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O.P.No.257 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.12.2024
Pronounced on : 13.12.2024

CORAM

THE HONOURABLE **MR.JUSTICE P.B.BALAJI**

O.P.No.257 of 2018

Chennai Metro Water Supply & Sewerage Board,
No.1, Pumping Station Road,
Chintadripet,
Chennai – 600 002.

... Petitioner

VS.

1.M/s.IVRCL Infrastructures and Projects Ltd.,
No.30.A, South Cross Street,
Thiru Vi Ka Industrial Estate, Guindy,
Chennai – 600 032.

2.P.S.Krishnamurthi

3.S.Sivaraman

4.N.Pitchaimurthi

... Respondents

PRAYER: Arbitration Original Petition filed under Sections 34 of the Arbitration and Conciliation Act, 1996, to set aside the award passed by the respondents 2 to 4 dated 29.09.2011 and made in the unnumbered



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proceedings arising out of the work of providing collection system in Pallavaram Municipality Package II in Pallavaram Sewerage Scheme between the petitioner and the first respondent.

For Petitioner : Mr.Gowtham S.Raman

For Respondents : Mr.J.Ravikumar

ORDER

The Chennai Metro Water Supply and Sewerage Board, aggrieved by the award dated 29.09.2011, has preferred the above Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996.

2.The brief facts of the case are as hereunder:

The petitioner entered a contract with the respondents for providing collection system in Pallavaram Municipality Package II in Pallavaram Sewerage Scheme, in and by an agreement dated 19.12.2005. The respondent was forced to incur additional expenses and therefore, made a claim which was negated by the petitioner Board and consequently, the arbitration proceedings were initiated by the respondent. The arbitral



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Tribunal segregated the claims made by the petitioner into eight claims and after recording evidence and hearing the submissions of the parties, the arbitral Tribunal allowed the claims 1, 4, 6 and 7 and rejected the claims 2, 5b and 8. Insofar as claim 3, the Tribunal did not consider the same as it was a non-tendered item and insofar as claim No.5a, it pertaining to execution of culvert crossing, the said claim was dropped. Aggrieved by the award in allowing claims 1, 4, 6 and 7 to the tune of Rs.1,72,48,010/- payable with interest at 18% per annum, from 01.09.2011 till the date of payment, the Board is before this Court, challenging the award of the Arbitral Tribunal dated 29.09.2011.

3.I have heard Mr.Gowtham S.Raman, learned counsel for the petitioner Board and Mr.J.Ravikumar, learned counsel for the respondents/claimants. I have also gone through the materials placed before me by way of typed set of papers and the decisions on which reliances have been placed by the learned counsel for the parties.

4.Mr.Gowtham S.Raman, learned counsel for the petitioner would



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challenge the award of the arbitral Tribunal under Section 34 of the Arbitration and Conciliation Act, 1996, being prior to the amendment of the Act in 2015, on the following grounds, namely A: the award is patently illegal and contrary to terms of the contract and B: the award is a non speaking. Fortifying the challenge to the award on the above grounds, Mr.Gowtham S.Raman would take me through various terms and conditions in the contract, more specifically, the condition pertaining to payments on variations in Condition 42.5 which stipulates that the value of work executed shall include the valuation or variations in the compensation events, Condition 43.3 which relates to payments in respect of items of works for which no rate or price has been entered could not be paid by the employer and shall be deemed covered by others rates and prices in the contract. Finally, he would rely on Condition 44 which pertains to compensation events and sub Condition 44.1(f) which sets out that when the ground conditions are substantially more adverse than could reasonably have been assumed before issuance of letter of acceptance from the information issued to the bidders (including the Site Investigation Reports), from information available publicly and from a visual inspection of the site



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and Condition 44.2 stipulating that even a compensation event would result additional cost or which would prevent the work being completed before the intended completion date, the contract price shall be increased and/or intended completion date is extended and that the Engineer would be competent to decide both the increased contract price as well as the extension of the intended completion date.

5. Referring to the above conditions, the learned counsel would submit that the additional work executed by the respondents was not part of the original Bill of Quantity (BOQ) and when there were specific conditions which clearly set out the admitted agreed position that any additional costs would be part of the original contract and cannot be independently claimed, the Arbitrators have ignored such vital conditions in the contract and therefore, according to the learned counsel for the petitioner, the award is patently illegal, especially on account of non-consideration of important material evidence adduced before the Arbitrator.

6. The learned counsel for the petitioner would also submit that while



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extending the time for completion of contract, the petitioner Board has also awarded 25% over and above the original value of the contract only to meet the escalation costs and the same having been accepted by the respondents/claimants, it is not open to the claimants to contend that they were entitled to reimbursement of the additional expenses. He would also contend that the claimants ought to have foreseen the additional expenses because they had full opportunity to inspect the streets and find that some of the streets were very narrow and would not be possible for them to collect and store the excavated material in the same streets and would necessarily have to incur transportation costs to take it to a different location to ensure smooth flow of traffic.

7.The learned counsel for the petitioner would also place reliance on the following decisions in support of his contentions:

1.(2002) 4 SCC 45 : (General Manager, Northern Railway and Another Vs. Sarvesh Chopra).

2.(2003) 5 SCC 705 : (Oil & Natural Gas Corporation Ltd., Vs. Saw Pipes Ltd).

3.(1999) 9 SCC 610 : (Ch.Ramalinga Reddy Vs. Superintending Engineer and Another).

The learned counsel for the petitioner would therefore pray for the



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arbitration original petition being allowed, setting aside the award of the Arbitral Tribunal.

8.Per contra, Mr.J.Ravikumar, learned counsel appearing for the respondents would submit that the arbitral Tribunal consisted of three members and the Tribunal included a nominee of the petitioner themselves and all the three Arbitrators passed a unanimous award in favour of the respondents. He would further submit that it was not as if the award is a non speaking award as contended by the learned counsel for the petitioner, taking me through the portions of the award, he would attempt to establish that it is not as if the respondents have been awarded whatever was claimed by them. From the award, the learned counsel for the respondents would show that the Tribunal applied its mind and awarded amounts that were legally due and payable to the petitioner, disallowing several of the claims and also allowing some of the claims in part alone.

9.The learned counsel for the respondents would further submit that admittedly, the respondents/claimants have executed the work and it is not



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as if the respondents are claiming amounts for works not done. He would further submit that the contract does not expressly specify or prohibit such claims being made and referring to conditions which were relied on by the learned counsel for the petitioner, he would submit that all these conditions were pertaining only to the Bill of Quantity (BOQ) and when the claim before the arbitral Tribunal was not in terms of of BOQ then the same cannot be expected to be reflected in the BOQ and therefore, he would submit that the contentions of the learned counsel for the respondents that the claim amount would have to be subsumed in the original BOQ itself cannot be countenanced. The learned counsel for the respondents would submit that though there has been delay in completion and execution of the works assigned to the respondents/claimants, it is not the case of the petitioner that the delay was occasioned only because of the claimants and in any event, he would submit that the Board had rightly extended the time only because there was no delay on the part of the petitioner.

10. With regard to Environment Management Plan (EMV), the learned counsel for the respondents would submit that the only serve as would be a guideline and it does not speak about any payment aspects and therefore, the



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Tribunal has rightly applied its mind and proceeded to pass the award, allowing certain claims while rejecting certain other claims.

11. In support of his contentions, the learned counsel for the respondent placed reliance on the following decisions:

1. (1984) 4 SCC 679 : (*Renusagar Power Co. Ltd., Vs. General Electric Company and Others*).
2. (2011) 5 SCC 532 : (*Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others*).
3. (2013) 1 SCC 641 : (*Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others*).

12. I have carefully considered the submissions advanced by the learned counsel on either side. I have also gone through the award impugned in the present proceedings.

13. The main grounds on which the award is challenged are that it is patently illegal award for non consideration of material evidence, namely the conditions in the contract and also on the ground the award is non speaking award. Firstly, dealing with the the second ground, namely, the award being a non speaking award, I do not find that the award passed by



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the Arbitral Tribunal is a non speaking award. In fact, out of as many as eight claims made by the petitioner, the Tribunal has proceeded to pass an award only in respect of some of the claims, rejecting the other claims. Even in respect of the claims that have been accepted by the Tribunal, they have not blindly granted the amounts claimed by the respondents but have proceeded to pass an award based on the materials placed before the Tribunal alone. Therefore, I do not find any merit or substance in the arguments put forth on the side of the petitioner that the award is a non speaking one. Hence, his contention is rejected.

14.Coming to the question of non consideration of material evidence and consequently, the award being patently illegal, I find that the conditions which are heavily relied on by the learned counsel for the petitioner, as rightly pointed out by the respondents, all pertain only to the Bill of Quantities, that is the scope of work which has been agreed upon specifically under the contract. Only in case of any variation to the said Bill of Quantities, condition 40 would come into play. Similarly, I do not find condition 43.3 coming to the rescue of the petitioner Board. Though it is



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contended that the items of works for which no rate or price has been entered in could not be payable by the employer and could be deemed to be covered under other rates and prices in the contract, this again can only pertain to the items of works which have been contemplated or set out specifically in the contract and cannot be extended to additional work which was necessitated during the course of execution of the prosecution.

15. Equally, the compensation event condition 44.1(f) r/w 44.2 was in fact invoked in the present case and the respondents Board also by letter dated 18.08.2008 while granting extension of time up to 31.03.2009 agreed for 25.29% increase on the original contract value over the BOQ rates. Therefore, the said gesture on the part of the petitioner was only in respect of price variation in respect of the BOQ and not in respect of the claims made by the respondents which were purely pertaining to the additional works which became necessitated to execute the contract in full.

16. With regard to the discussion of the Arbitral Tribunal in this regard, I find that the Tribunal framed specific issues for each of the claims



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and after discussing the available material placed before it, the Arbitral Tribunal has rightly found that the respondents incurred additional transportation charges and awarded payment at the rate of Rs.130/- per cubic metre, finding that it would be reasonable.

17. Admittedly, when the said claim cannot be brought within the scope of the BOQ, the reliance placed on the existing conditions in the contract which all revolve around the BOQ and variations to the prices of the BOQ cannot be pressed into service. The Tribunal has rightly proceeded to award the claim in respect of the additional works which were necessitated on account of the lay of the property, especially narrow streets. Further, the arbitral Tribunal has also rightly found that it is not the case of the petitioner Board that the respondent has not carried out the work of shoring and shuttering and in the light of the work having been completed by the respondents, it could only be inferred that the process of shoring and shuttering was completed by the respondents and the respondents are entitled to payment for such work which was outside the ambit of the BOQ.



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18.Insofar as the escalation costs made in the claims 6 and 7, the Arbitral Tribunal has framed two issues and finding that the petitioner had extended the time and the same was not attributable to any delay on the part of the respondents/claimants and in terms of Condition 57.1, the Tribunal held that the respondents/claimants were eligible for revised rates from 19th July 2007 onwards. The Arbitral Tribunal also held that the letter dated 28.08.2008 relied on by the petitioner would not prohibit the claimant from seeking payment from the intended date of completion, namely on 19.07.2007. I do not find any illegality or perversity in the said findings rendered by the Tribunal, as I have already found that the escalation provided was only within the scope of the BOQ.

19.There is one more additional reason for me not to interfere with the award of the Tribunal. The award was passed way back on 29.09.2011 and the OP itself came to be numbered only in the year 2018 and expect the contract claim petition and award and some of the letters pertaining to extension of time granted to the respondents/claimants, the other records are not available before the Court. The petitioner has not been able to show



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what was agreed upon under a supplementary agreement which was apparently entered into between the petitioner and the respondents. Unless the relevant materials are placed before this Court to attack the findings of the Arbitral Tribunal, I am unable to accept the grounds raised challenging the award warranting interference under Section 34 of the Arbitration and Conciliation Act, 1996.

20. With regard to the decision relied on by the learned counsel for the petitioner in *General Manager, Northern Railway and Another Vs. Sarvesh Chopra* reported in (2002) 4 SCC 45, the Hon'ble Supreme Court held that when there is a delay in performance of the contract, the contractor without avoiding the contract, had accepted the same and he cannot claim compensation for any loss occasioned by non performance of the reciprocal terms by the employer. I do not find this decision applying to the facts of the present case since the delay admittedly is not attributable to the claimants even according to the petitioner and further, it is not a case of claim on account of loss occasioned by non performance of reciprocal terms as was the case before the Hon'ble Supreme Court.



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21.In *Oil & Natural Gas Corporation Ltd., Vs. Saw Pipes Ltd.*, reported in (2003) 5 SCC 705, the Hon'ble Supreme Court held that the Arbitral Tribunal had to decide the dispute in accordance with substantive law being in force, namely Indian Contract Act and Transfer of Property Act and other such laws in force and when there is violation of any of the provisions of the said Acts, then the award could be interfered with. Here, I do not find any violation of any substantial provisions of the Indian Contract Act. As already held, the claim was only in respect of additional works which were not contemplated under the BOQ and therefore, this decision also does not come to the rescue of the petitioner.

22.In *C.H.Ramalinga Reddy Vs. Superintendent Engineer and Another* reported in (1999) 9 SCC 610, the Hon'ble Supreme Court held that it was the obligation of the contractor to make necessary enquiries about local conditions before quoting his rates and he could not therefore make any claim due to his own lapse in not making enquiries about the fluorine content of the drinking water. In fact, in the very same decision, the Hon'ble



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Supreme Court only confirmed the award as limited by the High Court and did not choose to set aside the award on the grounds raised.

23.In *Renusagar Power Co. Ltd. Vs. General Electric Company and Others* reported in (1984) 4 SCC 679, the Hon'ble Supreme Court held that when the claim for compensatory damages is directly, closely and inextricably connected with the terms and conditions of the contract, it would be a claim 'arising out of' and in any event 'related to' the contract and therefore arbitrable.

24.In *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others* reported in (2011) 5 SCC 532, the Hon'ble Supreme Court held that the Arbitral Tribunal is being chosen voluntarily by the parties to the dispute. Every civil or commercial dispute, be it contractual or non-contractual, was capable of being adjudicated and resolved by arbitration, unless the jurisdiction of the Arbitral Tribunal which was specially excluded either expressly or by necessary implication.



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25. In *Chloro Controls (I) P.Ltd. Vs. Severn Trent Water Purification Inc. and Others* reported in (2013) 1 SCC 641, the Hon'ble Supreme Court held that when there is a defined 'legal relationship' between the parties, whether contractual or not and there is some arbitration agreement forming the basis of the arbitral proceedings then the dispute submitted to arbitration would be maintainable.

26. Though the learned counsel for the petitioner has not seriously challenged the jurisdiction of the Arbitral Tribunal on the ground that the claims made were not sustainable in view of the legal position settled by the Hon'ble Supreme Court as discussed herein above, I do not find that the claim for additional works would fall outside the scope of the contract and certainly, the respondents/claimants were entitled to seek for arbitration in respect of the said claims.

27. It is settled law that unless there is perversity writ large on the face of the award or where there is patent violation of any provisions of any substantive law or when the Tribunal fails to consider material evidence and



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on such other similar limited grounds alone, this Court can exercise power under Section 34 of the Arbitration and Conciliation Act, 1996 and interfere with the award passed. I do not find the grounds raised by way of challenge to the award falling within the ambit of Section 34 of the Arbitration and Conciliation Act, 1996. Both the grounds of patent illegality on account of non-consideration of material evidence and the award being non speaking have been discussed in detail and are without any merit. Therefore, I do not see any justifiable grounds to interfere with the award passed by the Tribunal.

28.For all the above reasons, this original petition is liable to be dismissed.

29.In fine, the arbitration original petition is dismissed. There shall be no order as to costs.

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