IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.02.2024

CORAM:

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

O.S.A.NOS.247 AND 248 OF 2019
AND
A.NOS.8232 TO 8237 OF 2019 AND 2644 OF 2020
AND
CMP NOS.21209, 21212 AND 21213 OF 2019
AND
CMP NOS.5287 AND 5288 OF 2022
AND
E.P.NOS.165 AND 166 OF 2018

National Highways Authority of India
New Delhi,
Through its Project Director
National Highways Authority of India, PIU,
Door No.212-3/D3-1, Sri Nagar Colony,
Narsothipatti, Salem – 636 004. ... Appellant
in both OSAs'

Vs.

1.M/s.JSR Constructions Pvt. Ltd.,
3415, 2nd Cross, 2nd Stage,
Indira Nagar,
Bangalore – 560 038.

2.Lt.Gen. Y.P.Khurana, PVSM (Retd.)
Presiding Arbitrator
No.175, Sector – 27, Arun Vihar,
Noida, Uttar Pradesh – 201 303.

3.H.P.Jamdar
Co-Arbitrator
No.5, Vishwakarma Colony,
Behind Civil Hospital, Shahibaug,
Ahmedabad – 380 004.

4.N.K.Bahri
Co-Arbitrator
D-306, Sarvodaya Enclave,
New Delhi – 110 017. ... Respondents in both OSA's

PRAYER: Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 read with Clause 15 of the Letters Patent and Order XXXVI Rule 1 of the Original Side Rules, praying to set aside the common order dated 30.04.2019 passed in O.P.No.545 of 2013 and O.P.No.764 of 2014 respectively.

For Appellant (in both OSAs') : Mr.AR.L.Sundaresan
Additional Solicitor General
for M/s.SU.Srinivasan

For Respondent-1 : Ms.K.Aparna Devi

COMMON JUDGMENT

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

Challenge in these appeals is to the orders of the Court exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 disposing the applications seeking to set aside the awards passed in O.P.Nos.545 of 2013 and 764 of 2014.

2.The facts that led to the arbitration proceedings are necessary for disposal of these appeals are as follows:

2.1.The first respondent was the successful bidder for the project of Four Laning of Salem - Bengaluru Highway for a distance of about 16.6 kms between 163.40 and 180 kms. The contract was entered into on 28.04.2005 and the date of completion was fixed as 26.11.2007. The total contract value was Rs.49,70,17,005.00. The work was actually completed on 31.12.2009.

2.2.Upon completion, the Contractor raised several claims against the appellant namely National Highways Authority of India seeking compensation under various heads. There were several claims made and they were referred to arbitration by a panel of 3 technically qualified Arbitrators. The claims were basically on excess work done, price adjustment, delay, loss of profit for retention of machineries etc. Originally, five claims were referred to arbitration and the Arbitrators passed an award on 03.10.2012 and there was a correction of the award on 04.01.2013.

2.3.The claims before the Arbitral Tribunal were as follows:

*"**1.Claim No.1** – Amount claimed Rs.8,76,592/-, Measurement of BOQ item no.2.05 (b) construction of embankment with fly ash conforming to Table 1 of IRC:SP:58-2001.*

***2.Claim No.2** – Amount claimed Rs.48,87,843/-, Method adopted for fixing of rates of BOQ and Non BOQ varied quantities.*

***3.Claim No.3** – Amount claimed Rs.10,52,013/-, Application of a wrongful method used by the Respondent to recover the Mobilization Advance.*

***4.Claim No.4** – Amount claimed Rs.3,82,90,850/-, The method of calculation of x, y, z percentages for Price Adjustment and tempering with the definition of R value.*

***5.Claim No.5** – Interest @ 18% p.a. on Claim Nos.1 to 4."*

2.4.The Tribunal allowed Claim Nos.1 to 5. As regards Claim No.1, the Arbitral Tribunal allowed the same partially concluding that the respondent would be entitled to a sum of Rs.8,76,592/- under the claim with interest.

2.5.Claim No.2 was considered in two parts namely, Claim 2A and 2B. On Claim 2A which relates to the price fixation for M30 Grade Concrete. The Tribunal agreed with the claim of the first respondent / Contractor and awarded a sum of Rs.31,21,266/- with interest.

2.5.1.On Claim 2B which relates to fixation of rates for M20 Grade concrete, the Tribunal awarded a sum of Rs.10,03,743/- with interest. The Tribunal took care to apply the rates that prevailed in April 2008 when the work was actually carried out.

2.6.As regards Claim No.3, which relates to recovery of mobilization advance, the Tribunal concluded that the process of recovery or the procedure for recovery adopted by the appellant was incorrect and in view of the specific request of the first respondent dated 06.10.2007 that the amounts recovered shall first be adjusted towards the principal, the Arbitral Tribunal concluded that the recovery of mobilization advance must have been in the manner requested by the first respondent at least on and from 06.10.2007. After having concluded so, the Tribunal came to the conclusion that there has been an excess recovery of Rs.2,50,568/- as interest and the first respondent is entitled to refund of the same with interest.

2.7.On Claim No.4 relating to calculation of price adjustment, the Tribunal concluded that the first respondent would be entitled to price adjustment based on the definition of 'price adjustment' on the whole value of the raw materials namely Cement, Steel and Bitumen. Based on the interpretation of the Clauses of the contract, particularly, Clauses 60.3 and 70.3 of the conditions.

2.7.1.As regards Claim No.4 is concerned, the award was not unanimous and the Arbitrators differed in their opinion. While two of the Arbitrators concluded that the claimant would be entitled to a balance price adjustment of Rs.20,65,297/- apart from being entitled to the refund of Rs.2,27,57,675/-, one of the Arbitrators, however, dissented and concluded that the claimant has been paid in excess of about Rs.2,11,93,896/- and the same should be recovered from him.

2.8.After this initial award was passed on 03.10.2012, some more issues arose between the parties and there was a second reference made to the same set of Arbitrators and these claims were five in number, namely, Claim Nos.6, 7, 8, 9 and 10.

2.9.A second award came to be passed by the Arbitrators on 08.05.2014 on the second set of pleas. Claim No.6 was withdrawn by the claimant and Claim No.7 which relates to payment of additional cost incurred due to change in the scope of work of Minor Bridge No.33 was rejected by the Tribunal. Claim Nos.8, 9 and 10 were allowed by the Arbitrators.

2.10.We must point out at this juncture that as regards Claim Nos.8 and 9, one of the Arbitrators gave a dissenting opinion. Claim No.8 related to wrongful fixation of rates of variations by the Engineer. The claimant sought for a sum of Rs.30,56,859/- on Claim No.8 contending that there has been a wrongful fixation of rates for varied items by the appellant and the Tribunal awarded a sum of Rs.19,94,193/-.

2.11.Claim No.9 relates to loss of profit or overstay charges. Here also, there is a disagreement among the Arbitrators. The claimant made a claim for Rs.20,69,69,731/-.The Arbitrators after analyzing the provisions of the contract, particularly, Clause 53.4 which relates to claim for loss of profit concluded that the claimant would be entitled to the same.

2.12.The majority of the Arbitrators held that even in the absence of compliance with Clauses 53.1 and 53.2 of the General Conditions of Contract, the Tribunal can assess the entitlement of payment on verification of contemporary records. On such conclusion, the Arbitral Tribunal held that the claimant can rely upon the contemporaneous records like the monthly progress reports and other materials that are available. The Tribunal also faulted the appellant's Engineer for not inspecting the sites and accepted the records maintained by the claimant. On the said conclusion, the Arbitral Tribunal awarded a total sum of Rs.6,10,10,971/-. On Claim No.9, the dissenting Arbitrator held that in the absence of compliance with Clauses 53.1 and 53.2, the claimant is not entitled to seek loss of profit or overstay charges.

2.13.On Claim No.10, the Arbitrators were unanimous. The said claim relates to rate of Bitumen that would be applicable in November 2004. The Arbitrators concluded that the claimant would be entitled to determination of the cost of Bitumen as per Clause 52 of the General Conditions of Contract. They fixed the amount that the claimant would be entitled to Rs.6,29,082/- at the rate of Rs.57.20 per cubic meter. The Arbitrators also granted interest at 10% per annum on the amounts awarded for the periods prescribed in the award. Since the award has been accepted by the first respondent, we are not going into the details of the rejected claims.

2.14.Aggrieved by the awards, the appellant moved the Court under Section 34 seeking to set aside the awards.

3.The learned Single Judge who heard the application under Section 34, after referring to the conclusion of the Arbitrators, found that the appellant has not made out any ground which would fall within the four corners of Section 34 in order to enable interference of the award. The learned Single Judge found that the award has a whole takes a plausible view which cannot be lightly interfered in exercise of the very limited jurisdiction available to the Court under Section 34. On the said conclusion, the learned Single Judge dismissed the Section 34 application. Hence, these appeals.

4.We have heard Mr.AR.L.Sundaresan, learned Additional Solicitor General appearing for the appellant and Ms.K.Aparna Devi, learned counsel appearing for the first respondent.

5.Mr.AR.L.Sundaresan, learned Additional Solicitor General would vehemently contend that despite the fact that the jurisdiction of the Court under Section 34 is limited, Section 34 Court was not right in glossing over from serious irregularities in the award and upholding the award on the ground that it is supported by plausible reason. The learned Additional Solicitor General would seek us to re-appreciate the evidence and indulge in a microscopic examination of the awards to pick holes in the awards. He would draw our attention particularly to the decision on Claim No.4 and Claim No.9.

5.1.As regards Claim No.4 is concerned, the grievance of the learned Additional Solicitor General is that while fixing the price variation, the Arbitral Tribunal has added the other charges like transportation, surcharge etc., to the cost of the materials, namely, cement, steel and bitumen and has adopted variation of that price. He would seek to support his argument by referring us to the dissenting note of the third Arbitrator who has disagreed with the other two Arbitrators. Even though such an exercise has been carried out by the learned Judge while exercising the Section 34 jurisdiction, we have again perused the award along with the respective clauses in the contract and the reasoning of the Arbitrators. The Arbitrators who are technical persons have gone by the definitions that have been set out in the contract itself to conclude upon the manner of working the price fixation or price variation. When the contract itself provides a particular manner of fixation or determination of price variation and the Arbitrators have only gone by such fixation, we do not think we could allow these appeals to contend that a similar method should have been adopted. As pointed out by the learned Single Judge, the exercise that is carried out in a setting aside application under Section 34 which is of a very limited scope, cannot be expanded by the parties by pointing out the dissenting opinion of the one of the Arbitrators. The award is one and it is the award of the majority.

5.2.As regards Claim No.9, the learned Additional Solicitor General would invite our attention to the fact that the first respondent has not given an early warning and therefore, he is not entitled to such claim in view of Clauses 53.1 and 53.2. This submission of the learned Additional Solicitor General overlooks a very relevant clause namely Clause 53.4, which is in the nature of the proviso. It says that even in case of failure to comply with Clauses 52.1, 52.2 and 52.3, the claimant can make a claim and the Tribunal can access the loss based on contemporaneous documents. The Arbitrators have adverted to the contemporaneous documents in the nature of monthly progress reports and other status reports which were available before them. The Arbitrators have in fact faulted the Engineer for not having inspected the area in question. It is this conclusion of the Arbitrators which is the subject matter of serious challenge by the learned Additional Solicitor General.

5.3.The learned Additional Solicitor General would also draw our attention to the judgment of the Hon'ble Supreme Court in ***UNIBROS VS. ALL INDIA RADIO [SLP (Civil) No.8791 of 2020 decided on 19.10.2023]*** wherein the Hon'ble Supreme Court had held that the claim of loss of profit arising from delayed contract or missed opportunities should be proved and the evidence should convincingly demonstrate that there has been a loss.

6.The Arbitrators had found that the machineries of the claimant were idling for a long period and the claimant is entitled to the amounts determined by the Arbitrators. They have also determined the period for which the claimant would be entitled to loss of profit. The standard of proof required would vary from case to case and what is the standard of proof required for determination of loss is entirely within the domain of the Arbitrators and it is not for the Courts to prescribe or test such standard when the Arbitrators are given cogent and convincing reasons for their conclusions. Though the learned Additional Solicitor General would attack the award on the other heads also, unfortunately for him the Arbitrators being technical persons have rendered the award with appropriate reasons making it very difficult for him to pick holes in the award. The learned Judge who had dealt with the Section 34 application has also concurred with the views of the Arbitrators for the reasons recorded by him.

7.As we have elaborated above, we do not find any ground which would satisfy the requirements of Section 34 of the Arbitration and Conciliation Act, 1996, in order to enable us to interfere with the award or order of the learned Single Judge. We find these appeals will have to fail and they are accordingly dismissed. No costs. All the pending applications and connected Civil Miscellaneous Petitions in CMP Nos.21209, 21212 and 21213 of 2019 are closed.

7.1.The Execution Petitions in E.P.Nos.165 and 166 of 2018 are remitted to the learned Master for execution.

8.It is stated that the appellant had on the basis of the dissenting award recovered a sum of Rs.2,92,00,711/- from the appellant. The appellant would be entitled to repayment of the said sum so recovered.

9.Now that we have confirmed the order of the Section 34 Court and the claimant will be entitled to withdraw the amount that is kept in the deposit to the credit of Execution Petition. The execution proceedings will go before the Master and the master will proceed with the execution in accordance with law. C.M.P.Nos.5287 and 5288 of 2022 are ordered accordingly.

[R.S.M., J.] **[R.S.V., J.]**

21.02.2024

Index : No
Internet : Yes
Neutral Citation : No
Speaking Order
TK

R.SUBRAMANIAN, J.

AND

R.SAKTHIVEL, J.

TK

OSA NOS.247 AND 248 OF 2019

21.02.2024