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OSA(CAD).No.109 of 2



THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.01.2024

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

OSA(CAD).No.109 of 2022

and

C.M.P.No.11435 of 2022

M/s.Lakshmi Enterprises,
Represented by its Proprietor, S.Loganathan,
Door No.36/14, Shop No.2,
M.K.N.Road, Guindy,
Chennai - 600 032.

...Appellant

Vs.

1.Tamil Nadu Cements Corporation Limited,
Represented by its Managing Director,
LLA Buildings, No.735, Anna Salai,
Chennai - 600 002.

2.Tamil Nadu Cements Corporation,
Represented by its Deputy General Manager,
Alangulam Works, Tamil Nadu Cements post,
Virudhunagar District - 626 127.

...Respondents

Prayer: Original Side Appeal filed under Section 13 of the Commercial Courts Act r/w. 37 of the Arbitration and Conciliation Act, against the fair and decreetal order dated 06.09.2021 passed in O.P.No.260 of 2021 on the file of this Court, confirming the award dated 06.03.2020 passed by the Sole Arbitrator in Arbitration Case (MHC) No.1 of 2019.



WEB COPY

OSA(CAD).No.109 of 2



For Appellant : Mr.T.L.Thirumalaisamy

For Respondents : Mr.M.Jaisingh

J U D G M E N T

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

The claimant before the Arbitrator, having suffered an award of rejection of his claim and acceptance of the counter claim by the respondent is on appeal under Section 37 of the Arbitration and Conciliation Act, 1996 as his attempt to have the award set aside under Section 34 of the said Act also failed.

2.The appellant was the successful bidder at the auction of iron scrap sold by the respondent by calling for a tender. The appellant had quoted a price of Rs.29,000/- per Metric Tonne, which was the highest and he was awarded a tender to lift 504 Metric Tonnes of scrap at Rs.29,000/- per Metric Tonne. Timelines were also prescribed for payments as well as lifting of the scrap. It is not in dispute that the timelines were breached and that the appellant did not pay the entire amount payable under the contract.



3.From the records, it appears that the appellant had attempted a negotiation to have the prices scaled down, since the price of iron scrap, in the market, tumbled during the currency of the contract. The respondents did not accept the said claim / request of the appellant. The appellant was able to lift only 90.61 tonnes of scrap during the contract period and he had paid a sum of Rs.55,00,000/- towards the value of the scrap. The appellant contended that he is entitled to refund of the excess money that he has paid and sought arbitration.

4.Upon appointment of the Arbitrator, the respondent made a counter claim contending that because of the failure of the appellant to pay and remove the entire scrap, the respondents were forced to terminate the agreement and go for a re-auction. In the re-auction that was conducted on 29.08.2016, the remaining scrap of 449.39 Metric Tonnes was sold at Rs.17,750/- per metric ton, leaving a deficit of Rs.11,250/- per metric tonne. Therefore, according to the respondent because of the failure on the part of the appellant to have lifted the scrap, it had suffered a loss of Rs.50,55,637.50/-. After adjustment, the excess payment that was made by the appellant, the respondent would claim that it is entitled to penalty for



non-lifting of materials and also the loss that is caused due to sale of the scrap at a lower price in the re-auction.

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5.The respondent claimed a sum of Rs.89,24,885.50/- as counter claim while the appellant had claimed a sum of Rs.28,13,334/- which according to him is the difference between the value of the scrap that he had lifted and the monies paid by him. The Arbitrator framed the following issues for determination:-

a) Whether the claimant is entitled for refund of the sum of Rs.28,13,334/- together with interest.

b) Whether the respondents are entitled to counter-claim of Rs.89,24,885.50/- towards loss, non-lifting of material and penalty for non-lifting of material.

*c) To such other relief as the parties are entitled to ?
At the time of arguments the claimant had taken the plea that the respondents are not entitled to make a counter claim.
Hence, an additional issue is framed.*

d) Whether the respondents are not entitled to raise a counter claim?

6.Upon consideration of the evidence that was let in before him, the learned Arbitrator concluded that the termination of the contract for failure



of the appellant is justified and therefore, the appellant is not entitled to refund. On the counter claim, the learned Arbitrator found that the appellant had not filed a rejoinder to the counter claim, denying the claims made therein. He also found that even in cross-examination of the evidence of the respondent, the claim made that unlifted material was sold at Rs.17,750/- per metric ton was not disputed. Therefore, the Arbitrator accepted the contentions of the respondents made in the counter claim and passed an award for a sum of Rs.22,45,100/- after adjusting the monies that remained with the respondents towards the value of the unlifted stock. Aggrieved by the award, the appellant move this Court under Section 34 of the Arbitration and Conciliation Act, 1996.

7. Though various grounds were raised in the petition filed under Section 34, before the Section 34 Court, the same were restricted only to the right of the Arbitrator to entertain the counter claim. The learned Single Judge after referring to Section 23-A of the Arbitration and Conciliation Act, 1996 and the judgment of the Hon'ble Supreme Court in ***State of Goa Vs. Praveen Enterprises*** reported in ***2012 (12) SCC 581*** concluded that the Arbitrator is well within the powers in entertaining the counter claim and



the said power cannot be assailed. The learned Judge also has recorded that no other argument was advanced and went ahead to dismiss the petition filed under Section 34 paving way for this appeal by the appellant.

8.Heard Mr.Thirumalaisamy, learned counsel for the appellant and Mr.Jaysingh learned counsel for the respondents 1 and 2.

9.Mr.T.L.Thirumalaisamy, learned counsel appearing for the appellant would vehemently contend that in the absence of any evidence to show the loss, the Arbitrator was not justified in accepting the plain statement made in the counter claim and concluding that the respondent had suffered loss because of the appellant's failure to honour the contract. The learned counsel would take us through the list of documents that were filed before the Arbitrator to point out that no document evidencing the loss has been filed.

10.Contending contra, Mr.M.Jaisingh, learned counsel for the respondents would submit that Arbitrator has found that the claim made in the counter claim regarding the loss has not been disputed by filing a



rejoinder. He would also point out that the Arbitrator has specifically observed that there is not even a suggestion in the cross-examination of the witness regarding the quantum of loss claimed by the respondent.

11.From the perusal of the award, we find that while dealing with the claim for loss, the learned Arbitrator has found that apart from failure to dispute the contentions made in the counter claim by filing a rejoinder, the appellant has not even chosen to cross-examine the witness, who appeared on the side of the respondent regarding the quantum of loss, the learned Arbitrator observed as follows:-

"The claimant had not filed any additional points of contention disputing the re-auction or the rate at which the re-auction was conducted or any other ground. Even while cross-examination, the only question that was poised to RW1 was why the respondent did not accept the rate offered by the Claimant. Even when the witness was recalled no additional question on this issue was asked."

12.In the light of the above observations by the learned Arbitrator, we do not think, it is open to the appellant to contend that there is no proof of damages. Unlike a regular suit proceeding under Section 34 has its own



limitations. The Section 34 Court is not a Court of appeal or a review. The jurisdiction of the Section 34 Court is very limited and if the award of the Arbitrator appears to be reasonable and there is some basis for the conclusions, the Section 34 Court cannot interfere. We therefore, do not find any reason to interfere with the order of the Section 34 Court in dismissing the application for setting aside the award. This Appeal is therefore, **dismissed**. No costs. Consequently, connected miscellaneous petition is closed.

(R.S.M., J.) (R.S.V., J.)

05.01.2024

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Internet: Yes

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Neutral Citation : No



WEB COPY

OSA(CAD).No.109 of 2



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