IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 13.06.2023

Coram

The Honourable Mr.Justice KRISHNAN RAMASAMY

O.P.No.563 of 2018
and Application No.4846 of 2018

Cuddalore Port Company Private Limited,
5th Floor, Prince Tower No.25 & 26,
College Road, Nungambakkam,
Chennai – 600 006.
...Petitioner

Versus

Welspun Corp. Ltd.,
With Registered Office at
Village – Varsamedi, Tal-Anjar, District Kutch,
Gujarat – 370 010.
and
Correspondence address at
7th Floor, Welspun House,
Kamala City, Senapati Bapat Marg,
Lower Parel (W),
Mumbai – 400 013.
Represented by its
Deputy General Manager, Legal – Mr.Arnab Pahari
...Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the order dated 08.12.2016 in the Arbitration proceedings between the petitioner and the respondent.

For Petitioner : Ms.Varsha Chandrasekar
for Mr.K.Harishankar
For Respondent : Mr.Karthik Sundaram

ORDER

This Original Petition has been filed by the petitioner seeking to set aside award dated 08.12.2016 passed by the learned Arbitrator.

2. Though the petitioner has filed this petition challenging the Arbitral Award on many grounds, the learned counsel for the petitioner restricted the relief sought herein, only in respect of a sum of Rs.19,70,03,136/- awarded towards Inventory Holding Cost. The learned counsel submitted that the learned Arbitrator has awarded such a huge amount towards Inventory Holding Cost, in the absence of any evidence.

2.1. Further, the learned counsel drew the attention to this Court to paragraph no.182 of the Arbitral Award, which reads as follows:

> *"182. The claimant has also sought for Rs.19,70,03,136/- towards inventory holding costs, it being calculated on the gross cost of the plates at the interest rate charged by Canara Bank from 22.11.2011 to the date of filing the claim petition i.e., 25.05.2015 after giving adjustment to the*

interest calculated from 14.03.2011 till 25.05.2015 of Rs.5,47,47,175/- on the advance amount of Rs.6,85,50,000/- and on the interest calculated from the sale proceeds of 2831.49 MT at Rs.88,071,325 at the rate charged by Canara Bank on the LOC opening rates. The claimant had incurred storage cost on the plates in their plant and claimed a sum of Rs.79,92,319/-. Considering the indefinite deferment sought by the respondent, the claimant seeks payment of storage costs till the date of filing of the claim petition with interest at Rs.79,92,319/-. The claim is factually justified and hence, the same merits to be considered in favour of the claimant."

Referring the above paragraph of the Arbitral Award, the learned counsel contended that in order to justify the awarding of Inventory Holding Cost, no exhibits have been discussed by the learned Arbitrator.

2.2. The learned counsel also submitted that in the case of ***Kailash Nath Associates Vs. Delhi Development Authority & Anr.*** reported in ***(2015) 4 SCC 136,*** particularly, in paragraph no.43.6, the Hon'ble Supreme Court has held as follows:

"43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded."

Relying the above judgment, the learned counsel contended that if there was a loss or damage, the respondent ought to have proved the actual damages or loss since such proof cannot be dispensed with at any cost, but, in the present case, in the absence of any such proof, the learned Arbitrator has awarded a sum of Rs.19,70,03,136/- towards Inventory Holding Cost. Hence, there is no justification on the part of the learned Arbitrator with regard to the amount awarded towards Inventory Holding Cost.

3. *Per Contra*, the learned counsel appearing for the respondent submitted that it is not true that the learned Arbitrator has awarded the Inventory Holding Cost in the absence of any evidence. The Inventory Holding Cost is nothing but the cost of funds incurred by the respondent towards holding the inventory. The letters from Canara Bank which were marked as Exhibit C34 show the rate of interest paid by the respondent during the period from 22.11.2011 to 25.05.2015. Based on the interest rate mentioned in the letters of Canara Bank, the learned Arbitrator has considered the respondent's claim of Inventory Holding Cost and awarded a sum of Rs.19,70,03,136/- towards Inventory Holding Cost.

3.1. Further, the learned counsel submitted that initially, on

28.04.2010, the petitioner floated a tender for supply of Carbon Steel Line Pipes Complete with Concrete Weight Coating, External Anti-Corrosion Coating Using Coal Tar Enamel and Anodes, for the purpose of constructing a marine terminal for import of crude oil and export of products such as Euro IV auto fuels. Pursuant to the said tender, the respondent participated in the tender and submitted its offer for a total quantity of 11,000 Meters at the price of Rs.76,68,73,140/-. After discussions, the respondent submitted its revised price offer on 15.02.2011 for a total quantity of 11,000 Meters at the price of Rs.68,55,00,000/-. As per the contract, the respondent was supposed to deliver the goods between 20.06.2011 and 15.07.2011. On 15.02.2011, the petitioner issued a Letter of Acceptance to the respondent, pursuant to which, on 16.02.2011, the respondent placed a purchase order on an overseas supplier viz., M/s.Daewoo International for supply of 869 HR plates of 6465 MT at the price of USD 1050 P.M.T. On 14.03.2011, the petitioner paid a sum of Rs.6,85,50,000/- (10% of the contract value) as advance amount to the respondent. While so, the petitioner sent an e-mail dated 28.04.2011 to the respondent, seeking deferment in the delivery date i.e., till February – May, 2012. Thereafter, on 26.05.2011, in furtherance of the Letter of

Acceptance, the petitioner and the respondent entered into a contract, under which, the respondent agreed to supply an increased quantity of 11,322 Meters of 48" Line Pipe of 130 mm CC thickness, for an increased consideration of Rs.71,07,83,315/-. Again, the petitioner sent an e-mail dated 26.07.2011 to the respondent, seeking further deferment in the delivery date i.e., till July – September 2012. The respondent called upon the petitioner to open the Letter of Credit for the payment of remaining 90% of contract value, the petitioner neither paid the balance 90% of the contract value nor taken the delivery of the steel plates. The respondent had waited for more than four years and ultimately, the respondent vide Letter dated 12.12.2014, terminated the contract dated 26.05.2011. Further, in the said letter, the respondent has stated that since they had incurred significant costs towards storage of materials, they have decided to sell the steel plates for the purpose of mitigating their losses.

3.2. Since the respondent had already placed a purchase order, they made payments to M/s.Daewoo International and purchased the goods (steel plates). With regard to the importation of goods (steel plates), the respondent has filed the invoices and the same have also been marked as

Exhibit C30. Similarly, with regard to the selling of goods (steel plates), the respondent has filed invoices along with Memo dated 08.09.2016 & 14.10.2016 respectively and the same are available at pages 399-400 & pages 403-404 of the typed set of documents filed by the petitioner.

3.3. The learned counsel for the respondent contended that since the petitioner did not take the delivery of goods (steel plates), the respondent kept the same with them for more then four years. During such period of four years, the respondent did not utilize the said steel plates for some other purposes. Only after a period of four years, the respondent had sold the said goods (steel plates) for the purpose of mitigating its losses. After the sale of such goods, the losses of respondent were reduced to the extent of Rs.3,76,97,189/-. Hence, the respondent is entitled to Inventory Holding Cost.

3.4. That apart, though the petitioner had paid only Rs.6.85 Crores (10% of the contract value) as advance amount to the respondent, on the basis of the Letter of Acceptance issued by the petitioner, the respondent had imported the goods (steel plates) worth about Rs.40.91 Crores, but, the petitioner had failed to perform their part of contract, due to which, the respondent kept the said imported goods in their site and suffered losses. Taking into consideration of all these aspects, the learned Arbitrator has considered the claim of respondent and awarded Inventory Holding Cost. Therefore, the learned counsel prayed for dismissal of this petition.

4. Heard the learned counsel on either side and perused the materials placed before this Court.

5. As far as this case is concerned, the central issue to be decided is that whether the respondent is entitled to get Inventory Holding Cost or not?

6. Though very many issues have been raised in this petition, the main issue raised by the petitioner is regarding the Inventory Holding Cost awarded by the learned Arbitrator. According to the petitioner, the learned Arbitrator ought not to have awarded Inventory Holding Cost to the respondent since no documents were filed by the respondent to prove the damage or loss caused to them.

7. Upon perusing the documents filed by the respondent along with the claim statement, it is evident that pursuant to the receipt of Letter of Acceptance dated 15.02.2011 from the petitioner, the respondent had placed a purchase order on overseas supplier viz., M/s.Daewoo International for supply of goods (steel plates) and imported the said goods worth about Rs.40.91 Crores and the invoices with regard to the import of goods were also marked as Exhibit C30. Hence, there is no dispute regarding the import of goods.

8. As far as this case is concerned, the petitioner had paid only Rs.6.85 Crores (10% of the contract value) as advance to the respondent and thereafter, they did not come forward to open the Letter of Credit for the payment of remaining 90% of contract value. That apart, the petitioner vide e-mail dated 28.04.2011, sought deferment in the delivery date, the respondent were not in a position to get into the process of converting the raw goods (HR plates) into Carbon Steel Pipes. Even then, the petitioner vide another e-mail dated 26.07.2011, sought further deferment in the delivery date and thereafter, did not take the delivery of goods (steel plates),

as a result of which, the imported goods were kept idle at the site of respondent. Aggrieved over the same, the respondent vide Letter dated 12.12.2014, terminated the contract and informed the petitioner that they had kept the imported goods with them for more than four years, but, the petitioner did not take the delivery of goods and hence, they have to sell the goods (steel plates) to mitigate their losses. After issuing the said letter to the petitioner, the respondent had sold the goods (steel plates) and reduced their losses.

9. As rightly pointed out by the learned counsel for the respondent, until the sale of raw goods (steel plates), the respondent did not utilize the same for some other purposes and therefore, the respondent is entitled to Inventory Holding Costs.

10. In order to substantiate the submissions made in regard to Inventory Holding Cost, the respondent has filed the Letters from Canara Bank (Exhibit C34) which reflect that the interest paid by the respondent during the period from 22.11.2011 to 25.05.2015 was calculated at the rate of 12% to 14.75% p.a compounded monthly. Taking those Letters as an

yard stick, the learned Arbitrator has awarded the Inventory Holding Cost. Based on the calculations of Canara Bank, the respondent has filed their claim statement and hence, the same was accepted by the learned Arbitrator.

11. Though the learned Arbitrator has not mentioned anything about Exhibit C34 in the Arbitral Award, she has mentioned about the Canara Bank's Letters which means the learned Arbitrator has kept Exhibit C34 in her mind and passed the Arbitral Award.

12. Further, the respondent also produced the invoices worth about Rs.40.91 Crores vide Exhibit C30. The said Exhibit C30 clearly proves that the respondent imported HR Plates and kept the same in their yards idlely for a period of four years. Only in the year 2014-2015, the respondent has taken steps to sell the HR Plates. For more than four years, the petitioner has not taken any steps to receive the Carbon Steel Plates as ordered by them. It is important to note that what the petitioner did is they have not cancelled the order but only deferred the supply, which means, the petitioner would make demand for supply at any point of time. So, it is the duty of the respondent to keep the material ready whenever the petitioner

requires the same. It is needless to say that until the period of termination of sale for HR Plates, the respondent incurred the Holding Costs and the said Holding Costs would only petitioner is liable to pay. All these aspects were well considered by the learned Arbitrator and even assuming that the amount has not been borrowed by the respondent and they purchased the HR Plates in their own fund, the respondent is still entitled for Holding Costs at the Bank rate since the remaining materials were kept idle for over a period of four years and the reason for keeping the material idle was as per the instruction given by the petitioner for the deferment of supply, in which case, any costs incurred for the deferment, has to be paid by the petitioner. Under such situation only, the learned Arbitrator taking into consideration of each and every aspects and passed the award directing the petitioner to pay the Inventory Holding costs.

13. Hence, I do not find any error in the award passed by the learned Arbitrator with regard to Inventory Holding Cost. Further, I do not find any force in the submissions of the learned counsel for the petitioner.

14. For the foregoing reasons, this Court is not inclined to allow this petition. Hence, this Original Petition is dismissed. No costs. Consequently, connected miscellaneous application is closed.

13.06.2023

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Index : Yes/No

Speaking Order (or) Non-Speaking Order

KRISHNAN RAMASAMY, J.

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