



O.P.No.57



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON
04.09.2024

PRONOUNCED ON
19.12.2024

CORAM:

THE HONOURABLE MR.JUSTICE K. KUMARESH BABU

O.P.No.574 of 2007

Chennai Petroleum Corporation Ltd.,
536, Anna Salai, Teynampet,
Chennai 600 018.

Rep., by its Deputy Secretary,
Mr.M.Sankaranarayanan

... Petitioner

Vs

1.M/s.Afcons Infrastructure Limited,
Afcons House, 16, Shah Industrial Estate,
Veera Desai Road, Azad Nagar PO
P.B.No.11978, Andheri (W),
Mumbai – 400 053.

2.Mr.S.N.Jha,
Sole Arbitrator,
C-31, Hauz Khas,
New Delhi – 110 016.

... Respondents

PRAYER:- Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking for setting aside the arbitral award dated 23.03.2007 in so far as it relates to the award of the sum of Rs.5,81,38,638/- with interest thereon as extended stay compensation (Claim No.3) by allowing this petition with costs.



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For Respondents : Mr.D.Balaraman for R1

ORDER

This Original Petition had been placed on board pursuant to the order of remand made by the Hon'ble Apex Court in Civil Appeal Nos.1502 & 1503 of 2018 by order dated 02.02.2018. The relevant portion of the order is extracted hereunder:-

As we find from the order passed by the learned Single Judge and the Division Bench of the High Court, it is noticeable that they have been exclusively guided by absence of reasons by the Arbitrator with regard to quantum. Mr.Datar, learned Senior counsel appearing for the appellant would submit, he would not arise the issue of non-ascribing of reasons by the Arbitrator and would only put forth his submission pertaining to non-arbitrability of the dispute under the clause of the agreement.

In view of the aforesaid, we are inclined to allow the appeals, set aside the judgments and orders passed by the learned Single Judge and by the Division Bench of the High Court and remand the matter to the learned Single Judge to deal with the contention alone raised under Section 34 of the Act.

It may be mentioned at the cost of repetition that the learned Single Judge shall only address with regard to arbitrability of Claim No.3 within the stipulates of the contract and not address itself with regard to any other claim or the quantification of Claim No.3, as found by the Arbitrator. Ordered accordingly.

The appeals are allowed to the extent indicated above.

There shall be no order as to costs. (emphasis supplied)



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2. Under the order of remand, the Hon'ble Apex Court had clearly directed to address the issue with regard to Arbitrability of claim No.3 and the Court not to address with regard to any other claim or quantification of claim No.3. The said direction would imply that this Court cannot re-appreciate the award with regard to any other claim or quantification of claim No.3 and it is only restricted to find out the arbitrability of the issue framed under claim No.3. The claim No.3 as framed is as follows:-

Claim No.3:-

Claim for expenses during the extended period of completion amounting to Rs.22,84,55,943/-

3. The learned counsel appearing for the petitioner would contend that the issue raised in claim No.3 is not at all arbitrable. According to him, the reason as to why the same is not arbitrable is that the contract had not provided for any compensation towards expenses during the extended period of completion. He would submit that the Arbitrator cannot go beyond the terms of contract which had been agreed to between the parties to the contract. He would draw my attention to clauses 33 & 34 of the contract and contend that the respondent would only be liable to pay compensation for the delayed completion of work, even though, the reasons could be attributed to the petitioner. He had also referred to clause 85.7 which provides that the schedule



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of rates cannot be altered for the reason of the works or any other part of them being modified, altered, extended, diminished or omitted. He would also refer to clause 18 of the Special Conditions of Contract which in clear terms indicate that the contract price shall be firmed and deemed to be valid for the entire duration of the contract and that no adjustment due to increase in price of materials, consumable and labour or any other inputs whatsoever for the performance of the work under the contract shall be admitted. He would draw my attention to the letter of acceptance of the contract which also indicates that the schedule of rates in the annexure and in the schedule of labour rates in annexures 2 & 5 are firm and the same cannot be modified. After relying upon the aforesaid clauses he placed reliance upon the judgment of the Hon'ble Apex Court in the case of *Oil and Natural Gas Corpn., vs. Wig Brothers Builders and Engineers Private Limited* reported in (2010) 13 SCC 377, *Associate Builders vs. Delhi Development Authority* reported in (2015) 3 SCC 49, *Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India* reported in (2019) 15 SCC 131 and *Union of India & Ors., vs. Bharat Enterprise* reported in 2023 SCC Online Sc 369. Referring to the aforesaid judgments, the learned counsel would plead that the Arbitrator being a creature of a contract and the parties to the contract, cannot travel beyond the terms of the contract. He would submit that in the present contract between the parties, it had been agreed upon between them that the



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compensation for the delayed work would have to be borne by the contractor and that there will be no escalation cost payable to the contractor. Therefore, he would conclude that the Arbitrator did not have the jurisdiction to arbitrate the claim No.3 at all and on that ground itself the award with regard to claim No.3 would have to be set aside.

4. Countering his arguments, Mr.D.Balaraman, the learned counsel appearing for the respondent would submit that the petitioner having participated in the arbitration proceedings and made his submissions to the claim No.3 is estopped from making a claim that the claim No.3 is not arbitrable. He would further submit that after the pleadings were completed, the claims were formulated by the Arbitrator and based upon the same, the evidences were let in including the arguments made. That apart, he would draw attention of this Court to clause 91 which provides for notice of claims for additional payment. He would submit that the said clause enables the contractor for any extra payment or compensation towards the claims in respect of the work, then he shall give notice in writing to the Engineer in-charge within 10 days from ordering of any work or happening of any event upon which the contractor for basis of such claim and only on the failure on the part of the contractor to put forward any such claim with necessary particulars within the time, it would amount to a waiver of such claim by the contractor.



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5. The learned counsel appearing for the respondent would further rely upon the various exhibits that had been marked before the Arbitrator to contend that the respondents have put on notice, the petitioners of their claim for additional payment as per the clause 91 of the agreement. He would further submit that the necessity of the extension of time had occurred only due to the reasons attributable to the petitioner and not the respondents. He would submit that in view of clause 91 of the General Conditions of Contract, the respondent is entitled for an extra payment or compensation in whatever term, it could be granted not only for the extra works but also for the claim of escalated charges. He would submit that the other provisions which relates to fixed schedule of rates and fixed schedule of labour rates, cannot be put against the respondent particularly in view of the consensual agreement between the parties under clause 91 which entitles the respondents to claim for compensation. He would further contend that the judgments relied upon by the learned counsel appearing for the petitioner are for the proposition that when the clauses in contract do not provide for an escalation rate or compensation for delayed work only, then the claimant may not have been entitled for such claim. However, in this case, he would submit in view of clause 91 of General Conditions of Contract, the petitioner is entitled for the claim under the claim No.3 which had been thoroughly analysed by the Arbitrator in favour of the respondent. Hence, he



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and the Contractor shall pay to the Owner as compensation, an amount equal to 1 percent or such smaller amount as the Engineer-in-Charge whose decision in writing shall be final) may decide, on the amount of the estimated cost of the whole work as shown in the tender for every week that the work may remain incomplete as per the time schedule, subject to a maximum compensation of 10 percent of the total cost of the whole work after which period action will be taken by the Engineer-in-charge under the provisions of the contract. To ensure good progress during the execution of the work, the Contractor shall be bound, in all cases in which the time allowed for any work exceeds one month, to complete one-fifth of the work before one-fourth of the time allowed under the contract has elapsed, three-eighths of the work before one-half of such time has elapsed and three-fourths of work before three-fourths of such time has elapsed in the event of the Contractor failing to comply with his condition he shall be liable to pay as compensation an amount as stipulated above.

Clause 85.7:- Schedule of Rates cannot be altered

(I) For work under unit rate basis, no alteration will be allowed in the Schedule of Rates by reason of works or any part of them being modified, altered, extended, diminished or omitted, the Schedule of Rates are fully inclusive rates which have been fixed by the Contractor and agreed to by the Owner and cannot be altered.

(ii) For lumpsum contracts, the payment will be made



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according to the work actually carried out, for which purpose an itemwise, or workwise. Schedule of Rates shall be furnished, suitable for evaluating the value of work done and preparing running account bills. Lumpsum contracts shall also allow for any increase or decrease in the total quantity of work upto approximately 10% of the quoted price and the contract value shall be adjusted accordingly.

Clause 91:- Notice of claims for Additional Payment

Should the Contractor consider that he is entitled to any extra payment or compensation or to make to any claims whatsoever in respect of the work, he shall forthwith give notice in writing to the Engineer-in-Charge that he claims extra payment and or compensation. Such notice shall be given to the Engineer-in-Charge within ten days from the ordering of any work or happening of any event upon which the Contractor bases such claims and such notice shall contain full particulars of the nature of such claim with full details and amount claimed. Failure on the part of the Contractor to put forward any claim with the necessary particulars as above within the time above specified shall be an absolute waiver thereof.

No omission by the owner to reject any such claim and no delay in dealing therewith shall be waiver by the Owner of any rights in respect thereof.

Special Contract Clause 19 – Price Escalation:-

19.1 The contract price shall be firm and deemed to be valid for the



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entire duration of the contract till the completion of work including extension thereof, in all respects. No adjustment due to increase in price of materials, consumable labour etc., or any other input whatsoever for performance of work under the contract shall be admitted.

10. A reading of the aforesaid clauses would indicate that the respondent contractor would not be entitled for making any claim on the escalated charges and the schedule of rates shall be the firm rates for entire period of contract. The employer namely the petitioner was also entitled for compensation on the ground of delay in completing the project. The above are reflected as per the clauses 34, 85.7 of the General Conditions of Contract and clause 19 of the Special Conditions of Contract. Clause 91, which has been relied upon by the learned counsel appearing for the respondent would indicate that the contractor, if he considers that he is entitled for any extra payments or compensation, he shall make such claims to the Engineer in-charge. It is the case of the respondent that the said claims had been made to the Engineer in-charge under various documents that had been marked before the Arbitral Tribunal.

11. A reading of the written arguments filed by the petitioner particularly with respect to claim No.3 which had been dealt in extenso under Chapter 14 to



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the written arguments, I could not find any issue that had been raised by the petitioner as regards to the arbitrability of the said issue. It had infact made each of the claim under claim No.3 on its merits. Judgments have been relied upon by the learned counsel appearing for the petitioner for the proposition that the Arbitrator ought not to have travelled beyond the terms of the contract. The said proposition cannot be disputed. Whether those proposition are applicable to the facts of the case is the issue that had to be decided. In the present case from the terms of the contract particularly clause 91 extracted supra entitles the contractor for making a claim if in his consideration, he would be entitled to for any extra payment or compensation. When such a clause had been incorporated in the contract, where the contractor is entitled to make a claim for additional payment of compensation, the petitioner cannot plead that the issue is not arbitrable.

12. For the reasoning and findings given above, I am of the considered view that the claim No.3 is arbitrable. Accordingly, the above O.P is disposed of. However, there shall be no order as to costs.

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Index :Yes/No
Speaking Order/Non Speaking Order

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K.KUMARESH BABU, J.

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