



WEB COPY



O.P.No.1051 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.06.2024

CORAM:

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

O.P.No.1051 of 2019

and

A.Nos.9738 of 2019 & 3023 of 2021

Dalmia Cement (Bharat) Ltd (“DCBL”)
Rep. by its Managing Director,
Fagun Mansion, 4th Floor,
No.26, Ethiraj Salai, Egmore, Chennai 8.

...Petitioner

Vs.

NECC Cargo Carrier Pvt. Ltd.,
Rep., by its Director Neeraj Kumar Choudry,
No.718/A, 15th Ward, Amaravathi, Hospet 583 201,
Bellari District, Karnataka.

...Respondent

Prayer:- This Original Petition has been filed under Section 34(b)(ii) (2A) of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 05.09.2019 passed by the learned sole Arbitrator to the extent as aggrieved by the petitioner herein in respect of Arbitration proceedings between the petitioner and the respondent.

For Petitioner : Mr.P.J.Rishikesh

For Respondent : Mr.T.Sivagnanasambandam,
No appearance



O.P.No.1051 of 2019

ORDER

WEB COPY

This Original Petition has been filed under Section 34(b)(ii) (2A) of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 05.09.2019 passed by the learned sole Arbitrator to the extent as aggrieved by the petitioner herein in respect of Arbitration proceedings between the petitioner and the respondent.

2. Aggrieved and dissatisfied over the award dated 05.09.2019 passed by the learned Arbitrator, the petitioner has filed the present Original Petition. The respondent herein was the claimant before the arbitral Tribunal.

3. The case of the petitioner is that, the petitioner is engaged in the business of manufacturing and marketing cements. The respondent is engaged in the business of transporter/supplying vehicles for transporting goods on hire. The respondent had approached the petitioner with an offer to provide transportation services to the petitioner for transportation of cement. This being so, after negotiation, an agreement dated 01.04.2013



O.P.No.1051 of 2019

WEB COPY

was entered between the parties, wherein, the respondent is supposed to provide 30 trucks to the petitioner, having carrying capacity of 21 tonnes and the cost of per truck/per month would be a sum of Rs.90,000/-. Subsequently, a supplementary agreement dated 26.10.2013 was entered between the parties, wherein it was mutually agreed that the cost of per truck per month was reduced to Rs.80,000/- with effect from 01.11.2013. After executing the agreement, the respondent herein had unilaterally made endorsement as “this revision of rates is agreed upto March 2014”. The said words were unilaterally inserted by the respondent and it was never agreed upon by the petitioner. Further, the respondent was not performing its duties as agreed upon in the agreement between the parties. In spite of the repeated warnings, the respondent never adhered to the terms of the agreement and there was consistent breach of the same. Hence, the petitioner had tendered a termination letter dated 20.04.2015 on the respondent, even after the receipt of such termination letter, the respondent had supplied the trucks at Rs.80,000/- per truck/per month.

3.1. Pursuant to which, the respondent raised a dispute and sought for appointment of Arbitrator to adjudicate the above dispute



O.P.No.1051 of 2019

WEB COPY

including other disputes as per Clause 16 of the aforesaid agreement and filed a petition before this Court in O.P.No.207 of 2017. This Court vide order dated 20.06.2017, appointed sole Arbitrator to adjudicate the disputes arisen pursuant to the agreement. Thereafter, the respondent made three claims before the learned Arbitrator, which read as follows:

- “(i) To declare the termination of the transport agreement dated 01.04.2013 is illegal and against clause 13(a) of the agreement and not binding on the respondent.*
- (ii) To award compensation of Rs.1,00,00,000/- for illegal termination of the agreement.*
- (iii) To direct the petitioner to pay a sum of Rs.1,26,00,000/- to the respondent towards the outstanding dues.”*

4. The learned counsel for the petitioner would submit that, as far as the first claim is concerned, the arbitral Tribunal awarded a sum of Rs.6,30,000/- on the part of the failure of the petitioner for not issuing seven days prior written notice for termination of the transport agreement dated 01.04.2013. As far as the second claim is concerned, with regard to compensation for illegal termination of agreement, the learned Arbitrator has rejected the said claim made by the respondent. As far as the third claim is concerned, the Tribunal has rejected the contention made by the



O.P.No.1051 of 2019

WEB COPY

petitioner and awarded a sum of Rs.18,00,000/-, though the claim made for a sum of Rs.1,26,00,000/-. He would further submit that a sum of Rs.18,00,000/- was calculated by taking a sum of Rs.90,000/- per vehicle/per month from October 2014 to March 2015, which comes around Rs.18,00,000/-. The main contention of the petitioner is that the respondent has not at all made any plea or request with regard to the payment of Rs.90,000/- and the endorsement made unilaterally in the supplementary agreement dated 26.10.2013, which will not bind any cost and also he referred to the general conditions of the agreement dated 01.04.2013 under Clause (k). He would further submit that any modification in the agreement dated 01.04.2013 would be by mutual agreement of both the parties. Therefore, he would submit that the arbitral award is in violation of the agreed terms and conditions between the parties concerned. Any award passed against the agreed terms and conditions of the agreement, its amount to patent illegality.

5. Notice was served on the respondent and the learned counsel entered appearance on behalf of the respondent. Even on previous occasion, none appeared on behalf of the respondent, and hence, the matter



O.P.No.1051 of 2019

WEB COPY

was passed over and directed the petitioner to contact the counsel on record. Accordingly, the matter is listed today i.e., on 12.06.2024, however, none appeared on behalf of the respondent. This shows that the respondent is not interested to prosecute the case. Therefore, after hearing the submission of learned counsel for the petitioner and on perusal of the materials available on record, this Court is inclined to proceed with the matter and pass orders on merits.

6. As far as the first claim is concerned, the Tribunal awarded a sum of Rs.6,30,000/- for the illegal termination of the contract. Hence, the Tribunal arrived at a conclusion that the petitioner tendered termination without issuing seven days prior written notice to the claimant/respondent. Thus, the learned Arbitrator ordered a sum of Rs.6,30,000/- towards compensation to the respondent for the loss of business for seven days notice period. However, the Tribunal failed to make consideration that even after the termination of the contract agreement, the respondent continued to supply the trucks from the month of April 2015 to July 2015. The said aspect was not at all considered by the arbitral Tribunal, while passing the award for Rs.6,30,000/-. Taking into consideration of this



O.P.No.1051 of 2019

WEB COPY

aspect, the Tribunal ought not to have awarded a sum of Rs.6,30,000/- for seven days notice period. In the present case, after the termination letter dated 20.04.2015, the respondent supplied trucks to the petitioner for a period of three months, and the respondent has not at all lost his business. In view of the above, the arbitral Tribunal committed patent illegality, and awarded a sum of Rs.6,30,000/- towards compensation, which in the opinion of this Court is liable to be set-aside and accordingly, the same is set-aside.

7. The arbitral Tribunal awarded a sum of Rs.18,00,000/- to the respondent/claimant, though the claim was made for a sum of Rs.1,26,00,000/- towards outstanding dues. In the case on hand, the supplementary agreement dated 26.10.2013, the parties have mutually agreed for a revised sum of Rs.80,000/- per truck/per month. However, in the supplementary agreement, the respondent only made an hand written endorsement “this revision of rates is agreed upto March 2014”. The Tribunal has completely failed to note that the endorsement was made unilaterally. In terms of provisions of Clause (k) of the general conditions of the contract, any modification can be made by mutual consent in writing



O.P.No.1051 of 2019

and duly signed by the parties. It would be apposite to extract Clause (k) of the General Conditions of the agreement dated 01.04.2013, which reads as follows:

“k) We may, by mutual consent recorded in writing and duly signed by us, amend or change any stipulation of this Contract or of the terms and conditions thereof; until so signed, no such change or amendment shall not be effective.”

8. On perusal of the above, it appears that any modification in the agreement should be made only by mutual consent recorded in writing and duly signed by both the parties. In the case on hand, it is crystal clear, that the respondent made endorsement “unilaterally” in the supplementary agreement dated 26.10.2013, which appears to have been made after signing the agreement for the revised rate of per truck/per month as Rs.80,000/-. The said aspect is completely ignored by the arbitral Tribunal, and the respondent has not at all made any claim before the petitioner with regard to the differential rate of Rs.10,000/- based on the endorsement made on 26.10.2013. Therefore, this Court is of the view, and taking into consideration the general conditions of the contract and also the relevant documents, this Court finds that there is patent illegality in the present



O.P.No.1051 of 2019

WEB COPY

award passed by the arbitral Tribunal, while awarding a sum of Rs.18,00,000/- towards outstanding dues and a sum of Rs.6,30,000/- awarded by the Tribunal are liable to be set-aside, on the ground of patent illegality and accordingly, both are set-aside.

9. In the result, the Original Petition is allowed. No costs. Connected Applications are closed.

After dictating this order, one Mr.R.T.Chidambaram, learned counsel representing Mr.T.Sivagnanasambandam, learned counsel for the respondent submitted that, he is in abroad, and hence, he is not in a position to appear before this Court. Since this Court has already passed this order in detail and allowed the Original Petition, it is open for the respondent to recall the order by assigning sufficient reasons for his non-appearance before this Court.

12.06.2024

Index:Yes/No

Web:Yes/No

Speaking/Non Speaking

Neutral Citation:Yes/No

jd



WEB COPY



O.P.No.1051 of 2019

KRISHNAN RAMASAMY.J

jd

O.P.No.1051 of 2019

and

A.Nos.9738 of 2019 & 3023 of 2021

12.06.2024