IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	27.04.2023
Pronounced on	12.06.2023

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

O.P.No.731 of 2013

Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO),
Rep. by its Chief Engineer, Projects I,
NPKRR Maaligai,
Old No.800 (New No.144), Anna Salai,
Chennai 600 002.

... Petitioner

[**Amended as per order dated 22.02.2018 in Application No.1539 of 2018]

Vs.

1.M/s.Engineering Projects (India) Limited,
(A Govt. of India Enterprise),
Head Office at Core-3, SCOPE Complex,
7 Institutional Area, Lodhi Road,
New Delhi 110 003.

2.Dr.H.C.Visvesvaraya,
Presiding Arbitrator.

3.Mr.R.Subramanian,
Arbitrator.

4.Shri.P.Arumugam,
Arbitrator.

... Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 06.02.2013 passed by the Arbitral Tribunal namely, respondents 2 to 4, insofar as the same relates to grant of extension of time in favour of the first respondent under Issue No.11C2 and awarding certain amounts in favour of the first respondent under Issue Nos.11C3, 11C4, 11C5, 11C7, 11C9, 11C10, 11C12, 11C15, 11C17 and disallowing partly certain amounts in favour of the petitioner Board under Counter Claim Issues Nos.11R7, 11R10, 11R14, 11R15, 11R26 and rejecting the counter claims made by the petitioner Board insofar as it relates to the counter claim Issue Nos.11R1 to 11R6, 11R9, 11R16 to 11R25, 11R27 and 11R28 and adjusting the amounts awarded in favour of the petitioner herein under Issue No.11R8 wrongly, as against issue No.11C5 in favour of the first respondent and also for the award cost of this petition.

For petitioner : Mr.N.C.Ramesh, Senior counsel,
for Mr.T.Sivaprakasam
and Mr.G.Dhyaneshwar.

For Respondents : Mr.R.Murari, Senior counsel,
for Ms.Hema Srinivasan, for R1
No appearance for R2 to R4

ORDER

This Original Petition has been filed to set aside the impugned award passed by the Arbitral Tribunal dated 06.02.2013 and for the cost of this petition.

2. Mr.N.C.Ramesh, learned Senior counsel represented Mr.T.Sivaprakasam, learned counsel appearing for the petitioner and Mr.R.Murari, learned Senior counsel represented Ms.Hema Srinivasan, learned counsel appearing for the first respondent.

3. The brief facts of the case is as follows:

3.1 The petitioner had notified and invited the international competitive bids for complete Internal Coal Handling System (ICHS) on 19.12.1989. The first respondent had submitted its bid on 18.05.1990 and its bid for package I was selected by the petitioner. Therefore, the petitioner had issued two Letters of Intent (LOI) dated 28.06.1991 to the first respondent vide two contracts, one for supply and other for erection. As per Clause 3 of the said LOI, the Stream A is supposed to be completed within 24 months from the date of issuance of LOI and Stream B is supposed to be completed within 36 months from the date of issuance of LOI. The said LOIs were accepted by the first respondent vide its letter dated 10.07.1991. Thereafter, the petitioner and the first respondent had entered into agreements dated 02.08.1991 for supply and erection and also entered into a General Conditions of Contract (GCC).

3.2 Though the first respondent initially agreed for the aforesaid deadlines, the same could not be achieved due to the reasons not attributable to the respondent herein, which are as follows:

(i) Withdrawal of Cash Compensatory Scheme and deemed export benefits by the Government of India;

(ii) Policy changes by the Government of India;

(iii) Large scale escalation of steel prices due to decontrol;

(iv) Devaluation of INR against US Dollar;

(v) Increase in fuel cost, etc.,

3.3 Further, the said delay was also occurred due to the failure on the part of the petitioner to perform its obligations including providing fronts for erection and non-opening of letter of credit. Therefore, the petitioner had granted extension of time to the respondent from time to time. On 20.07.1996, the petitioner and the first respondent met and discussed with regard to various issues and agreed that the disputes between the parties shall be settled by discussion/arbitration. Further, the time line for completion of the project was extended till 30.06.1997 vide amendments dated 18.09.1996. Thereafter, the petitioner had also sent the letters dated 05.03.1997 and 12.02.1998 for granting extension of time until 31.12.1997 and 23.02.1998 respectively for completion of project. On 22.10.1999, the respondent sent a letter stating the reasons for delay and requested for further extension of time till 31.12.1999. However, the petitioner did not sent any reply to the said letter. Thereafter, in the meeting dated 28.12.1999, it was recorded by both the parties that the respondent had completed all the project works. On

16.01.2000, the performance test for Stream B was conducted by the respondent.

3.4 At this juncture, the petitioner had awarded another contract to the respondent for ICHS for a Thermal Power Station at Tuticorin. On 20.04.2000, the parties had met at Chennai and in the minutes of said meeting, the petitioner had recorded that the remarks/comments on the proposal given by the respondent for extension of delivery/erection may be furnished during the closure of project. Further, the petitioner had stated that the total expenses would be reconciled and they would settle the payments for both the projects, viz., Tuticorin and North Chennai (subject project) together, since both are inter-linked according to the petitioner. However, the first respondent had not accepted the same, since the North Chennai project and Tuticorin project were separate projects.

3.5 Due to the said dispute, the first respondent had sent a letter dated 04.07.2000 to the Engineer of the petitioner enclosing the claims for consideration in terms of Clause 27.1 of GCC and in terms of Clause 27.4 of GCC, for which the Engineer should have sent his response within 30 days, i.e., on or before 04.08.2000. However, no response was received from the Engineer. Hence, the first respondent had sent a letter dated 16.08.2000 invoking arbitration in accordance with Clause 27.4 of GCC. The Tribunal had entered upon reference on 11.12.2000. The claim statement was filed by the first respondent herein on 11.01.2001 and the counter claim was filed by the petitioner herein on 19.03.2001.

3.6 The Tribunal had framed three preliminary issues, 15 issues relating to the claims filed by the respondent and 28 issues relating to the counter claim filed by the petitioner and finally passed the impugned award dated 06.02.2013. Being aggrieved by the said impugned award, the petitioner had filed this original petition to set aside the same.

4. This Court is inclined to deal with the issues as follows:

A. Issue of Limitation:-

A1. Mr.N.C.Ramesh, learned Senior counsel appearing for the petitioner would submit that the Tribunal has framed the preliminary issue on the following aspects:

(i) arbitrability of claim and the counter claim,

(ii) applicability or otherwise of law of limitation.

A2. He would further submit that after considering the submissions of both the parties, the Arbitral Tribunal had passed a detailed award on 06.02.2013, whereby the learned Tribunal had held that the present claim is not barred by limitation and the claims made by the parties are arbitrable, since those claims have been made as subject matter of General Conditions of Contract (GCC).

A3. He would submit that the claim of the first respondent before the learned Arbitrator is not arbitrable and it is also barred by limitation. By referring Clauses 27.1 and 27.4 of GCC, he submitted that in terms of the said clauses, the claims should have been referred within 90 days from the date of completion of the performance test. In the present case, the performance test was completed on 16.01.2000. Therefore, the reference for the disputes should have been made by the first respondent in terms of Clause 27.1 of GCC within a period of 90 days from the date of completion of the performance test, i.e., on or before 15.04.2000. However, according to the petitioner, in the present case, the reference was made by the claimant only on 04.07.2000 and thereafter, the matter was referred to the appointment of arbitrator and the arbitration notice was issued on 16.08.2000. These references and arbitration notices were not in accordance with the Clause 27.1 of GCC. Therefore, he would contend that it is barred by limitation.

A4. It was also contended by the learned Senior counsel for the petitioner that while considering the issue of limitation, the Tribunal has taken the minutes of meeting dated 20.04.2000 into consideration and held that since the meeting was convened on 20.04.2000, at least five or six days before the meeting, the notice should have been emanated. Therefore, it has come to the conclusion that the reference was made within a period of 90 days from the date of completion of the performance test. According to him, the meeting, which was held on 20.04.2000, is only a project closing formality as accepted by the first respondent and therefore, it has nothing to do with regard to the reference made in terms of the Clause 27.1 of the GCC. Therefore, he would contend that the present claim is barred by limitation and the interpretation of the arbitrator with regard to the terms and conditions of the contract, particularly Clause 27 of GCC, is not correct.

A5. Further, he would submit that this Court can very well interfere, since the present claim is barred by limitation. The determination of issue of limitation by the learned Tribunal can be decided in a petition, which is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called as "the Act"). Hence, he would submit that findings of the Tribunal, to the extent that the present claim is within the period of limitation, is liable to be set aside.

A6. Per contra, Mr.R.Murari, learned Senior counsel, who is appearing for the first respondent would submit that the present claim is well within the period of limitation. The Clause 27 of GCC says that the reference has to be made within 90 days from the date of completion of the performance test. It is an admitted fact by both the parties that the date of completion of performance test was on 16.01.2000. Further, he would submit that the reference was made to arbitration in terms of Clause 27 of GCC, which has to be read with Clause 26 of GCC. The Clause 26 of GCC talks about the amicable settlement of the dispute. After exploring the settlement of dispute in terms of Clause 26 of GCC, if no amicable settlement is reached, then as per the terms of Clause 26.2 of GCC, all the disputes can be settled by virtue of arbitration as provided in Clause 27 of GCC. Hence, he would contend that initially the reference has to be made under the provisions of Clause 26 of GCC and thereafter under Clause 27 of GCC.

A7. He would further submit that in the present case, a period of 90 days mentioned in Clause 27 of GCC is not mandatory, but it is a directory due to the reason of invocation of Clause 26 of GCC. If Clause 26 of GCC is invoked, there is no prescribed period, which has to be determined for the settlement of the dispute amicably between the parties and it may go beyond 3 or 4 months also. There is no prohibition under Clause 26 of GCC. If no amicable settlement is arrived at as per Clause 26.1 of GCC, then the Clause 26.2 of GCC clearly prescribes to go for arbitration to settle the matter by virtue of Clause 27 of GCC. Therefore, he would submit that 90 days period mentioned in Clause 27 of GCC is insignificant, but it is only a directory in nature. He would also submit that without invoking Clause 26 of GCC, the parties cannot invoke Clause 27 of GCC directly, since Clause 26.2 of GCC provides that only if the amicable settlement is not reached, then the matter has to be settled by way of arbitration as provided in Clause 27 of GCC. Therefore, he would contend that all these aspects have been well considered by the Arbital Tribunal and it has come to the conclusion that the present claim is well within a period of limitation and the same is not barred by limitation as contended by the learned Senior counsel appearing for the petitioner.

A8. Upon hearing both the learned Senior counsel, it appears that the present issue pertains to the interpretation of Clauses 26 and 27 of GCC. The learned Senior counsel appearing for the petitioner has interpreted that in the event of any dispute, the same shall be referred in terms of Clause 27 of GCC. In simpler words, according to the petitioner, if the claims had been made as per Clause 27.1 of GCC, the Clause 26.1 of GCC will take place. Therefore, he would submit that without making any claim as per Clause 27.1 of GCC, Clause 26.1 of GCC will not take place.

A9. In reply, Mr.Murari, learned Senior counsel, who is appearing for the respondent had interpreted those Clauses of GCC and submitted that the Clause 26 of GCC will come into picture immediately upon any dispute among the parties. The said disputes shall be referred with regard to how to explore all the possibilities to settle the dispute amicably in terms of Clause 26 of GCC. In the event no settlement is arrived at, Clause 26.2 of GCC provides for the reference of the disputes to the arbitration. Thereafter, Clause 27 of GCC will be invoked. Therefore, he would contend that the limitation period mentioned in Clause 27 of GCC is not mandatory but it is a directory, which is issued due to the reason that the settlement of disputes may take even beyond a period of 90 days from the date of completion of performance test. Therefore, the limitation period mentioned in Clause 27.1 of GCC will not have any consequences and it is only insignificant.

A10. On the other hand, that Tribunal had arrived at a conclusion that the meeting was convened for settlement of disputes on 20.04.2000. According to the petitioner, the claim should have been made on or before 15.04.2000. For convening a meeting, the notice should have been emanated at least 5 or 6 days before the meeting. Therefore, the Tribunal had come to the conclusion that the reference was made well within the period of 90 days and hence the issue of limitation does not arise. Further, he would contend that since no settlement was arrived, the arbitration clause was invoked.

A11. After considering all the above aspects, this Court is of the view that totally there was a meeting on 20.04.2000, which had been held to discuss and to resolve the disputes amicably and a perusal of the content of the minutes of the meeting would exhibit the same. Therefore, the process of amicable settlement was already on in terms of Clause 26.1 of GCC and in terms of Clause 26.1 of GCC. A perusal of the minutes of meeting and other documents, communications would establish that the dispute is well within the limitation period and that is the reason why the meeting was convened. In the said meeting, if there was any claim, which was barred by limitation, the same should have been discussed, otherwise, the meetings should not have been convened. Having convened the meeting and discussed all the issues with regard to the payment and since no settlement was arrived at in the said meeting, it is not fair on the part of the petitioner to come before this Court stating that the claims were barred by limitation.

A12. As contended by Mr.Murari, learned Senior counsel, this Court is also of the view that the Clauses 27 and 26 of GCC has to be read together. When we read Clauses 26 and 27 of GCC together, it is clear that without invoking the Clause 26 of GCC, Clause 27 of GCC cannot be invoked. In the present case, once if the parties invoke Clause 26 of GCC for amicable settlement, only subsequent to the failure in attaining resolution amicably in terms of Clause 26 of GCC, thereafter only matter referred to Clause 26.2 of GCC for arbitration and subsequently, the terms and conditions of Clause 27 of GCC would apply. Therefore, this Court is of the considered view that without invoking Clause 26 of GCC, the parties cannot invoke Clause 27 of GCC directly, since Clause 26.2 of GCC provides that if only amicable settlement is not reached, the matter has to be settled by way of arbitration as provided in Clause 27 of GCC. Therefore, the period of 90 days mentioned in Clause 27 of GCC is not mandatory but it is a directory in nature, due to the reason of invocation of Clause 26 of GCC. Under these circumstances, taking all these aspects into consideration, the Tribunal had arrived at conclusion that the present claim was made well within the period of limitation and rejected the communication of the petitioner. This Court is also of the view that the present claim is well within the period of limitation for the reason assigned above.

A13. Since no settlement was arrived, the claim was made before the Tribunal on 04.07.2000 and the notice for arbitration was issued on 16.08.2000, wherein all the claims were set out. Therefore, many ways of interpretation of Clauses 26 and 27 of GCC is possible and it is for the arbitrator to interpret the Clauses and come to a conclusion. Unless and otherwise if there is any patent illegality on those interpretations of the arbitration Clauses, this Court, which is normally sitting under Section 34 of the Act, will not interfere. As stated above, many ways are possible to interpret the contract. Therefore, in the present case, the interpretation of the contract by the Tribunal was just and reasonable. It is not unreasonable to render that the Arbitration Award suffers from patent illegality. Further, this Court had also found that the approach of the Arbitrator is also not arbitrary or capricious while interpreting the terms of the contract.

A14. A similar aspect was considered and approved by the Hon'ble Supreme Court at the paragraph No.42 in the case of ***Associate Builders vs. Delhi Development Authorities*** reported in ***2015 3 SCC 49***, which reads as follows:

> *"42. In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub heads -*
>
> *42.1 (a) a contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:*
>
> > *"28. Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated in India,-*
> >
> > *(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"*
>
> *42.2 (b) a contravention of the Arbitration Act itself would be regarded as a patent illegality- for example if an arbitrator gives no reasons for an award in contravention of section 31(3) of the Act, such award will be liable to be set aside.*
>
> *42.3 (c) Equally, the third sub-head of patent illegality is really a contravention of Section 28 (3) of the Arbitration Act, which reads as under:*

"28. Rules applicable to substance of dispute.- (3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do."

A15. Therefore, this Court is of the considered view that the present claim is very well within the limitation as held by the Arbital Tribunal. The Arbitral Tribunal had given sustainable reasons and findings for its decisions as to how the present claims are well within limitation. Hence, the said aspect of the Tribunal need not to be interfered by this Court. Therefore, since there are no merits in the contentions of the learned Senior Counsel for the petitioner, this Court is inclined to uphold the award of the Arbitrator in this aspect.

A16. The learned Senior counsel appearing for the petitioner had referred the following judgements with regard to the limitation aspect:

(i) ***Siemens Limited rep. by its Manager vs. Marg Limited*** report in ***(2019) 5 Mad LJ 428***;

(ii) ***S.Pandi Meenakshi and another vs. Hinduja Leyland Finance limited*** being an order dated 03.04.2019 made in ***O.P.No.783 of 2018***;

(iii) ***Ion Exchange India Limited vs. Angeripalayam Common Effluent Treatment Plant Limited*** being order dated 30.04.2019 made in ***O.P.No.942 of 2018 and A.No.8508 of 2018***;

A17. Since this Court had already arrived at a conclusion that the present claim is well within limitation, the above judgements referred by the learned Senior counsel appearing for the petitioner will not be applicable for the present facts of the case.

B. Extension of time:-

B1. The next issue is pertaining to the aspect of extension of time.

B2. According to the learned Senior counsel appearing for the petitioner, the petitioner had not at all extended the time without the levy of liquidated damages. Hence, the first respondent is not entitled for extension of time after a period of 13 years and the same was wrongly held by the Arbital Tribunal.

B3. However, according to the learned Senior counsel for the first respondent, the time extended up to 31.12.1999 was for completion of the project and that is the reason why they had opportunities to complete the project. If the petitioner had no intention to extend the time limit and to permit the respondent to complete the project, they are not supposed to have allowed it and should have terminated the contract. In the present case, no such things happened and as found by the Tribunal, the extension of time was granted up to 31.12.1999 from time to time. Therefore, the question of refusal to grant extension of time does not arise and the Tribunal has well considered this aspect and come to the conclusion. Hence, he would contend that the award need no interference of this Court on this aspect.

B4. Upon hearing both the learned Senior counsel, it is clear that the present issue is pertaining to the extension of time and as per the terms of contract, the present project is supposed to have completed within a period of 24 months from the date of issuance of Letter of Intent (28.06.1991) i.e., on or before 27.06.1993. A perusal of the documents would shows that at the meeting held on 05.09.1998, the parties had agreed to extend the date for completion of the project up to 30.09.1999 and the parties had continued their discussions regarding the date of completion and the same is clear from the letter dated 22.10.1999. The performance of the first respondent was accepted at the minutes of meeting dated 28.12.1999, wherein it was stated that the TNEB advised the EPI to complete the formality with regard to the submission of bills, handing over of spares, reconciliation of issues, etc., expeditiously.

B5. Therefore, it is crystal clear that the parties have jointly agreed that the time period for completion of work was extended until 31.12.1999. Further, the petitioner had also permitted the first respondent for carrying out the performance test for Stream A and Stream B. These works were completed on 31.12.1999 and the performance test on Stream B was completed on 16.01.2000 and on Stream A was completed on 20.06.1999. These aspects would show that the petitioner had permitted the respondent to carry out the performance test after the completion of project and it would ultimately show that due to the extension of time only, the respondent was in a position to complete this project and with the permission of the petitioner only, the performance test was conducted. Having permitted the respondent to complete the work and allowing him to conduct the performance test, now it is not fair on part of the petitioner to come forward and to argue before this Court that they had not granted any extension of time.

B6. Therefore, this Court is of the considered view that since all these facts were well considered by the Tribunal and the Tribunal had passed the well reasoned Award, the same does not require any interference of this Court.

C.Loss of Profit:-

C1. The next issue is with regard to the claim No.11C3, which pertains to the loss of profit.

C2. The learned Senior counsel appearing for the petitioner would submit that the Tribunal had followed the Hudson's formula. Further he would submit that the issue of loss of profit was raised by the first respondent for the first time in the claim letter dated 04.07.2000 and the same was not raised initially. By referring the clauses 22.2 of GCC, he would submit that since at the initial point of time the present claim was not made under Clause 22.2 of GCC, it is not permissible to raise the loss of profit after completion of the project.

C3. Further, he would submit that the award is not based on any evidence. Though the Auditor had furnished the certificate with regard to the determination of the loss of profit by virtue of the Discounted Cash Flow (DCF) method, the petitioner had no opportunity to rebut the evidence by means of cross-examination. Therefore, he would submit that the tribunal had disregarded the vital facts and hence, this award was passed without any evidence and the same is liable to be set aside. He referred the following citations in support of his submission:

(i) ***Parsa Kente Collieries Limited vs. Rajasthan Rajya Vidyut Utpadan Nigam Limited*** reported in ***(2019) 7 SCC 236***;
(ii) ***Monarch Erectors Private Limited vs. Bhiwandi Nizampur City Municipal Corporation*** reported in ***2012(1) ARB.LR.232 (BOMBAY) (DB);***
(iii) ***Ennore Port Limited vs. Skanska Cementation India Limited and others*** reported in ***2008 (2) Arb.LR.598 (Mad)***;
(iv) ***Edifice Developers and Project Engineers Ltd. vs. Essar Project (India) Limited*** reported in ***2013 SCC ONLINE BOMBAY 5 (DB);***

C4. On the other hand, Mr.M.Murari, learned Senior counsel for the respondent would submit that in the present case, Clause 22.2 of GCC will not apply, since it talks about the price variation due to the inflation. In the present case, the loss of profit was claimed for rendering the additional expenses and other overhead expenses during the extended period of contract and the claimant had raised the claim for a sum of Rs.22,79,89,000/- before the Tribunal. Only based on the certificate of the Chartered Accountant, the Tribunal has come to the said conclusion.

Though the Chartered Accountant suggested for loss of profit of the first respondent by virtue of three different methods, the arbital Tribunal felt that the appropriate method to determine the loss of profit would be Hudson's formula, wherein the loss of profit would be arrived at based on Discounted Cash Flow (DCF) method, since the DCF method was the lowest out of the said three different methods. Accordingly, it had selected the said method.

C5. As far as the objection of the petitioner with regard to the application of Hudson's formula is concerned, the Tribunal had taken the same into consideration all the three different methods and after consideration of all those aspects, the award came to be passed.

C6. Upon hearing the learned Senior counsel for the petitioner and upon perusal of the award and other documents, it reveals that the LOI was granted on 28.06.1991 and the project was supposed to have been completed after two years from the date of LOI i.e., on or before 27.06.1993. However, due to various reasons, the project was not completed by the first respondent and the same was attributed to the petitioner, that is the reason why the petitioner had extended the period for completion of work from time to time till 31.12.1999. During those period, they had spent huge expenses on the aspect of the overhead expenses for running the office at the working site of the petitioner and also maintaining the site offices and engaging the personnels, who were looking after the site. Apart from that, they had also invested huge money for various aspects.

C7. After taking all the above aspects into consideration, the Tribunal had selected the Hudson's formula and determined the loss of profits on the basis of the certificate issued by the Chartered Accountant. Initially, the Chartered Accountant had calculated the loss of profit in three different methods and the learned Arbitrator had arrived at the said loss of profit by selecting the DCF method. The Tribunal had held that the balance sheet, which was filed by the first respondent for a period of 12 years, had proved that the overhead expenses is 14.18% and the loss of profit is 9.57% per annum.

C8. The Tribunal had further took note of the details of expenses and salary for extended period of contract, which was filed by the first respondent and certified by the Chartered Accountant. The Tribunal had also noted that the respondent had proved that due to the delay caused by the owner, to keep the site, etc., to complete the work. The Tribunal had further held that the Chartered Accountant, had also filed the details with regard to his expenses and salary paid.

C9. The Tribunal had also recorded that it was of the view that financial health of an organisation is demonstrable by its Balance Sheet and the claimants had produced the balance sheet for a period of 12 years. Further, the Tribunal had also took note of the expenses. Therefore, based on Hudson's formula, the Tribunal granted a sum of Rs.9.68 crores, which was the lowest possible calculations among these three methods.

C10. In view of the above, since the loss of profits arrived at by the Tribunal is based on the sound reasons and supported by evidences and also based on the well accepted Hudson's formula, I do not find any patent illegalities in the award to interfere with regard to the loss of profit as awarded by the Tribunal and I do not find any merits in the submission of the petitioner. Therefore, the award with regard to the loss of profit as ordered by the Tribunal stands confirmed.

D. Returning of Performance Bank Guarantee with interest:-

D1. The next point for consideration is with regard to the Claim Nos.C4, C5, C7, C9, C12 and C14. In all these claims, the petitioner has raised the issue of limitation. Since this Court had already arrived at the conclusion that the present claims are well within the period of limitation, this Court has discussed and grant its findings with the regard to other aspects of the relevant issues as below.

D2. As far as the Claim No.C4 is concerned, it pertains to the returning of the performance guarantee with interest.

D3. The learned Senior counsel for the petitioner would submit that the performance guarantee will be returned without any interest at the end of the guarantee period. Thus, the first respondent was not entitled to any interest or bank charges.

D4. The learned Senior counsel for the first respondent would submit that in the present case, the project was completed on 31.12.1999 and as per the terms and conditions of the performance guarantee, the same shall continue up to one year from the date of completion of the project, i.e., the performance guarantee would subsist up to 31.12.2000. Subsequent to the said period, the petitioner is supposed to return the performance guarantee. However, since they had failed to return the performance guarantee, the Tribunal had awarded interest.

D5. Upon hearing both the learned Senior counsel, it is clear that it is an admitted fact that the performance bank guarantee would be returned without any interest immediately after the expiry of a period of 1 year from the date of completion of the project and if there is any failure on the part of the petitioner to return the performance bank guarantee after the expiry of a period of 1 year from the date of completion of the project, nothing has been provided in the contract for payment of interest.

D6. Under the circumstances, the Tribunal had arrived at the said conclusion and awarded the interest for the delayed period, since the performance bank guarantee was not returned. In the contract nothing has been provided about the interest, in the event of failure of returning the performance guarantee after expiry of one year from the date of completion of the project. In the present case, the transaction between the petitioner and respondent are in the nature of business dealings. In the absence of any contract for payment of interest, certainly the respondent is entitled for interest at the commission rate wherever only interest rate is prescribed under the contract after the expiry of one year from the date of completion of project. On this aspect, I find no error or patent illegality committed by the Tribunal to interfere. Hence, this Court is inclined to agree with the interest awarded by the Tribunal on the aspect of the delay in returning the performance bank guarantee.

E. Withdrawal of Cash Compensatory Support:-

E1. The next issue is claim No.11C5, which is pertaining to the withdrawal of the Cash Compensatory Support (CCS) to the deemed exporter. The project is an ADB funded project and the EXIM policy was announced on 01.04.1990. As per the policy, the ADB funded project was considered as deemed exports and deemed export benefits were granted. The export subsidy was called as cash compensatory support, whereby a sum of Rs.3.75 Crores was granted and a sum of Rs.1.18 Crore towards sale proceeds on selling of import replenishment licenses to third parties. Since CCS withdrawn by the Government with effect from 30.07.1991 after the issuance of LOI on 28.06.1991, this was claim for statutory price variation and Force Majeure.

E2. According to the petitioner, the said claim was raised by the respondent on 16.03.1993 and the same was rejected by the petitioner vide letter dated 24.05.1995. After a period of 5 years from the said date, the present claim came to be raised again. In terms of Clause 27.4 of GCC, either the first respondent should have referred the claim to arbitration within a period of 30 days from the date of rejection or the first respondent should have been reserved his right to refer this claim to arbitration after the completion of work, which had not happened. Therefore, he would contend that without considering these aspects, the tribunal had allowed these claims.

E3. On the other hand, the learned Senior counsel for the respondent would submit that the petitioner had referred Clause 27.4 of GCC before this Court, but all these aspects were not been argued before the Arbitrator. Therefore, he would submit that they are not entitled to request this Court to interpret Clause 27.4 of GCC.

E4. Considering the submissions made by the parties, since the petitioner failed to make any reference to Clause 27.4 of GCC before the Arbitral Tribunal, it is not open for the petitioner to raise the said issue before this Court. That too, the present issue is pertaining to the withdrawal of the CCS. If CCS was available, the first respondent would have participated in the tender after taking the said CCS. However, since it has been withdrawn, naturally, it is a Force Majeure Clause and certainly, the first respondent is entitled for losses. Even assuming that it was rejected by the petitioner in the year 1995, in terms of Clause 27.4 of GCC, they have to accept the same until the completion of the project, which would mean that after completion of the project, the same issue can be raised along with other claims.

E5. In such view of the matter, I do not find any error in the award passed by the Tribunal and therefore, the submission of the learned Senior counsel for the petitioner is not sustainable. Accordingly, this Court is inclined to upheld the award passed by the Tribunal in this aspect.

F. De-control of Steel Price:-

F1. The next issue pertaining to the Issue No.C7, which pertains to the de-control of steel price.

F2. According to the petitioner, the first respondent had raised the issue on 16.03.1993 and the same was rejected and therefore, there is a bar under Clause 27.4 of GCC to raise the present issue.

F3. According to the first respondent, the present issue has not been raised before the Tribunal with regard to the applicability of Clause 27.4 of GCC and it is not open for them to raise the said issue before this Court on the aspect of Clause 27.4 of GCC.

F4. As far as this issue is concerned, the petitioner had not raised the issue with regard to the applicability of Clause 27.4 of GCC. A reading of Clause 27.4 of GCC would show that they have to accept the findings of the owner/engineer. From a conjoint reading of Clauses 27.4 and 27.2 of GCC, it would appears that whatever decision, the same has to be followed until the completion of work. The intention of Clause 27.2 of GCC was that the work should not be disturbed at any cost and for any dispute. Once if any order is passed by the vendor/contractor or owner/purchaser, it is final until the completion of the work, which means, immediately after completion of work, the limitation would start. Therefore, since all these aspects have been considered by the Tribunal, this Court is of the considered view that there is no scope for interference as contended by the learned Senior counsel for the petitioner.

G. Other Claims:-

G1. The issues pertaining to other claims are as follows:

(i) Claim No.11C9- Outstanding payments of running bills;

(ii) Claim No.11C10- Retention Money payable;

(iii) Claim No.11C12- Mobilization Advance;

(iv) Claim No.11C14- Interest on delayed payments.

G2. Upon hearing the learned Senior counsel on both sides, it appears that these are all the issues pertaining to the claimant's entitlement about the fresh variation due to increase in quantity and price of steel structures and these are all the aspects, which has to be decided on the facts. Therefore, as tribunal is the fact finding authority, they found that there is increase in quantity and also increase in price and had passed the award. Therefore, this Court is not inclined to interfere the award with regard to this aspect under Section 34 of the Act, as this Court did not find any patent illegalities to interfere in the award on the above aspects.

G3. Further, as far as Claim Nos.C9, C10, C12, C14 are concerned, this Court finds that there is no infirmity in the award passed by the Tribunal and this Court is inclined to up held the award passed by the Tribunal

H. Rejection of Counter claim:-

H1. The petitioner had also raised the claim against the rejection of the counter claim and these counter claims are inter-linked with the claims of the claimant as awarded by the tribunal. Since this Court had upheld the award passed by the Tribunal, there is no scope to entertain the challenges made against the rejection of counter claim of the petitioner by the tribunal.

H2. Accordingly, this Court is not inclined to interfere with the award passed by the Tribunal and the present Original Petition is liable to be dismissed.

5. The following judgements were referred by the learned Senior counsel for the petitioner in support of his contentions:

(i) ***Iron and Steel Co. Ltd. vs. Tiwari Road Lines***, reported in ***(2007) 5 SCC 703***;

(ii) ***Simpark Infrastructure Private Limited vs. Jaipur Municipal Corporation*** reported in ***(2013) 3 RLW 2133***;

(iii) ***Nirman Sindia vs. Indal Electromelts Ltd, Coimbatore,*** reported in ***1999 SCC OnLine Ker 149***;

(iv) ***Sushil Kumar Bhardwaj vs. Union of India*** reported in ***2009 SCC OnLine Del 4355***;

(v) ***Star Mineral Resources Private Limited vs. Madhya Pradesh State Mining Corporation Limited***, reported in ***2017 SCC OnLine MP 922***;

(vi) ***National Highways Authority of India vs. PATI-BEL (JV)***, reported in ***2019 SCC OnLine Del 6793***;

(vii) ***Build Fab vs. Airport Authority of India***, reported in ***2012 SCC OnLine Cal 7189***;

(viii) ***Halidram Manufacturing Company Private Limited vs. DLF Commercial Complexes Limited,*** reported in ***2012 SCC OnLine Del 2139***;

(ix) ***Ved Prakash Mithal & Sons vs. Delhi Development Authority***, reported in ***2018 SCC OnLine Del 9884***;

However, since this Court had rejected the submissions made by the learned Senior counsel for the petitioner and the above judgements will not be applicable for the present facts of the case and issues decided by this Court, this Court is not inclined to deal with the judgements referred by him in support of his submission.

6. With the above, this Court is inclined to confirm the award dated 06.02.2013 passed by the Tribunal and accordingly, the present Original Petition is dismissed. No costs.

12.06.2023

Speaking/Non-speaking order
Index : Yes / No
Neutral Citation : Yes / No
nsa

KRISHNAN RAMASAMY.J.,

nsa

O.P.No.731 of 2013

12.06.2023