



Arb.O.P.(Com.Div)No.150 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	20.10.2022
Judgment pronounced on	03.01.2023

CORAM

THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

Arb.O.P.(Com.Div)No.150 of 2021

and

A.No.3253 of 2021

The Union of India
Rep. by its Chief Engineer,
Chennai Zone, Island Ground,
Chennai – 600 009.

... Petitioner

vs.

M/s.Maheswari Builders,
No.25-B, Sadul Ganj,
Bikaner - 334 003.
Rajasthan.

... Respondent

PRAYER: Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996, to set aside the Final Award dated 31.08.2017 passed in the Sole Arbitrator in arbitral proceedings in CA.No.CECZ/MH/32 of 2007 - 2008 Provision of OTM ACCN for 250 Cadets at Chennai (Phase -II) awarding a total sum of Rs.2,75,39,225/- (Rupees two crore seventy five



Arb.O.P(Com.Div)No.150 of 2021

lakhs thirty nine thousands and two hundred and twenty five only) with interest against this respondent and for costs of the present petition.

For Petitioner : Mr.R.Sankaranarayanan, ASG-I,
Assisted by
M/s.K.S.Jeyaganeshan
Senior Panel Counsel, Central Govt.

For Respondent : M/s.S.Rajeni Ramadass
C.P.Senthil Sujatha

ORDER

The petitioner/employer awarded a contract to the respondent/contractor for the construction of quarters for cadets at Chennai. For ease of reference, the petitioner is referred to as the employer and the respondent as the contractor throughout this order. The total value of the contract was Rs.13,99,28,741.41. Work was to be executed in two phases: Phase-I to be completed by 22.01.2009 and Phase-II by 22.04.2010. In course of execution of Phase-I work, extensions of time were requested for and granted. By communication dated 07.09.2009, the employer informed the contractor that Phase-I work had been satisfactorily completed on 05.09.2009 subject to the rectification of defects listed in Appendix-A to said communication. The formal extension order for extension up to 05.09.2009 was issued by the



employer on 16.04.2010 under condition 11 (A)(vii) of IAFW-2249, General Conditions of Contract (the GCC). Similarly, in course of execution of Phase-II work, extensions of time were requested for and granted. The last extension that was granted while work was being carried on was up to 31.03.2012. All extensions were under condition 11 (A)(vii) of the GCC. Thereafter, by communication of 07.07.2012, the employer informed the contractor that work was completed on 05.07.2012 subject to rectification of the defects listed in Appendix A and B of said communication.

2. By communication dated 13.04.2015, the contractor invoked the arbitration clause in the contract and requested the employer to take necessary steps to form the arbitral tribunal to adjudicate 31 claims. As is evident from the narration in the preceding paragraph, while work was carried out and completed subject to defect rectification on 05.07.2012, extension of time for the period running from 01.04.2012 to 05.07.2012 had not been granted. Therefore, parties corresponded on said issue and the processing of the final bill. In that context, a letter dated 07.01.2016 and a letter dated 18.02.2016 enclosing an affidavit were issued by the contractor agreeing to



withdraw all court cases and the request for appointment of an arbitrator.

Pursuant thereto, as requested, extension of time was granted up to 05.07.2012. Meanwhile, pursuant to a communication dated 16.06.2016 from the Engineer-in-chief, the arbitrator entered upon reference and called upon parties to submit pleadings by notice dated 02.07.2016. In response, by letter dated 16.07.2016, the employer informed the arbitrator about the submission of an affidavit by the contractor agreeing to withdraw the request for arbitration, and the grant of extension of time pursuant thereto. Therefore, it was submitted that there are no claims/disputes requiring adjudication.

3. Thereafter, by communication dated 08.08.2016, the contractor informed the Arbitral Tribunal that the affidavit was given under pressure since the contractor was informed that extension of time would be granted only if such affidavit is provided, and that the final bill would be paid subject to such condition. An application under Section 16 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) was filed by the employer in these facts and circumstances on 06.09.2016. By order dated 04.11.2016, the Arbitral Tribunal rejected the jurisdictional challenge on the ground that the



letter dated 07.01.2016 and affidavit were not submitted under free consent.

The arbitral proceedings continued and the contractor herein made 16 claims before the Arbitral Tribunal.

4. Claims 1 to 11 and 16 were claims for reimbursement of costs incurred in relation to work executed. Claim 12 pertained to amounts due and payable under the final bill. Claim 13 was for release of fixed deposits. Claim 14 was for interest and Claim 15 for costs. The employer made five counter claims in respect of the following: differential cost incurred by engaging a third party contractor (risk and cost claim); compensation for delay in completion of work; loss of reputation; non-submission of record drawings; and costs of arbitration. By the arbitral award dated 31.08.2017 (the Award), the following sums were awarded towards the claims: Rs.23,05,414/- towards claim No.1; Rs.11,34,012/- towards claim No.2; Rs.43,88,368/- towards claim No.3; Rs.2,69,718/- towards claim No.4; Claim No.5 was rejected; Rs.60,51,702/- towards claim No.6; Rs.6,69,882/- towards claim No.7; Rs.38,362/- towards claim No.8; Rs.21,099/- towards claim No.9; Claim No.10 was rejected; Rs.14,05,927/- towards claim No.11;



Rs.86,45,311/- towards claim No.12; and Rs.7,77,702/- towards interest on the withheld fixed deposits. The employer was also directed to release the fixed deposits for an aggregate sum of Rs.35,75,000/-. *Pendente lite* interest was awarded at 12% per annum. Future interest was awarded at 15% per annum from the date of award till the date of payment. As regards the costs of reference, a sum of Rs.3,32,000/- was awarded, and a sum of Rs.14,99,728/- was awarded as reimbursement of additional costs.

5. The risk and cost counter claim was awarded as claim No.1 in a sum of Rs.12,28,615.55 but this amount was adjusted against the final bill amount in claim no.12. All the other counter claims were rejected. The Award is challenged by the employer under Section 34 of the Arbitration Act.

6. Oral arguments were advanced on behalf of the petitioner/employer by Mr. R. Sankaranarayanan, learned ASG, and on behalf of the respondent/contractor by Ms. Rajeni Ramadass, learned counsel.

7. Learned ASG challenged the Award on the ground that the Arbitral



Tribunal did not have the jurisdiction to entertain the claims because the contractor agreed to withdraw its arbitration claims as a pre-condition for the extension of the contract period under letter dated 07.01.2016 and the affidavit. Learned ASG pointed out that upon receipt of the aforesaid, the extension requested for by the contractor was granted. Therefore, he contended that there was accord and satisfaction. Subsequently, by retracting the affidavit and resiling from the agreement, the arbitral proceedings were proceeded with. Therefore, the said proceedings were objected to by the employer on jurisdictional grounds by filing a petition under Section 16 of the Arbitration Act challenging the authority of the Arbitral Tribunal to adjudicate the claims of the contractor.

8. Learned ASG submitted that the Section 16 petition was rejected by an order dated 04.11.2016, and that said order of the Arbitral Tribunal is devoid of reasons. With reference to paragraph 7 of the said order, learned ASG pointed out that the Arbitral Tribunal referred to the letter dated 07.01.2016 and the affidavit. Thereafter, the Arbitral Tribunal recorded a cryptic finding that the sole arbitrator was of the view that the above



mentioned agreement referred to by the employer is not with 'free consent' without providing any reasons in support of such conclusion. Turning to the Award, learned ASG submitted that the Award contains reasons for rejecting the objections of the employer under Section 16 of the Arbitration Act. However, learned ASG submitted that the findings of the Arbitral Tribunal are even contrary to the pleadings of the contractor.

9. Learned ASG submitted that Section 63 of the Indian Contract Act, 1872 (the Contract Act) provides for the dispensing with or remission of the performance of a promise made by a party to the contract. It also provides for the acceptance of any form of satisfaction as consideration for dispensing with the performance of the promise. According to learned ASG, by virtue of the letter and affidavit, the contractor agreed to accept extension of the contract period as the consideration for not pursuing claims before the Arbitral Tribunal. Since the Arbitral Tribunal disregarded Section 63 of the Contract Act, he submitted that the Award is unsustainable.

10. Learned counsel for the respondent/contractor refuted these contentions. She submitted that work was completed by the contractor in



July 2012. Upon completion of work, the final bill was submitted on 24.05.2013. The said final bill was not processed by the employer. When the contractor negotiated with the employer and requested for the processing of the final bill, the employer called upon the contractor to provide an affidavit agreeing to withdraw all claims made before the Arbitral Tribunal. The letter and affidavit were given in the said facts and circumstances. By referring to the judgment of the Hon'ble Supreme Court in *National Insurance Co. Ltd v. M/s.Boghara Polyfab Pvt. Ltd. (National Insurance)*(2009) 1 SCC 267, particularly paragraph 52(iii) and 54 thereof, she submitted that the letter and affidavit cannot be construed as full and final settlement of the claims of the contractor. She also relied on the judgment of the Hon'ble Supreme Court in *Chairman & M.D., NTPC Ltd. vs. M/s.Reshmi Constructions* (2004) 2 SCC 663.

11. By referring to paragraph 30 of the Award, learned counsel pointed out that the Arbitral Tribunal noticed in Clause (e) thereof that the affidavit was given as a consequence of an agreement between the parties that extension would be granted only if the claimant withdrew all claims. Learned



counsel further pointed out that the Arbitral Tribunal concluded that there was no free consent after taking into account the fact that large sums of money were due to the contractor under the final bill and that the said final bill had been withheld for four years. She also pointed out that the Arbitral Tribunal noticed that the extension was from 31.03.2012 to 05.07.2012, whereas such extension was granted on 21.03.2016 after receipt of the affidavit. Therefore, she submitted that the Award does not call for interference.

12. At the outset, it should be noticed that the challenge is entirely on the basis that parties had reached a settlement and that the Arbitral Tribunal exceeded its authority in receiving, considering and adjudicating claims in spite of such settlement. In order to decide this challenge, it is sufficient to focus on the factual matrix in which the letter and affidavit were submitted, the content of the documents evidencing settlement and the findings recorded by the Arbitral Tribunal. As set out while narrating the facts, the communication dated 07.09.2009 evidences that Phase-I work was completed on 05.09.2009 subject to carrying out rectification of defects listed in Appendix A to the said communication. The approval for extension up to



05.09.2009 was granted subsequently as evidenced by communications dated 12.04.2010 and 16.04.2010. As regards Phase-II work, the communication dated 07.07.2012 from the Garrison Engineer of the employer to the contractor (Exhibit R11) evidences completion on 05.07.2012 subject to carrying out the rectification listed in Appendix A and B thereof. As stated earlier, while Phase-II work was in progress, extension of time was granted up to 31.03.2012 but not for the period subsequent thereto (01.04.2012 to 05.07.2012). Upon completion of work, a dispute arose between the parties with regard to the quality of work and, in particular, the rectification of defects. Consequently, the dispute extended to deductions proposed to be made by the employer and, therefore, to amounts payable to the respondent/contractor.

13. The final bill dated 24.05.2013 and a communication from the contractor in September 2013(Ex.C-13) are on record. The contractor stated in Ex.C-13 that if deductions were made, the final bill should be treated as under protest. The arbitration clause required that the contractor should request the Engineer-in-Chief for appointment of an arbitrator in case of



disputes. Such letter appears to have been given by the contractor to the Engineer-in-Chief on 13.04.2015. The undisputed position is that the last extension of time up to 05.07.2012 had not been issued and the final bill had not been processed or paid when arbitral proceedings were initiated. The contractor states that the employer was unwilling to process the final bill because of the absence of a formal extension of the contract period from 01.04.2012 to 15.07.2012. In relation thereto, the contractor issued a letter dated 07.01.2016. In the said letter, the contractor stated, in relevant part, as under:

"2. We want to request you that if your good selves grant extension of time up to 05/07/2012 we shall withdraw our all the cases from court and will not seek arbitration in the interest of state. As regards labour escalation matter has been referred to CIC through high court whatever decision we will be intimated to you.

3. There is dispute of foundation D.O. Of



entire complex the D.O. has not been made by the department. Sir, go through the entire drawings of the buildings and section you will find only end levels i.e. for two place has been shown. How based on these two levels tender can be quoted. When it is been made part of lumpsum then department should give entire levels of the area where are the buildings is to be constructed should be given but in this case it was not done? Whereas foundation shows 1.5 meter depth we have coated the tender considering 1.5 meter depth and any variable quantity to be paid under D.O. but it was not paid hence our claim is remain stand.

4. Therefore we hope in the interest of the state department will take action as deemed fit without loss to us.”

14. This was followed by an affidavit. The said affidavit is



undated. However, it was executed on a non judicial stamp paper issued on

17.02.2016. The said affidavit contains the following clauses:

"1. I hereby agree to withdraw all court cases, request for appointment of Arbitrator for claim Nos.1 to 31, if extension of time is granted upto 05 Jul 2012. However our stand on labour escalation holds good till decision obtained from Chief Information Commission, Chennai.

2. This is our final satisfaction of all our claims under this Contract Agreement."

15. Based on the above mentioned letter and affidavit, the employer challenged the authority of the Arbitral Tribunal to receive, consider and adjudicate the claims of the contractor. The contractor, however, relied on a communication dated 08.08.2016 whereby the contractor informed the Arbitral Tribunal that the affidavit was given under pressure because a sum of about Rs.70 lakhs was due to the contractor towards final bill payment. This issue was examined by the Arbitral Tribunal in the above factual matrix.



WEB COURT

16. While rejecting the Section 16 petition on 04.11.2016, the Arbitral Tribunal recorded that the letter and affidavit were not submitted by the contractor with free consent and that the circumstances under which the affidavit and above mentioned letter were given have been brought out by the contractor during the arguments and reinforces the view of the Arbitrator. The contention of learned ASG that reasons were not provided in the said order cannot be brushed aside because the Arbitral Tribunal was economical with reasoning at that juncture. Thereafter, in paragraph 30 of the Award, detailed reasons were provided. In paragraph 30(e), the Arbitral Tribunal recorded the conclusion that the language of the affidavit indicates that it was given in consequence of an agreement between the parties that extension would be granted if the claimant withdrew the claims and the request for arbitration. In Clause (f), the Arbitral Tribunal noticed that large sums of money towards the final bill had been held up. The Arbitral Tribunal took note of the communication dated 08.08.2016 from the respondent/claimant to the effect that the affidavit was given under pressure. In clause (g), the Arbitral Tribunal referred to the fact that an extension was granted on 21.03.2016 for the period from 01.04.2012 to 05.07.2012. The Arbitral



Tribunal also recorded that there is no reason to grant extension of time on condition that the claimant should withdraw claims by way of an affidavit.

17. After noticing that such extension was granted under General Condition 11-A(vii) of the GCC, which is applicable only when work is delayed for reasons beyond the contractor's control, the Arbitral Tribunal recorded the finding that there is no provision in the contract for granting extension of time in exchange for the consent by the contractor (supported by an affidavit) to withdraw the court cases. The Arbitral Tribunal also recorded the following significant findings:

"(h) Moreover, I do not find any logical reasoning for the Claimant to state in an affidavit that "this is our final satisfaction of all our claims under this contract agreement" when the final bill was yet to be paid and large number of claims of huge amount, were yet to be adjudicated upon, unless there were some compelling circumstances for



WEB COPY



Arb.O.P(Com.Div)No.150 of 2021

the Claimant to do so.

(j) From the actions of the Respondent it is clear to me that being in a dominant position in this case the Respondent coerced the Claimant into writing the letter No.MB/Chennai dated 18th Feb 2016 and furnishing affidavit dated 17th Feb 2016. The affidavit given by Claimant is therefore not a "free consent".

In ***National Insurance***, the Hon'ble Supreme Court noticed, significantly, at paragraph 54 of the report, that the discharge voucher had been given even before the amounts were received. In that context, it was concluded at paragraph 52(iii) that when the contractor who is hard-pressed for funds and keen to get the admitted amount released, signs on the dotted line stating that the amount is received in full and final settlement, discharge is said to be under economic duress. Although the relevant statute was modified later thereby impacting the basis of the decision on merits, ***National Insurance*** remains an authoritative precedent on free consent.



18. While the Arbitral Tribunal was economical with reasons in support of the order in the Section 16 petition, the final award contains detailed reasons in paragraph 30 thereof. The Contract Act provides that there is no free consent if a party enters into and executes a contract while being subject to coercion, fraud, misrepresentation or undue influence. The Arbitral Tribunal concluded that the letter and affidavit were not given with free consent. The letter from the contractor withdrawing the affidavit refers to pressure from the employer. It also refers to coercion. The Arbitral Tribunal took into account the circumstances in which the letter and affidavit were given. In particular, the Arbitral Tribunal took into account the fact that the request for extension was being made in 2016 for the period running from April 2012 to July 2012 and that the final bill had not been paid although the work was completed in 2012.

19. Of particular significance is the finding at paragraph 30(h), which is extracted in the preceding paragraph, that there is no logical reason for the contractor to state that he has no claims when the final bill had not been paid and huge claims were pending. A contractor does not benefit from mere extension of time especially when such extension is granted almost four years



Arb.O.P.(Com.Div)No.150 of 2021

after work was completed. Therefore, mere extension of time without being coupled with payment of the final bill and other claims would not constitute consideration for the contractor with regard to the alleged waiver or remission under Section 63 of the Contract Act. Although this inference is not fleshed out in the Award, it flows from the findings recorded in paragraph 30, particularly sub-paragraph (h) thereof. Thus, the Award of the Arbitral Tribunal does not suffer from infirmities warranting interference under Section 34 of the Arbitration Act.

20. For reasons set out above, Arb.O.P.(Com.Div.) No.150 of 2021 is dismissed without any order as to costs. Consequently, connected application is closed.

03.01.2023

Speaking Order
Index : Yes/No
Internet : Yes/No
rrg



WEB COPY



Arb.O.P(Com.Div)No.150 of 2021

J

SENTHILKUMAR RAMAMOORTHY,

rrg

Pre-delivery order

20/21



WEB COPY



Arb.O.P(Com.Div)No.150 of 2021

in
Arb.O.P.(Com.Div)No.150 of 2021

03.01.2023