IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.07.2023

CORAM

THE HON'BLE Mr. JUSTICE ABDUL QUDDHOSE

Arb.O.P (Com.Div.) No.212 of 2021
and A.No.4024 of 2021

1.The Union of India,
rep. by the General Manager,
Integral Coach Factory,
Perambur,
Chennai 600 038.

2.Chief Materials Manager/Furnishing,
Integral Coach Factory,
Perambur,
Chennai 600 038. ... Petitioners

Versus

M/s.Oriental Veneer Products Ltd.,
At Post Aghal,
Via Kalyan (Railway Station),
Thane District,
Maharashtra, Pin 421 601. ... Respondent

Prayer: Arbitration Original Petition (Commercial Division) filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 02.12.2019 passed by the Sole Arbitrator.

For Petitioners : Mr.M.Vijay Anand

For Respondent : Mr.K.Ashok Kumar

ORDER

This petition has been filed under Section 34 of the Arbitration and Conciliation Act, challenging the Arbitral Award dated 02.12.2019 passed in favour of the respondent against the petitioners.

2.Under the impugned Arbitral Award, the petitioners have been directed to pay a sum of Rs.3,82,252/- together with interest as detailed hereunder:

> *"12.Operative portion of the Arbitral Award*
> *Respondents are directed to pay claimant, a sum of Rs.3,82,252/- (Rupees Three Lakhs Eighty Two Thousand Two Hundred and Fifty Two only) within thirty days, from date of publication of the Award. Interest at the rate of 8.25% per annum (maximum rate of interest for Term Deposit below Rs.2 crores by SBI + 2%) is payable on balance amount due to be paid, from thirty first day from date of publication, till the date of payment, in terms of Section 31(7)(b) of the Arbitration and Conciliation (Amendment) Act, 2015. This award is made towards full and final settlement of disputes between the parties."*

3.The respondent is a Contractor, who was awarded a Contract by the petitioners. There arose disputes out of the same. The petitioners had deducted liquidated damages for the alleged delay on the part of the respondent in completing the Contract. The liquidated damages deducted by the petitioners was Rs.3,82,252/-. Since the respondent claimed that the deduction of Rs.3,82,252/- towards liquidated damages by the petitioners is improper and illegal, they initiated Arbitration in accordance with Arbitration Agreement contained in the Contract.

4.The Sole Arbitrator acted upon the reference and after hearing both the parties, has passed the impugned Arbitral Award dated 02.12.2019 in favour of the respondent against the petitioners, which is the subject matter of challenge in this petition filed under Section 34 of the Arbitration and Conciliation Act. The petitioners have challenged the impugned Arbitral Award on the ground that the same is opposed to public policy and the same has been passed by total non-application of mind to the terms of the Contract, which enables the petitioners to deduct the liquidated damages for the delay caused by the respondent in completing the project.

5.Learned counsel for the petitioners drew the attention of this Court to various documents filed along with this petition as well as to the impugned Arbitral Award dated 02.12.2019. He would submit that as per IRS Guidelines, the petitioners are entitled to deduct a sum of Rs.3,82,252/- towards liquidated damages on account of the delay committed by the respondent in completing the project.

6.Learned counsel for the respondent would submit that there was no loss caused to the petitioners on account of the delay. He would further submit that the petitioners had acceded to the request of the respondent for granting extension of time and only within the extended period, the respondent having completed the project, the question of deduction of liquidated damages will not arise. Therefore, according to him, the Arbitrator has appreciated the evidence available on record correctly and has passed the impugned Arbitral Award by directing the petitioners to pay the respondent a sum of Rs.3,82,252/- together with interest, which has been erroneously deducted by the petitioners towards liquidated damages. He also drew the attention of this Court to the relevant paragraphs in the impugned Arbitral Award and would submit that it is a well considered Award and therefore, the question of interference by this Court under Section 34 of the Arbitration and Conciliation Act will not arise.

7.This Court has given careful consideration to the documents filed along with this petition under Section 34 of the Arbitration and Conciliation Act as well as to the impugned Arbitral Award. Sufficient reasons have been given by the Arbitrator for allowing the claim of the respondent in respect of the liquidated damages, wrongfully deducted by the petitioners amounting to Rs.3,82,252/-. The reasons given by the Arbitrator are extracted in the following paragraphs:

> *"8.1.9.6 As the tendered quantity was 170 sets and the Purchase Order on Claimant was for 86 sets only Arbitral Tribunal, enquired from Presenting Officer for respondents about the orders placed for balance quantity of 84 sets and their performance. Presenting Officer for respondents clarified that another order was placed for 10 sets on M/s.Varsha Industries, Chennai with delivery of 5 sets by 28.02.2015 and balance 5 sets by 31.08.2015. Balance out*

tendered quantity was not covered by a Purchase Order. Respondents cancelled the Purchase Order on M/s.Varsha Industries, Chennai on 01.12.2015, on their failure to make any supply and initiated a risk and cost purchase. Another PO was placed on 27.05.16, for supply of these 10 sets on M/s.Oriental Veneer Products, the Claimant, in this case. An amount of Rs.8007.00 @ Rs.800.70 per set, was to be recovered from M/s.Varsha Industries, Chennai towards Risk Purchase amount. In case of Claimant, who had supplied 68 out of 86 sets ordered, an amount of Rs.3,82,252 was levied as LD for delayed supply of 18 sets, that works out to a levy of damages at the rate of Rs.21,236.22 per set. Thus, failure of two firms were meted with different and unequal treatments, that goes against principles of natural justice.

8.1.9.7 In the light of above reasoning, it is evident that delay in supply of 18 sets out of Lot (c), within the original delivery period of 31.08.2015, did not in any way affect the out-turn of AC 2T coaches from ICF, due to existence of sufficient stock, needed to support production activities for next five months at the least. Absence of initiation of any emergency procurement clearly proved lack of urgency for the material when LD was levied and continued on two more occasions. Respondents did not prove that the delay had caused loss to them. Levy of Liquidated damages by respondent No.2 was done routinely without application of mind, assessment of stock position and the demand from Production Wing, when Clause 0702(a) of IRS

Conditions of Contract for Stores was not a mandatory clause but only a discretionary one. Respondents did not present any evidence to show that they considered the reasons for delay, stated by Claimant in their requests for extension of delivery period and found them unreasonable or unacceptable. Arbitral Tribunal, hence, concludes that the action of levying of LD by respondent No.2, was arbitrary, prejudiced and unjustified and hence, the LD amount deduced should be refunded."

8.As seen from the discussion of the Arbitrator, it is clear that the petitioners have not produced any proof to show that they had suffered loss on account of the alleged delay committed by the respondent in completing the project. It is also to be seen that the request of the respondent seeking for extension of time for completing the project was also acceded to by the petitioners as seen from the reply of the petitioners, sent to the respondent. The Arbitrator has also held that IRS guidelines are only directory in nature and are not mandatory. No documentary evidence has also been produced by the petitioners to show that IRS guidelines are mandatory. The respondent in his request seeking for extension of time, has given reasons as to why extension will have to be granted. The respondent has not admitted that the delay was only due to their fault. The petitioners had also accepted the same and had granted extension. Being a well considered and reasoned Award and the view taken by the Arbitrator in the impugned Arbitral Award is a possible legal view, the question of interference by this Court under Section 34 of the Arbitration and Conciliation Act will not arise.

9.There can be two possible legal views, but, if one legal view is adopted by the Arbitrator, this Court cannot interfere with the said findings of the Arbitrator. The petitioners have also not produced any documentary evidence to prove that they have suffered loss on account of the alleged breach of Contract committed by the respondent. The same is also well considered by the Arbitrator under the impugned Award. When the petitioners have extended time for performance of the Contract by the respondent and that too when no documentary evidence has been produced by them to show that they have suffered loss, this Court cannot interfere with the impugned Arbitral Award. Having disclosed in the reply sent by the petitioners to the respondent deducting the liquidated damages, they ought to have produced documentary evidence before the Arbitral Tribunal to show that the respondent was at fault and that the petitioners had suffered loss due to the same. They have miserably failed to do so.

10.Therefore, this Court cannot interfere with the findings of the Arbitrator, which are well considered findings. Therefore, the grounds raised by the petitioners in this petition does not deserve any merit. Accordingly, this petition is dismissed. No costs. Consequently, connected Application stands closed.

27.07.2023

vga
Index:Yes/No
Speaking/Non-speaking orders

ABDUL QUDDHOSE, J.

vga

Arb.O.P (Com.Div.) No.212 of 2021
and A.No.4024 of 2021

27.07.2023