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O.P. No.19 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

**Reserved on : 21.09.2023
Pronounced on : 27.09.2023**

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

O.P. No.19 of 2021

The Managing Director,
M/s.Ambur Economic Development
Organisation Limited,
43, Raja Muthiah Road,
Periamet,
Chennai 600 003.

... Petitioner

vs.

1.M/s.Yeses Infrastructure Private Limited,
represented by its Managing Director
Subramanyam Naidu

2.The Chief Project Consultant,
Tamil Nadu Water Investment Company Limited,
Teynampet,
Chennai 600 018.

... Respondents

Prayer : Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the impugned award dated 27.07.2020.

For petitioner : Mr.M.S.Krishnan
Senior Counsel
for Mr.N.V.N.Margandeyan

For R1 : No appearance



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ORDER

WEB COPY This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, challenging the Arbitral Award dated 27.07.2020 passed against the petitioner and in favour of the first respondent.

2.A Work Order dated 31.10.2006 was issued by the petitioner in favour of the first respondent for construction of a Common Facility Centre at Ambur. Thereafter, a contract dated 01.12.2006 was entered into between the petitioner and the first respondent in terms of the Work Order dated 31.10.2006. There arose disputes out of the Contract dated 01.12.2006 between the parties. The first respondent claimed that the petitioner had committed breach of contract and therefore, initiated arbitration proceedings in accordance with the Arbitration Clause contained in the Contract dated 01.12.2006. The first respondent claimed certain sums of money under various heads for the alleged breach of contract committed by the petitioner. This Court, under Section 11 of the Arbitration and Conciliation Act, 1996 appointed a Sole Arbitrator to adjudicate the dispute between the petitioner and the first respondent arising out of the contract dated 01.12.2006. The Sole Arbitrator acted upon the reference and after hearing both the parties to the dispute,



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passed an Arbitral Award dated 27.07.2020 in favour of the first respondent against the petitioner, awarding certain sums of money in favour of the first respondent, which was payable by the petitioner. The details of the sums of money awarded in favour of the first respondent under various heads are as follows:

Claim. Nos.	Nature of claim	Claim amount	Award amount
1	Idle hire charges and incidental expenditure for Site Establishment for 85 days from the awarded date of contract.	Rs.15,00,000/-	Rs.1,00,000/- awarded on notional basis
2	Delay in handing over of approved drawings at site	Rs.15,00,000/-	claim rejected
3	Variation in quantities beyond 110% in reinforcement steel concrete	Rs.75,00,000/-	Rs.21,57,840/-
4	Change of scope of work than the original drawing for which rate was quoted	Rs.25,00,000/-	Rs.1,00,000/-
5	Unwarranted retention of entitled money of the claimant by the respondent depriving the benefit of financial resource for completing the project	Rs.10,00,000/-	claim rejected
6	Claim towards deprival of turnover profit	Rs.10,00,000/-	claim rejected
7	Claim towards refund of alleged recovery towards	Rs.7,00,000/-	Rs.7,00,000/-



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Claim. Nos.	Nature of claim	Claim amount	Award amount
	non supply of steel for third floor		
8	Claim towards refund of liquidated damages recovered by the respondent with interest	Rs.19,20,000/-	Rs.19,20,000/-
9	Unlawful recovery caused by the respondent and deducted from the running bill towards air-conditioning commissioning which was not the fault of the claimant	Rs.12,95,000/-	claim rejected
10	Claim towards re-doing of the work as ordered then and there by the first respondent	Rs.15,00,000/-	claim rejected
11	Denied profit due to foreclosure of the agreement and terminating the agreement due to foreclosure	Rs.50,00,000/-	claim rejected
12	Enhanced rate demanded by 45% over and above the executed value of Rs.303.25 lakhs certified by the TWICL	Rs.1,36,45,000/-	Rs.7,50,000/-
13	Non-settlement of final bill value i.e. executed value Rs.3,03,23,669/-, bill certified and paid Rs.2,46,90,965/-. Balance Rs.56,32,704/- and discharged Bank	Rs.56,32,704/-	Rs.40,08,508/-



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Claim. Nos.	Nature of claim	Claim amount	Award amount
	Guarantees issued for mobilisation advance and security deposit amount Rs.56,32,704/-		
14	Reimbursement of value of the stock handed over at site Rs.1,97,197/-	Rs.1,97,197/-	Rs.1,97,191/-
15	Reimbursement of additional charges for the third floor as agreed by the Minutes of Meeting held on 22.10.2008	Rs.10,000/-	Rs.10,000/-
16	Reimbursement of 50% cost escalation admitted in the proceedings by the first respondent at 15 lakhs but agreed to pay Rs.7,50,000/- and not paid	Rs.7,50,000/-	claim rejected
17	Reimbursement of cost escalation on cement and steels the remaining 50% of Claim No.16 agreed and not paid	Rs.7,50,000/-	claim rejected
18	Additional steel of 88.41 metric tonnes ordered for extra reinforcement work payable @ Rs.24,480/- per metric tonne	Rs.21,64,277/-	claim rejected
19	Reimbursement of service tax - out of Rs.11,56,501/- Rs.5 lakhs paid and the balance of Rs.6,56,501/- has to be payable	Rs.6,56,501/-	claim rejected



Claim. Nos.	Nature of claim	Claim amount	Award amount
20	Reimbursement of CWCT at 4% on certified amount of Rs.2,80,70,422/-. Though admitted to remit, has not remitted the same.	Rs.11,22,816/-	Rs.11,22,817/-
21	Value of the steel stock supplied at site remaining in the custody of the respondent - steel balance stock 12.000 - 8.300 = 3.700 MT at Rs.54,000/- per MT: Rs.1,99,800/-	Rs.1,99,800/-	Rs.1,97,191/-
22	(i)Interest at 18% p.a. on all the Claim Nos.1 to 21 from 16.11.2008 to 15.06.2010, the date of petition, for 19 months: Rs.1,41,34,315/- (ii)Further interest at 18% from 16.06.2010 to the date of discharge of all the Claims 1 to 21 - to be quantified by the Tribunal	Rs.1,41,34,315/-	(i)Interest at 9% from 16.11.2008 to 15.06.2010 on Rs.1,10,66,356/- (ii)Interest at 10% from the date of award till the entire amount is paid by the first respondent
23	Cost towards defending the arbitral proceedings	Rs.5,00,000/-	Both parties have to bear their respective cost considering the facts and circumstances of the case discussed above

3. Aggrieved by the Arbitral award dated 27.07.2020 referred to supra, this petition has been filed by the first respondent in the



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Arbitration. At the outset, the claimant in the Arbitral proceedings had also separately challenged the very same Arbitral award in O.P. No.248 of 2021. Several opportunities were granted by this Court for the learned counsel for the petitioner in O.P. No.248 of 2021 to argue the matter. Despite the same, there was no representation on the side of the petitioner in O.P. No.248 of 2021 on various hearing dates. In view of the said fact, this Court had dismissed O.P. No.248 of 2021 for non-prosecution on 31.08.2023.

4.The instant Original Petition has been filed challenging the very same Arbitral Award by the first respondent in the Arbitration against whom the impugned Arbitral Award has been passed.

5.Mr.M.S.Krishnan, learned Senior Counsel representing Mr.N.V.N.Margandeyan, learned counsel for the petitioner drew the attention of this Court to the impugned Arbitral Award and would submit that the impugned Arbitral Award is an unintelligible Award, bereft of reasons and patently illegal.



6.This Court, has given due consideration to the submissions made by the learned Senior Counsel for the petitioner and as rightly pointed out by him, observes the following:

a)Refund of liquidated damages allowed twice, one under claim No. 8, and the other under claim No. 13. The Tribunal has awarded Rs.19,20,000/- towards refund of liquidated damages under claim No.8, after observing the following:

“....Further it has been found that escalation of price of cement etc. to abnormal increase (which has been accepted by the respondent) has caused the delay. It has been further found earlier that the claimant also to be blamed for delay on certain counts.

While so it may not be proper for the first respondent to withhold the amount recovered from the claimant towards the L.D. It is not out of place to mention that the contract was foreclosed by mutual consent of both the parties.”

Claim No.13 also included the refund of liquidated damages i.e., Rs.19,20,000/- and it is a repetitive claim as seen from the following findings of the Arbitrator:

“As to the claim regarding alleged non-settlement of final bill, it is stated that

a) *The certified value of the final bill was*



Rs.2,80,70,466/-

- b) *The first respondent had paid a sum of Rs.2,40,61,958/- as advance payments, cheque payments, TDS deductions, leaving a balance amount of only Rs.5,18,408/- out of 40,08,508/- after adjusting a*
- i) *a sum of Rs.19,20,000/- towards liquidated damages;*
 - ii) *a sum of Rs.15,70,100/- for completion and commissioning of the Air-conditioning system;*

No security deposit was available in the claimant's account. The Bank Guarantee that had earlier been furnished by the Claimant had subsequently been returned and was not kept renewed thereafter."

.....

"....That apart the first respondent has not made any counter-claim in this proceedings. When this Tribunal is constituted to decide all the disputes between the parties, the first respondent ought to have made a counter-claim for Rs.19,20,000/- towards L.D. and Rs.15,70,100/- for completion and commissioning of the Air-conditioning system said to be carried out by engaging another Contractor. Without doing so, the first respondent unilaterally deducted those amounts from the amounts payable to the claimant.

Therefore, this Tribunal, considering the above facts



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and circumstances discussed above is of the view that the claimant is entitled to Rs.40,08,508/- from the first respondent and not Rs.56,32,704/- as is claimed under Claim No. 13. Thus this Tribunal holds that the claimant is entitled to Rs.40,08,508/- under claim No. 13."

As seen from the findings of the Arbitrator with regard to the award of liquidated damages, the Arbitrator has awarded twice a sum of Rs.19,20,000/- by total non-application of mind. Further despite the fact the Arbitral Tribunal has given a finding that the claimant also to be blamed for delay on certain counts, no proper reasons have been given by the Arbitrator as to why he has awarded towards liquidated damages a sum of Rs.19,20,000/- in favour of the claimant.

b) Though refund of air-conditioning commissioning charges claimed by the claimant under claim No.9 for a sum of Rs.12,95,000/- has been rejected by the Arbitrator, the Arbitrator has allowed the very same claim made under claim No.13. As per Ex.C92, the claimant accepted that air-conditioning machines were commissioned by M/s.Annamalaiyar HVAC Systems Chennai. That apart, the claimant did not claim air-conditioning commissioning work in Ex.R73 dated



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25.05.2010. As an after thought, the said amount was claimed under

Ex.R74 dated 10.06.2010. By non-application of mind to the documentary evidence available on record, the Arbitrator has taken a contradictory decision while deciding the very same claim i.e., refund of air-conditioning commissioning charges. In claim No.9, which relates to the same claim, the Arbitrator has rejected the said claim, whereas in claim No.13, which comprises of the claim towards refund of air-conditioning commissioning charges, the Arbitrator has allowed the said claim. There cannot be two different conclusions by the very same Arbitrator in respect of the very same claim. By total non-application of mind, refund of air-conditioning commissioning charges has been considered by the Arbitrator.

c)The Arbitrator has awarded a sum of Rs.40,08,508/- in favour of the claimant towards non-settlement of portion of RA bill. The claimant raised a final bill dated 31.12.2008 for Rs.3,03,23,669/-. Under Ex.R73, the claimant himself admitted that gross bill was certified only for Rs.2,80,70,466/-. The petitioner has admitted before the Arbitrator that it has already paid Rs.2,40,61,958/-. This is not disputed by the claimant.

Therefore, this Court is surprised as to how the balance amount of



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Rs.40,08,508/- has been arrived at by the Arbitrator insofar as claim No.13 is concerned.

d)The Arbitrator has awarded a sum of Rs.11,22,816/- to the claimant towards reimbursement of Contractor Works Contract Tax (CWCT), which is towards claim No.20. The claimant has not produced any evidence for payment of CWCT before the Arbitrator. As seen from Exs.C37 and R73, the claimant has agreed to remit the tax amount, but he did not do so. No reasons have been given by the Arbitrator for awarding a sum of Rs.11,22,816/- towards claim No.20, which has been claimed towards reimbursement of Contractor Works Contract Tax (CWCT). The Tribunal has also not properly considered Ex.C37, where the claimant has agreed to remit the tax amount.

e)The Arbitrator has awarded a sum of Rs.7,00,000/- towards refund of alleged recovery towards non supply of steel for third floor. Though the petitioner has raised two claims in the written arguments, the Arbitrator has overlooked the fact that pre-closure had taken place between the parties and the petitioner did not supply steel for the third floor. Without any evidence, the Arbitrator has awarded a sum of



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Rs.7,00,000/- to the claimant towards refund of alleged recovery towards non-supply of steel for third floor.

f)The Tribunal, without any evidence and on notional basis, has awarded a sum of Rs.1,00,000/- each in favour of the claimant towards a)idle hire charges and incidental expenditure for site establishment from the awarded date of contract and towards b)change of scope of work. Without giving any particulars about the expenses incurred for idle hire charges, the Tribunal has awarded a notional sum of Rs.1,00,000/- towards the said claim in favour of the claimant which is arbitrary. Similarly, without proving the changes made by the petitioner effecting the scope of work, the Tribunal has arbitrarily awarded a sum of Rs.1,00,000/- as notional damages though the claim towards the said head was for a much higher sum of Rs.25,00,000/-.

g)The Tribunal has not given plausible reasons while awarding a sum of Rs.21,57,840/- to the claimant towards variation in quantities beyond 110% in the reinforcement steel concrete, though the claimant had made a claim under the said head for a sum of Rs.75,00,000/-. This Court notices from the tender conditions that the petitioner had the right



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to increase or decrease quantity of works and add or remove any item. As seen from Ex.C22, total steel required is 130MTS, but quantity used is 274MTS and the increase is 111%. This Court also notices that without any supporting evidence, the Arbitrator has come to the conclusion that there is variation in quantities beyond 110% in the reinforcement steel concrete and by giving the said finding, has arbitrarily awarded a sum of Rs.21,57,840/- to the claimant. There must be evidence supporting any claim, but, the Arbitrator, without any supporting evidence, has awarded a sum of Rs.21,57,840/- in favour of the claimant towards variation in quantities beyond 110% in the reinforcement steel concrete.

h)The Arbitrator has awarded a sum of Rs.7,50,000/- to the claimant towards the head “enhanced rate @ 45% over and above the executed value” and for the said head, the claimant claimed a sum of Rs.1,36,45,000/-. No reasons have been given by the Arbitrator for awarding the aforesaid sum of Rs.7,50,000/- though a claim was made for a huge sum of Rs.1,36,45,000/-.

i)It is to be noticed from the Arbitral award that the Arbitrator has



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given a finding that the petitioner alone is not at fault and the claimant is also responsible for the delay. On the face of it, though the Arbitral award runs to several pages, it is an unintelligible award.

j)This Court also finds that there is a duplication, more particularly, with regard to the award towards liquidated damages. The Arbitrator has also awarded on notional basis in respect of the two claims, without any evidence whatsoever. This Court is unable to understand as to how an award in respect of certain claims can be awarded on notional basis.

7.As observed earlier, in respect of all the claims made by the claimant, the Arbitrator, has not applied his mind to the evidence available on record in a judicious manner, instead arbitrarily, has awarded certain sums of money in favour of the claimant towards some of the claims. The total award for a sum of Rs.1,10,66,356/-, which has been awarded towards claim Nos.1, 3, 4, 7, 8, 12, 13, 14, 15, 20 and 21 and interest at 9% from 16.11.2008 to 15.06.2010 and interest at 10% on the amount awarded i.e., from the date of award till the entire amount is arbitrary based on perverse findings and without any acceptable



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evidence.

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8.Despite several opportunities granted to the learned counsel for the first respondent to defend this petition, he has chosen not to appear before this Court on various dates. Infact, as observed earlier, the petition filed by the first respondent challenging the very same Arbitral award in O.P. No.248 of 2021 has also been dismissed for non prosecution by orders of this Court passed on 31.08.2023, which will infer that the first respondent is not interested in defending this petition as well. Hence, the first respondent is set exparte by this court.

9.This Court, while exercising powers under section 34 of the Arbitration and Conciliation Act, 1996, is having the power to set aside the Arbitral award as laid down by various decisions of the Hon'ble Supreme Court and as per Section 34, if the Arbitral award is a) patently illegal, b) opposed to public policy, c) opposed to fundamental policy of Indian law, d)the findings of the Arbitrator are absolutely perverse and e)the award is highly unintelligible shocking the conscience of this Court. The impugned Arbitral award, on proper scrutiny makes it clear that it is a)patently illegal b) unintelligible and c)absolutely perverse and



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is not based on any acceptable evidence.

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10. Though the claimant may be entitled for certain sums of money from the petitioner and vice versa, the Arbitrator, by total non-application of mind to the evidence available on record and arbitrarily, has passed the impugned Arbitral Award, which shocks the conscience of this Court. This Court is of the considered view that in view of the reasons stated supra, the impugned Arbitral award has to be set aside by granting both the parties liberty to initiate fresh Arbitration in accordance with law for arriving at a just conclusion.

11. In the result, the impugned Arbitral award dated 27.07.2020 is hereby set aside and this petition is allowed. However, liberty is granted to both the parties to initiate fresh Arbitration with regard to the very same subject matter in accordance with law.

27.09.2023

Index: Yes/ No

Speaking order / Non speaking order

Neutral citation : Yes / No

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ABDUL QUDDHOSE, J.

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**Pre-delivery order in
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