IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 13.06.2023

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The Honourable Mr.Justice KRISHNAN RAMASAMY

Arb.O.P.(Com.Div.)No.5 of 2021
and Application No.2206 of 2021

1.The General Manager,
Southern Railway,
Head Quarters Office,
Park Town, Chennai – 600 003.

2.The Chief Engineer,
Construction,
Periyar EVR High Road,
Chennai – 600 008.

...Petitioners

Versus

M/s.CT Ramanathan Infrastructure Pvt. Ltd.,
Flat No.4/3, "SK Enclave" 2nd Floor,
Old No.47, New No.4, Nowroji Road,
Chetpet, Chennai – 600 031.

...Respondent

Original Petition filed under Section 34(2)(iv) of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 for the following reliefs:

(i) To set aside the partial portion of the Arbitral Award dated 26.03.2019 passed by the Sole Arbitrator and

(ii) To award costs of the present petition.

For Petitioners	:	Mr.V.Radhakrishnan, Senior Counsel for Mr.M.Vijay Anand, Additional Standing Counsel
For Respondent	:	No Appearance

ORDER

This original petition has been filed by the petitioners seeking to set aside the partial portion of the Arbitral Award dated 26.03.2019 passed by the learned Sole Arbitrator.

2. Though the petitioners have filed this petition challenging the partial portion of the Arbitral Award on many grounds, the learned counsel for the petitioners restricted the relief sought herein, in respect of amount awarded towards Damages on Loss of Profit for the unexecuted value of work and the *pendente lite* interest and post award interest imposed by the learned Arbitrator.

2.1. The learned counsel for the petitioner submitted that the 2nd petitioner vide Tender Notice No.26/CE/CN/MS/2010 (OT) dated 03.12.2010 invited a tender for the work "Gauge Conversion of Pollachi – Podanur Section – proposed re-modelling of Pollachi Yard, reconstruction of minor bridges, earthwork in forming bank, transportation of permanent way materials, linking of tracks providing passenger amenities, platform shelter, sub-way etc., at Pollachi Yard and balance works permanent way, linking roads in Reach I & II of Pollachi – Palghat Section. The respondent company participated in the said tender. In the said tender, the respondent was the lowest tenderer. After negotiation and discussions, the 2nd petitioner vide Letter of Acceptance (LOA) dated 18.04.2011, accepted the bid of respondent company for a total value of Rs.12,82,04,808.00/- and awarded the contract to the respondent company. The currency of the said contract was six months from the date of issuance of LOA, as per which, the work should be completed on or before 17.10.2011. However, the respondent company was unable to complete the work within the stipulated time period. At the request of the respondent company, the currency of the contract was extended periodically. Finally, the 2nd petitioner extended the currency of contract upto 30.09.2012.

2.2. Though the currency of aforesaid contract was extended till 30.09.2012, the respondent company did not speed up the work and their progress was far away from satisfactory. So, the 2nd petitioner sent a Notice dated 02.08.2012 to the respondent company, stating that the respondent company is given 7 days notice in accordance with Clause 62 of the GCC to make good the progress, failing which, action will be taken to terminate the contract and the performance GB including security deposit will also be forfeited. Even after the issuance of said notice, there was no improvement in the performance of respondent company. Hence, the 2nd petitioner vide Notice dated 11.09.2012, giving 48 Hours Notice to the respondent company. However, even thereafter, there was no improvement in the work of respondent company, as a result of which, the 2nd petitioner vide Notice dated 18.09.2012, terminated the contract awarded to the respondent company. After the termination of contract, the respondent company vide Letter dated 05.10.2012, requested the petitioners to revoke the termination order, however, the petitioners refused to accept the said request and sent a suitable reply to the respondent company on 22.11.2012.

2.3. Thereafter, before the Arbitral Tribunal, the respondent filed a claim statement claiming a sum of Rs.2,73,20,480/- and prayed for quantification of post award interest at 15% per annum under 9 claim including a prayer for declaring the order of termination of contract as illegal. The petitioners filed a detailed reply statement before the Arbitral Tribunal. On 26.03.2019, the learned Arbitrator has passed the Arbitral Award in favour of the claimant/respondent company by directing the petitioners to pay a sum of Rs.2,64,31,243/- along with accrued interest at 12% per annum from 19.09.2012 to till date of award to the claimant/respondent company and also, directing the petitioners to pay further interest @ 15% per annum for the said grand total amount arrived at, from the date of award till the date of realization with cost of the claimant.

2.4. The learned counsel specifically contended that the petitioners are no way responsible for any loss or damages caused to the respondent company. Since there was a delay on the part of respondent company in completing the work, the 2nd petitioner had terminated the contract under Clause 62 of the GCC. Hence, the claimant/respondent company is not entitled to damages on the unexecuted value of work at 10% per annum.

Moreover, no proof or material was produced by the respondent in regard to the damages on the unexecuted value of work. However, in the absence of any such proof, following the judgment passed by the Hon'ble Supreme Court in the case of ***Dwaraka Das Vs. State of Madhya Pradesh & Anr. reported in (1999) 3 SCC 500***, the learned Arbitrator has awarded a sum of Rs.83,12,191/- under the head, “Damages on Loss of Profit for the unexecuted value of work”.

2.5. The case of ***Dwaraka Das Vs. State of Madhya Pradesh & Anr. reported in (1999) 3 SCC 500*** is regarding the termination of a tender contract for not completing the entire work. In the said case, the Hon'ble Supreme Court came to the conclusion that the termination of tender contract is not valid, whereas, in the present case, the 2nd petitioner has terminated the contract due to the poor progress and indifference of work on the part of the respondent company. The facts of the case of ***Dwaraka Das Vs. State of Madhya Pradesh & Anr. reported in (1999) 3 SCC 500*** are different from the facts of the present case. Therefore, the said judgment will not apply to the case on hand.

2.6. According to the petitioners, as per Clause 64(5) of GCC, the respondent company is not entitled to *pendente lite* interest. Clause 64(5) of GCC clearly states that where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made. The parties have also agreed with Clause 64(5) of GCC. While so, without looking into the provision in Clause 64(5) of GCC, the learned Arbitrator passed the award directing the petitioners to pay a sum of Rs.2,64,31,243/- along with accrued interest at 12% per annum from 19.09.2012 to till date of award to the claimant/respondent company and also, directed them to pay further interest @ 15% per annum for the said grand total amount arrived at, from the date of award till the date of realization with cost of the claimant. The learned counsel submitted that the award passed by the learned Arbitrator is liable to be set aside since the same is patently illegal and also, in conflict with the fundamental public policy of Indian law.

3. Despite the service of notice to the respondent and the name of the respondent is being printed in the cause list, none appeared on behalf of the respondent.

4. Heard the learned counsel for the petitioners and perused the materials placed before this Court.

5. Upon perusing the materials available on record and hearing the submissions made by the learned counsel for the petitioners, it is seen that the learned Arbitrator has awarded a sum of Rs.83,12,191/- towards Damages on Loss of Profit for the unexecuted value of work, in the absence of any proof or material produced by the claimant/respondent in regard to the claim of damages at 10% of the value of work not executed owing to termination of contract. It is also seen that in order to justify the awarding of Rs.83,12,191/- towards Damages on Loss of Profit for the unexecuted value of work, there were no findings in the award passed by the learned Arbitrator. Similarly, the learned Arbitrator has not mentioned anything in the award in regard to whether the delay has occurred due to the petitioners or it has occurred due to the respondent.

6. It is to be noted that the currency of the contract was six months from the date of issuance of LOA, as per which, the work was to be

completed on or before 17.10.2011. However, at the request of respondent company, the petitioners had extended the currency of contract till 30.09.2012. The Notices dated 02.08.2012 & 11.09.2012 sent by the petitioners would clearly show that the petitioners had expressed their displeasure to the respondent company regarding the delay and also, insisted the respondent company to speed up their progress of work. In spite of that, there was no improvement in the work of respondent company. Hence, the petitioners had terminated the contract. However, the learned Arbitrator has passed the award without considering all these aspects.

7. As far as this case is concerned, the contract was not terminated before the completion of currency period and the same was terminated only after the completion of said currency period that too due to the poor progress and delay in execution of work on the part of the respondent. Hence, there is no legalities on the part of the learned Arbitrator in awarding a sum of Rs.83,12,191/- towards Damages on Loss of Profit for the unexecuted value of work. Further, it is to be noted that the judgment passed by the Hon'ble Supreme Court in the case of ***Dwaraka Das Vs. State of Madhya Pradesh & Anr. reported in (1999) 3 SCC 500*** would not apply

to the present facts of the case, but, the learned Arbitrator erroneously held that the said judgment is squarely applicable to the facts and circumstances of the case on hand and following the same, the learned Arbitrator has awarded Rs.83,12,191/- under the head, “Damages on Loss of Profit for the unexecuted value of work”.

8. For the foregoing reasons, this Court is inclined to set aside the award dated 26.03.2019 passed by the learned Arbitrator, in respect of a sum of Rs.83,12,191/- awarded towards Damages on Loss of Profit for the unexecuted value of work. Accordingly, a sum of Rs.83,12,191/- awarded towards Damages on Loss of Profit for the unexecuted value of work by the learned Arbitrator is set aside.

9. So far as *pendente lite* interest and post award interest imposed by the learned Arbitrator is concerned, I am of the opinion that as rightly pointed out by the learned counsel for the petitioner, as per Clause 64(5) of GCC, the respondent company is not entitled to *pendente lite* interest. However, the respondent is entitled to post award interest. Hence, this Court is inclined to set aside the direction issued by the learned Arbitrator

to the petitioners, only in respect of paying accrued interest at 12% per annum from 19.09.2012 till the date of award. Accordingly, the direction issued by the learned Arbitrator to the petitioners, in respect of paying accrued interest at 12% per annum from 19.09.2012 till the date of award alone is set aside.

10. It is needless to state that the petitioners shall pay the post award interest @ 15% per annum from the date of award till the date of realization with cost of the claimant.

11. In the result, this petition is allowed with the above observations. No costs. Consequently, connected miscellaneous application is closed.

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Index : Yes/No

Speaking Order (or) Non-Speaking Order

KRISHNAN RAMASAMY, J.

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