By relying on Clauses 18 and 32.2 of the contract between the parties, the respondent claims that it is entitled to levy liquidated damages on the applicant.

18. Clause 18 of the Contract between the applicant and respondent reads as follows:-

18.0.LIQUIDATED DAMAGES:

If the handing over of the work fully completed in all respects, if delayed beyond the scheduled date or extension thereof for commissioning as given under the Contract, the Contractor shall pay to the TANTRANSCO an amount calculated at the rate of half percent (0.5%) per completed week of delay of the value of the total Contract price subject to a maximum 10% of the total Contract price. In respect of contracts where supply effected in part or works executed in part, could not be beneficially used by the TANTRANSCO due to such incomplete execution, liquidated damages shall be worked out on the basis of entire contract price only and not on the value of of delayed portion.

The defaulting Contractors should be made liable to pay to the TANTRANSCO, in addition to Liquidated Damages for delay, the actual difference in price, whether TANTRANSCO orders the delayed quantity to be supplied/executed by other agencies at a higher rate.”

19. Clause 32.2 of the Contract between the applicant and respondent reads as follows:-

“*32.2. Any unexecuted delay by the Contractor in the performance of his obligations shall render the Contractor liable to any or all of the following sanctions, Forfeiture of Performance Guarantee / Security Deposit / Imposition of liquidated damages and / or termination of the Contractor for default.*”

20. The combined reading of Clauses 18 and 32.2 of the Contract would

make it clear in case of delay in completion of the project due to reasons attributable to the applicant/contractor, the respondent is entitled to levy liquidated damages at the rate of half percent (0.5%) for completed week of delay subject to the maximum of 10% of the total value of the contract.

21. In the case on hand, it is the specific case of the respondent that there is a delay on the part of the applicant in submission/resubmission of the drawings and submission of control cable schedule as per the approval PERT Chart. The learned Senior Counsel by taking this Court to the various communications of the Engineer Incharge, submitted that EoT was recommended by the Engineer Incharge from time to time without penalty or liquidated damages. On the other hand, learned Additional Advocate General appearing for the respondent would submit decision on levy of liquidated damages and penalty are relating to the financial matters and the Engineer Incharge can take decision only in respect of technical matters and the Engineer cannot recommend for EoT without liquidated damages.

22. In this regard, the communication from Chief Engineer, Transmission Projects-II, Mannarpuram, Trichy-20 to the Chief Engineer, Transmission, Chennai dated 07.06.2017 included in Page Nos.359 to 363 of the typed-set of papers filed by the applicant in this application assumes significance. In the said

communication, the Chief Engineer Incharge of the Transmission Projects recommended EoT upto 31.07.2017 without penalty subject to the consideration of the delay in approval of drawings. Therefore, it is clear that the recommendation for EoT without penalty is subject to the consideration of delay in approval of drawing.

23. It is the specific case of the respondent that even at the initial stage of the project there was a delay on the part of the applicant in submission/resubmission of the drawing. In one of the communication relied on by the applicant, the concerned Chief Engineer recommended EoT without penalty subject to consideration of delay in approval of drawing. Finally, the Managing Director of the respondent, who is the competent authority to decide on financial matters decided to impose liquidated damages by invoking Clauses 18 and 32.2 of the Contract between the parties. Whether there is a delay on the part of the applicant in submission of drawings or not is a disputed question of fact which can be decided only at the time of trial. It cannot be decided without relegating the parties to face the trial. The learned Senior Counsel for the applicant also contended that the respondent has not filed any counter claim seeking damages from the applicant/plaintiff and in the absence of such a counter claim, applicant/plaintiff is entitled to summary judgment.

24. In ***Kailash Nath Associates vs. Delhi Development Authority*** reported in ***(2015) 4 SCC 136*** while considering the scope of Section 74 of Contract Act, 1872 the Hon'ble Apex Court observed as follows:-

> "*43.1.Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. <u>In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.</u>*"

25. Therefore, it is very clear even if the contract between the parties provides for imposition of liquidated damages, only reasonable compensation can be claimed subject to the maximum amount mentioned in the contract as liquidated damages. The reasonable compensation would be fixed based on the loss suffered by the party, who complains of breach by other party. Whether the respondent suffered a loss due to delay in completion of the project and what is the quantum of compensation payable for the actual loss are all the questions of fact, which

requires evidence. It is for the respondent to prove the loss suffered by it. If respondent succeeds in proving the same, then as per law laid down in Kailash Nath Associates cited supra, respondent is entitled to claim that amount. Merely because in the communication imposing liquidated damages, the respondent failed to mention actual damages, it cannot be presumed there was no actual damage to respondent due to delay in completion of project. Therefore, this Court is of the view that the disputed questions of facts arising for consideration in this case can be decided only in a full fledged trial. The recording of oral evidence is also necessary to decide the question whether the delay is attributable to the applicant or not.

26. The amount payable to the applicant is withheld by the respondent by invoking Clause 18 of the contract and by imposing liquidated damages. Therefore, there is no necessity for the respondent to file counter claim for recovery of the alleged liquidated damages when the amount is already withheld. Therefore, the contention of the applicant that in the absence of counter claim by the respondent seeking recovery of the liquidated damages, it is entitled to summary judgment cannot be accepted.

27. In a suit filed by the applicant seeking recovery of the amount

withheld by the respondent, it is always open to the respondent to take a defence that in view of levy of liquidated damages, it is entitled to retain the amount. Whether the applicant is guilty of delay, whether the respondent is entitled to levy liquidated damages and if yes, to what extent, these are all the questions which have to be decided after trial of the suit. Therefore, I do not find any merit in the application for summary judgment and decree filed by the applicant/plaintiff and consequently, the present application is dismissed. No costs.

25.07.2023

dm

S.SOUNTHAR, J.

dm

A.No.418 of 2022
in C.S.No.108 of 2021

25.07.2023