IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.02.2024

CORAM

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

OSA.Nos.296 and 316 of 2019
and CMP.No.2580 of 2019

OSA.No.296 of 2019

M/s.Simplex Infrastructures Ltd.
No.48, Casa Major Road,
Egmore, Chennai 600 008
Represented by R.Swaminathan ...Appellant

Vs.

The Tamil Nadu Maritime Board
3rd and 4th Floors,
No.171, South Kesavaperumalpuram,
Greenways Road, R.A.Puram,
Chennai 600 028. ...Respondent

For Appellant : Mr.Thriyambak J Kannan
For Respondents : Ms.Amrita Poongudi Dhinakaran

Prayer: Original Side Appeal filed under 37 of the Arbitration and Conciliation Act, 1996 to set aside the order dated 05.08.2019 made in

OP.No.232 of 2017 whereby the learned Judge had partly allowed the petition by setting aside the finding of the Arbitrator on the refund of amount received towards interest on mobilization advance and allow the above appeal.

OSA.No.316 of 2019

The Tamil Nadu Maritime Board
3rd and 4th Floors,
No.171, South Kesavaperumalpuram,
Off Greenways Road,
Raja Annamalaipuram,
Chennai 600 028. ...Appellant

Vs.

M/s.Simplex Infrastructures Ltd.
No.21, Casa Major Road,
Egmore, Chennai 600 008 ...Respondent

For Appellant : Ms.Amrita Poongudi Dhinakaran

For Respondent : Mr.Thriyambak J Kannan

Prayer: Original Side Appeal filed under XXXVI Rule 1 of O.S.Rules r/w Clause 15 of Letters Patent to set aside the order and decreetal order dated 05.08.2019 made in OP.No.232 of 2017 on the file of the Original Side of this Court with respect to VAT claim made by the respondent and counter claims made by the appellant only with interest and costs.

COMMON JUDGMENT

[Judgment of the Court was delivered R.SUBRAMANIAN, J]

These 2 appeals are against the orders of Section 34 Court setting aside a portion of the award. While the appellant in OSA.No.296 of 2019 is aggrieved by the action of Section 34 Court setting aside the award for repayment of interest on the mobilisation advance. The appellant in OSA.No.316 of 2019 is aggrieved by the affirmation of the award for reimbursement of the Value Added Tax is concerned.

2. The brief facts that lead to the arbitration and the consequent Section 34 application are as follows:

(i)The Tamil Nadu Maritime Board invited tenders for carrying out the work of rehabilitating of the eastern Bank of Kaduvayar River at

Nagapattinam Port by providing a diaphragm wall to the length of 650 meters on 28.11.2006. The appellant in OSA.No.296 of 2019 submitted its bid on 19.12.2006 specifically indicating that its bid is exclusive of the Value Added Tax and also stating that it would be able to do the work only if it is granted interest free mobilisation advance against Bank guarantee. This offer of the appellant in OSA.No.296 of 2019 was accepted by the Tamil Nadu Maritime Board and letter of acceptance was issued on 23.04.2007. Consequent upon the same, the appellant in OSA.No.296 of 2019 also furnished Bank guarantee for a sum of Rs.86,33,168/- being 10% of the value of the contract as performance security. On 26.04.2007, a contract agreement came to be executed between the parties. There was another Bank guarantee towards 10% mobilisation advance on 28.04.2007. On 04.05.2007 the mobilisation advance of Rs.86,33,168/- was paid to the appellant and upon the sight being handed over to the appellant on 11.05.2007, it commenced the work and completed the same within the time stipulated under the contract. There is no dispute on this aspect, viz., completion of the work. Upon completion, the appellant submitted a debit note for

Rs.25,53,720/-, which was paid towards Tamil Nadu Value Added Tax from August 2007 to October 2008 on various materials. On 06.01.2009, the Maritime Board sent a letter to the appellant seeking authenticity for payments of the Value Added Tax made by the appellant. Upon completion of the contract, the appellant also furnished Bank guarantee towards the defects liability for a sum of Rs.23,00,000/-, which would be valid for a year.

ii) On 17.02.2009, the appellant in OSA.No.296 of 2019 furnished the certificate issued by the Assistant Commissioner Commercial Taxes for payment of the Value Added Tax. The Bank guarantee furnished by the appellant towards mobilisation advance and the performance guarantees were duly discharged and returned. However, subsequently, the Maritime Board claimed a sum of Rs.7,67,568/- towards interest on the mobilisation of advance on the ground that there has been an audit objection for grant of interest free mobilisation advance and hence, the appellant would have to either repay the said sum or the same would be deducted by invoking the

Bank guarantee provided by the appellant for the defect liability period. The Value Added Tax that was paid by the appellant in OSA.No.296 of 2019 was also not reimbursed. Hence, the appellant moved this Court under Section 9 of the Arbitration and Conciliation Act seeking a restraint order regarding invocation of the Bank guarantee and an application under Section 11 for appointment of Arbitrator. The Bank guarantee was however en cashed. This Court appointed a retired Judge of this Court (Hon'ble Mrs. Justice Chitra Venkataraman) as an Arbitrator. Before the Arbitrator a counter claim was also raised by the Tamil Nadu Maritime Board.

3. The Arbitrator framed the following issues in the arbitration proceedings:

"1. Whether the Respondent is entitled to invoke the bank guarantee for the interest free mobilisation advance?

2. Whether the Claimant is entitled to return of Rs.7,67,568?

3. Whether the Respondent is entitled to claim interest?

4. Whether the claimant is entitled for damages of Rs.5,00,000/- for wrongful invocation of bank guarantee?

5. Whether the claimant is entitled to reimbursement of Rs.25,53,729/- towards VAT?

6. Whether the counter claim is barred by limitation?

7. Whether the respondent is entitled for Rs.30.00 lakhs for rectification work?

8. Whether the Respondent is entitled for Damages/nominal compensation of Rs.1.00 Crore?

9. Whether the Claimant is entitled to interest, if so, from which period?

10. Costs. "

4. The Arbitrator after considering the evidence on record and the terms of the contract passed the following award:

"i) Issue No.1 - First respondent is not entitled to invoke the bank guarantee for the interest on mobilization advance.

ii) Issue No.2 - Consequently, the claimant is entitled to refund of Rs.7,67,568/-.

iii) Issue No.3 is answered against the claimant that it is not entitled to interest thereon.

iv) Issue No.4 - On the wrongful invocation of the bank guarantee, the claimant is entitled to damages of Rs.1.00 lakh.

v) Issue No.5 is answered in favour of the claimant that the claimant is entitled to the reimbursement of Rs.25,53,729/- towards VAT with interest. The claimant is entitled to interest on the VAT amount on Rs.25,36,730/- at 12% per annum from the date of the claim made, viz., 12.12.2008 to the date of the filing of the Claim Petition, i.e., 30.11.2015 barring the disputed item, viz., brick and paint, the liability for which according to the claimant, comes to Rs.16,915 + 275 = 16,990/-. Thus, on Rs.25,36,730/-, (Rs.25,53,720/- - Rs.16,990/- = Rs.25,36,730/-), the claimant is entitled to interest from 12.12.2008 to 30.11.2015 at 12% per annum and on the entire amount of Rs.25,53,720/- at 18% from the date of the award to the date of payment.

vi) Issue No.6 is answered against the respondent holding that the counter claim is barred by limitation.

vii) Issue No.7 is consequently rejected.

viii) Accordingly, issue No.8 is answered against the respondent.

ix) Issue No.9 - As regards the rate of interest, apart from what is ordered, as by way of interest on the refund of VAT under Issue No.5, the respondent is directed to pay the claimant the due as ordered by this award within three months from the date of award, failing which, the claimant will be entitled to interest at

18% from the date of award to the date of payment.

x) Issue No.10 - There will, however, be not order as to costs and the parties are directed to bear their respective costs."

5. It could thus be seen that major claims that were granted by the Arbitrator are the refund of a sum of Rs.7,67,568/- towards interest on mobilisation advance, which was deducted towards interest on mobilisation advance and reimbursement of a sum of Rs.25,53,720/- being the Value Added Tax paid by the appellant. Aggrieved by the award, the Tamil Nadu Maritime Board preferred an application under Section 34 of the Arbitration and Conciliation Act 1996 in OP.No.232 of 2017.

6. The learned Single Judge dealt with Section 34 application while confirming the award relating to the reimbursement of the Value Added Tax, however, set aside a portion of the award, which directed the refund of the interest on mobilisation advance. Aggrieved both the parties, viz., the Contractor and the Tamil Nadu Maritime Board have come up with these two appeals.

7. We have heard Mr.Thriyambak J Kannan, learned counsel appearing for the appellant in OSA.296 of 2019 and respondent in OSA.No.316 of 2019 and Ms.Amrita Poongudi Dhinakaran, learned Government Advocate appearing for the appellant in OSA.No.316 of 2019 and respondent in OSA.296 of 2019.

8. Mr.Thriyambak J Kannan, learned counsel appearing for the contractor would vehemently contend that Section 34 Court erred in setting aside a portion of the award on a wrong appreciation of clause 14.2 of the contract terms.

9. The learned counsel would point out the fact that the offer of the contractor subject to the condition that there should be a payment of an interest free mobilisation advance was accepted by the Tamil Nadu Maritime Board and the contractor followed such acceptance. Therefore, merely because there was an audit objection, the contractor cannot be made to pay the interest as against the agreed terms of the contract.

10. The learned counsel would also point out that there has been an error on the part of Section 34 Court in reading clause 14.2 of the contract agreement. The learned counsel would submit that the learned Judge has missed the word "or" appearing between the words guarantee and the words if the total advance payment is not stated in the contract data.

11. A perusal of the order of Section 34 of the Court shows that the learned Single Judge had on interpretation of the clause 14 concluded that since advance amount is not stated in the contract data, the sub clause relating to payment of interest free mobilisation advance will not apply. Sub-clause 14.2 reads as follows:

> ***"14.2: Advance Payment***
>
> *The Employer shall make an advance payment, as an interest-free loan for mobilisation, when the Contractor submits a guarantee in accordance with this Sub-Clause. The total advance payment, the number and timing of instalments (if more than one), and the applicable currencies and proportions, shall be stated in the Contract Data.*

Unless and until the Employee receives this guarantee, or if the total advance payment is not stated in the Contract Data this Sub-Clause shall not apply."

12. The learned Single Judge had concluded that since the total advance payment is not reflected in the contract data, the earlier clause relating to payment of interest free mobilisation advance cannot be invoked. As rightly contended by the learned counsel, the learned Single Judge has overlooked the word "or" appearing in the second part. The second part of clause 14(2) makes it clear that the earlier part will not apply if the employer does not receive the guarantee **or** if the total advance payment is not stated in the Contract Act. Therefore, there are 2 contingencies, one is that the employer should not have received a guarantee for mobilisation advance and the second is that the total advance payment should not have been stated in the contract Act. If any one of the above 2 has been complied with then the earlier clause would automatically come into operation. This has evidently been overlooked by the learned Single Judge.

13. The learned counsel for the State Maritime Board would draw our attention to the definition of the term laws occurring in clause 1.1.6.5 of the contract, which reads as follows:

> *"1.1.6.5 "Laws" means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority."*

would contend that this will include a Government Order issued in the year 2000 in G.O.Ms.No.445 dated 26.09.2000. Though there is a reference to the said Government Order in the proceedings in Ex.C35, dated 22.12.2009, the said Government order has not seen the light of the day either before the Arbitrator or before the learned Single Judge or before us. We are therefore unable to know the exact terms of the said Government Order. Even assuming that there was a Government Order and an agreement was entered into contrary to the said Government Order as far as the parties to the contract are concerned it binds them, if there is any violation of the Government Order by the officers of the Tamil Nadu Maritime Board all that could be done is the Tamil Nadu Maritime could recover the money from its officers who had entered contract to the agreement. The Board cannot seek to penalise the contractor, who was allured by the offers made by the Board to accept the contract and complete the work. We are therefore unable to sustain the findings of the learned Single Judge regarding the refund of the interest of Rs.7,67,568/-. That portion of the order learned Single Judge is set aside and the appeal in OSANo.296 of 2019 will stand allowed.

14. Adverting to the appeal in OSA.No.316 of 2019 that relates to the refund of the Value Added Tax, where the learned Arbitrator and Section 34 Court are on a common page. The fact that the rates quoted by the claimant/contractor, are exclusive of the Value Added Tax. This offer has been accepted by the Maritime Board. Therefore, the Arbitrator has concluded that the claimant/contractor would be entitled to the reimbursement of the Value Added Tax paid by it. It is however now sought to be contended that the contract makes it obligatory on the part of the

contractor to pay all taxes. We find this particular pleading has not been urged either before the Arbitrator or before the learned Single Judge while deciding Section 34 application.

15. In fact we find from the records that the respondent/Maritime Board had sought for certification of the Tax paid to enable reimbursement. The learned Arbitrator has gone into the question has found that the claimant/contractor would be entitled to reimbursement of Value Added Tax. In fact, the liability to reimburse Value Added Tax was admitted before the Arbitrator and it was contended that certain items of work were not covered. The same is the position before the Section 34 Court also. We therefore, do not think we could allow the Maritime Board to agitate the issue afresh before us in the appeal under Section 37.

16 The learned Government Advocate relied upon the judgment of Supreme Court in the State of ***Chattisgarh and another vs. Sal Udyog Private Limited*** reported in (2022) 2 Supreme Court Cases 275. Though the learned counsel would submit that this judgment particularly para 23

enables a party to the arbitration proceedings to raise a new plea for the first time in an appeal under Section 37, we are unable to read the judgment as it is read by the learned Government Advocate. The Hon'ble Supreme Court has actually found fault with the respondent therein for having kept quite during the period of the contract and raising a dispute regarding payment of supervision charges only after termination of the contract. So the conclusion of the Hon'ble Supreme Court turned out on completely different set of facts. We do not think that judgment could be treated as a precedent for the proposition that is now sought to be raised by the learned Government Advocate. We therefore, find no merit in the appeal in OA.No.316 of 2019 and the same stands dismissed. However, in the circumstances, we make no order as to costs in these petitions. Consequently, connected miscellaneous petition is closed.

(R.S.M.J.,) (R.S.V.J.,)
22.02.2024

Index : No
Speaking order: No
pvs

To

The Section Officer,
VR Section High Court, Madras.

R.SUBRAMANIAN, J.
and
R.SAKTHIVEL, J.

pvs

OSA.Nos.296 and 316 of 2019

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