



O.P.No.409 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	01.12.2022
Judgment pronounced on	08.02.2023

CORAM

THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

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M/s.Kris Heavy Engineering and
Constructions Sdn Bhd,
Athreya Apartments,
No.82-A, 7th Main Road,
VGP Layout, Part - I,
Pallavaram, Chennai – 600 041.
(Amended as per Order dated 28.03.2019
in A.No.2453/2019 and time extended as
per order dated 09.04.2019)

... Petitioner

vs.

1.Puncak Niaga Holdings Berhad,
Old No.66, New No.18,Second Street,
First Floor, Karpagam Avenue,
R.A.Puram, Chennai – 600 028.

Now at

No,12(First Floor), 7th Main Road,
Kasthuribai Nagar,
Chennai – 600 020.



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2.Lanco Infratech Limited,
Rep. by Mr.Savan Godivala
The Liquidator,
Lanco House, Plot No.4, Softness Units Layout,
HITEC City, Madhapur,
Hyderabad – 500 081.

3.Justice A.S.Venkatachalamoorthy
V-87, 5th Avenue, Anna Nagar,
Chennai - 600 040.

... Respondents

PRAYER: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to (a) set aside the Award dated 29.03.2013 passed by the third respondent herein and consequently allow the claims made by the petitioner, and (b) alternatively remit the matter to the third respondent to decide the issue in accordance with the findings of this Court.

For Petitioner : Mr.Anirudh Krishnan
Mr.Adarsh Subramanian
Mr.Varun Venkatesan

For 1st Respondent : Mr.Harishankar Mani
Mr.V.H.Vinay Datha
Mr.Mohamed Wasif Khan N
Mr.Adharsh.S



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ORDER

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The petitioner, the first respondent and second respondent entered into a joint venture (the JV) by executing a Joint Venture Agreement dated 28.01.2002(the JV Agreement) for the purpose of participating in a tender floated by the Chennai Metropolitan Water Supply & Sewerage Board(the CMWSSB) for the Chennai Water Supply Augmentation Project-I Package III. Under the JV Agreement, the equity participation ratio of the three parties was: petitioner: 10%; first respondent: 70%; and second respondent: 20%. The first respondent was the lead partner of the JV and a power of attorney dated 30.01.2002 was executed by the other partners of the JV in favour of the first respondent. The JV was the successful bidder for the contract and a Letter of Award dated 31.10.2002 was issued in favour of the JV. Later, Package 8 was awarded to the petitioner as a sub-contract and the parties entered into an agreement titled Key Terms to the Supplementary Joint Venture Agreement dated 13.03.2003 (Key Terms Agreement). Disputes arose between the three partners with regard to the petitioner's entitlement under the JV Agreement. Such disputes were referred for arbitration. The petitioner was the claimant and made claims for



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an aggregate sum of Rs.55,29,41,277/- under four heads of claims: a sum of Rs.81,67,273/- towards enabling costs with interest; a sum of Rs.3,99,74,004/- towards loss of profits due to reduction in scope of work; a sum of Rs.48,00,000/- towards loss of profits due to exclusion of the claimant from the operation and maintenance contract; and a sum of Rs.50,00,00,000/- towards compensation for loss of opportunity. In response, the first respondent filed a statement of defence and the petitioner/claimant filed a rejoinder statement.

2. The Arbitral Tribunal framed 16 issues upon consideration of the pleadings. Of these, in the present context, the two significant issues were: the second issue which related to rights and obligations *inter se* the JV members as well as in relation to the CMWSSB; and the fifth issue which related to whether the claimant continued to enjoy the rights as a JV partner *de hors* its status as one of the sub contractors. The claimant examined two witnesses as C.W.1 and C.W.2. Through those witnesses, Exs.C1 to C232 were marked. The respondents did not adduce oral evidence but exhibited 70 documents as Exs.R1 to R70. By arbitral award dated 29.03.2013 (the



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Award), the second and fifth issues were decided against the petitioner.

Except for the claim towards enabling cost, all the other claims were rejected and the first and second respondents were directed to pay a sum of Rs.14,62,503/- to the petitioner on or before 30.04.2013, failing which the petitioner would be entitled to interest thereon at 18% per annum from 01.05.2013 till the date of payment. This amount was paid to the petitioner in compliance with the Award. The Award is assailed by the petitioner/claimant.

3. Oral arguments on behalf of the petitioner were advanced by Mr.Anirudh Krishnan, learned counsel, and on behalf of the first respondent by Mr.Harishankar Mani, learned counsel.

4. Mr.Anirudh Krishnan provided an overview of the JV Agreement. He pointed out that Clause 12.1 of the JV Agreement provides that the failure or delay by a party to exercise any power or right under the JV Agreement shall not operate as a waiver of such power or right. He also referred to the Key Terms Agreement. By drawing reference to Clauses 1.1,



1.3, 1.5, 4.1 and 6 thereof, he submitted that it envisaged a significant change in the nature of the JV but was subject to a condition precedent. As per Clause 10.3 of the Key Terms Agreement, he submitted that the consent of CMWSSB was necessary. Indeed, he stated that if the consent of CMWSSB is not obtained, the JV Agreement would continue to operate and the Key Terms Agreement would not come into force. According to learned counsel, the admitted position is that the consent of CMWSSB was not obtained in relation to the Key Terms Agreement. Therefore, according to him, the JV Agreement continued to operate and, consequently, the petitioner continued to be entitled to 10% of the total revenue of the JV.

5. By drawing reference to internal pages 25 to 28 of the Award of the Arbitral Tribunal, learned counsel contended that the Arbitral Tribunal committed patent errors in concluding that the Key Terms Agreement had come into force notwithstanding the fact that the parties failed to obtain the consent of CMWSSB. Learned counsel further contended that the rejection of the claims made by the petitioner warrants interference by this Court.



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6. These contentions were refuted by Mr.Harishankar Mani, learned counsel. He submitted that the status of parties under the JV Agreement was modified by executing the Key Terms Agreement. As regards Clause 10.3 of the Key Terms Agreement, he submitted that the parties waived the requirement of obtaining the consent of CMWSSB by their conduct. In support of this contention, he referred to the Award of the Arbitral Tribunal and pointed out that the Arbitral Tribunal noticed the provisions of the JV Agreement at pages 21 to 24 of the Award. Thereafter, at pages 24 to 28, the Arbitral Tribunal noticed the key clauses of the Key Terms Agreement. As regards Clause 10 thereof, he submitted that the Arbitral Tribunal recorded a finding that the parties did not bother about getting approval from CMWSSB. In particular, he submitted that the Arbitral Tribunal took into account a reply from the petitioner (Ex.C36) emphasizing the need to proceed with contract implementation without delay. He pointed out that the Arbitral Tribunal also noticed that the claimant executed pipe laying work under package 8 and received payments in accordance with the Key Terms Agreement. By taking note of the above, he contended that the Arbitral Tribunal recorded the conclusion that the parties waived the requirement of



obtaining the approval of CMWSSB and that the Key Terms Agreement entered into force and was binding on the parties. Hence, learned counsel contended that the Award does not call for interference.

7. As is evident from the above, the petitioner founded its claims predominantly on its continuing entitlement under the JV Agreement on account of the failure of parties to obtain the consent of CMWSSB for the Key Terms Agreement. While other grounds were set out in the petition, this was the principal focus of the challenge. The sheet anchor of this contention is Clause 10.3 of the Key Terms Agreement. The said clause is set out below:

"10.3. The execution of the various terms in this agreement is immediate from the date of signing pending approval from CMWSSB. In case this agreement fails to get consent from CMWSSB, then the latest registered Joint Venture Agreement shall continue to apply, and no party is entitled to claim for whatever cost that may have incurred in executing this agreement."



On a plain reading of the above clause, it is clear that the Key Terms Agreement was intended to come into force pending approval from CMWSSB. Only in case parties failed to get the consent of CMWSSB, the JV Agreement would continue to apply. The Award discloses that the Arbitral Tribunal noticed the clauses of the JV Agreement at internal pages 21 to 24 of the Award. Thereafter, the Arbitral Tribunal took into account the significant clauses of the Key Terms Agreement. As regards the changed status and role of the petitioner, the Arbitral Tribunal noticed clauses such as Clause 7 which provided that the petitioner shall continue to be jointly and severally responsible to CMWSSB as a 10% shareholder in the JV, but the respondents shall indemnify the petitioner for all losses, liabilities and penalties incurred or to be incurred as regards CMWSSB and other third parties except in relation to work pertaining to package 8. After examining the JV Agreement, the Key Terms Agreement and the relevant correspondence, the Arbitral Tribunal recorded findings. In relevant part, the said findings are set out below:

"....All the parties did not bother about getting approval from CMWSSB and they completely



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ignored and proceeded further. In fact, when the final draft of key terms agreement was forwarded under a letter dated 14.02.2003 (Ex.C35) by the first respondent to the claimant, the later sent a reply (Ex.C36) emphasizing the need to curtail the delay immediately so that contract implementation can proceed. The key terms agreement was signed on 13.03.2003 and thereafter the claimant executed the pipe laying in package 8 and also received the amounts due to them as per the key terms agreement. This shows that the parties never intended to act upon and in other words the parties impliedly had given a go-bye to the requirement of getting approval. Consequently only key terms agreement continued to apply.”(internal page 26 of the Award).

“A careful reading of the various clauses in the key terms agreement would show that the parties decided and accordingly re-defined their role with



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new rights, duties and responsibilities.”(internal page 27 of the Award).

“....If the issue is examined as a whole, it can only be said that the claimant was primarily a sub contractor of JV (with reference to package-8) and secondarily a JV Member (with newly defined role with new rights, duties and responsibilities etc. as set out in the key terms agreement).”(internal page 27 and 28 of the Award).

8. From the above findings, it appears that the Arbitral Tribunal carefully examined and construed the relevant clauses of the JV Agreement and Key Terms Agreement. The Arbitral Tribunal also appraised the evidence by way of correspondence relating thereto. On that basis, the above findings were recorded. The above findings are based on a reasonable construction of the relevant clauses and by appraising the evidence on record. The petitioner has completely failed to establish that the conclusions of the Arbitral Tribunal call for interference under Section 34 of the Arbitration Act.



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9. For the above reasons, the challenge fails and O.P.No.409 of 2013

is dismissed. In the circumstances, there will be no order as to costs.

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Speaking Order

Index : Yes/No

Internet : Yes/No

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SENTHILKUMAR RAMAMOORTHY, J
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Pre-delivery order
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