IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.11.2016

Coram

The Honourable **Mr.Justice RAJIV SHAKDHER**

O.P.No.582 of 2012

1. Union of India
represented by the General Manager,
Southern Railway, Park Town,
Chennai-600 003.

2. The Chief Engineer (Construction),
Southern Railway,
Construction Office,
Egmore, Chennai-600 008. .. Petitioners

Vs.

1. Mr.M.Rajkumar,
No.30-J, Krishna Rao Third Street,
Dindugul-624 001. .. Respondent No.1

2. Hon'ble Mr.Justice P.Thangavel,
Judge (Retired), High Court, Madras,
No.2, Dr.Mu.Va.Street,
Arumbakkam, Chennai-600 106.
(ARBITRATOR) .. Respondent No.2

Prayer : Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the award of the learned respondent No.2 dated 07.09.2011 made in relation to disputes arising out of Arbitral Agreement dated 13.04.2005 bearing No.W.26/CN/2005 entered into between the petitioners and respondent No.1 and thus render justice.

* * *

For Petitioners : Mr.V.G.Suresh kumar

For Respondent : Mr.Amalaraj S.Penkilapatti

ORDER

1. This is a petition preferred, in effect, by Southern Railways to assail the award dated 07.09.2011, passed by a former Judge of this Court.

1.1. The learned Arbitrator was appointed, pursuant to a petition being filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short "the 1996 Act").

2. The award relates to the claims arising out of the contract awarded to respondent No.1 in respect of the work, which is described as follows : "construction of Bridge No.139 at km 52/1-3 [existing 8X12.19m Steel Girder-1X36.58 Steel Girder] as 8X19.20m PSC Box Girder between Tandarai and Tiruvannamalai stations of alternate alignment as part of per Villupuram - Katpadi Gauge Conversion Project".

2.1. For the sake of convenience, the aforementioned works will be referred to as "the subject contract".

3. Respondent No.1 was originally the claimant before the learned Arbitrator. The record shows that no counter-claims were preferred by the Southern Railway.

3.1. Respondent No.1 had, thus, lodged twelve (12) claims before the learned Arbitrator. The details, of which, I propose to set out hereafter in the course of my narration of events, which transpired in the instant case.

4. Therefore, before I deal with the contention of parties, let me advert to the broad facts and circumstances, which led to the eruption of disputes between the Southern Railway and respondent No.1.

5. Pursuant to a tender being floated and accepted, the Southern Railway issued a Letter of Acceptance (in short "LOA") in favour of respondent No.1 on 30.11.2004. The LOA was followed by an execution of a formal contract, dated 13.04.2005. The value of the subject contract was a sum of Rs.1,71,64,486/-. The total time-frame, within which, the subject contract had to be executed was a period of seven (7) months. The period, however, was to commence from the date of LOA, and not from the date of the contract.

5.1. Consequently, execution of the subject contract, in the usual course, would have come to an end by 29.06.2005.

5.2. It appears that the Southern Railway extended the time of the subject contract thrice : in the first instance till 30.03.2006; the second time around, it was extended, till 30.06.2006, and lastly, it was extended till 30.10.2006. Each time respondent No.1 sought extensions of time, albeit, without imposition of liquidated damages by Southern Railway.

5.3. Pertinently, after 30.10.2006, no further extensions were granted by the Southern Railway.

6. Evidently, vide communication dated 26.06.2006, Southern Railway issued a seven (7) days notice in accordance with Clause 62 of the General Conditions of Contract (in short "GCC") calling upon respondent No.1 to make good progress in the execution of the subject contract, failing which, he was put to notice that the termination of the contract would follow.

6.1. The record shows that respondent No.1 immediately responded to the said notice, vide a communication dated 30.06.2006. Southern Railway, followed it up with a rejoinder dated 01.08.2006.

6.2. Southern Railway followed the notice dated 26.06.2006, with yet another notice dated 03.10.2006. The contents of the said notice was identical to the notice dated 26.06.2006.

6.3. The record also shows that Southern Railway, thereafter, issued a notice dated 27.10.2006, which gave 48 hours to respondent No.1 to show satisfactory progress in the execution of the subject contract. By this notice, Southern Railway informed respondent No.1 that, if, the progress qua the execution of the subject contract was not satisfactory, it reserved the right to rescind the contract in whole or in part and to get the balance work completed via another agency, at his risk and costs.

6.4. Insofar as this notice is concerned, learned Arbitrator records a finding of fact that it was posted only on 30.10.2006, and that, it was received by respondent No.1 on 31.10.2006.

6.5. Evidently, on the very same date, respondent No.1 sent a phonogram and telegram to various officers of Southern Railway, whereby, it was pointed out that no termination of the subject contract could take place, as the contract had already expired, by efflux of time, on 30.10.2006.

6.6. The record also shows that the Southern Railway issued a formal notice of termination on 01.11.2006, which resulted in the rescission of the contract from the said date.

7. It may be noted that respondent No.1's stand before the learned Arbitrator was that the termination notice was despatched by the Southern Railway only on 13.11.2006.

7.1. Southern Railway, evidently, also issued an intra-office memo dated 20.11.2006, wherein, it was pointed out that the subject contract with respondent No.1 had been terminated, and therefore, no refund / release of : Earnest Money Deposit (in short "EMD"), Security Deposit (in short "SD") and conversion of Cash Security into GB, and release of FDR/Guarantee Bonds should take place. By this intra-office memo, a direction was also issued that no payment of final bill should be made till such time, the entire risk amount is recovered from respondent No.1.

8. In the meanwhile, vide communication dated 04.07.2006, respondent No.1 demanded foreclosure of the contract or, in the alternative, reference of the disputes and claims to Arbitration.

9. As indicated above, the learned Arbitrator finally got appointed in an action preferred by respondent No.1 under Section 11(6) of the 1996 Act.

10. Before the learned Arbitrator, as indicated at the very outset, twelve (12) claims were lodged by respondent No.1. Out of the twelve (12) claims, two (2) claims had no monetary effect. Out of these two (2) claims, one, related to seeking declaration, from the learned Arbitrator that the termination of the contract was illegal, while the other direction sought from him, was for return of Bank Guarantee assigned by Southern Railway.

10.1. The total value of the claims, excluding claims No.1, 4, 11 and 12, was pegged, by respondent No.1, at Rs.67,36,000/-.

11. The learned Arbitrator, however, qua the claims lodged by respondent No.1, awarded a sum of Rs.35,00,000/- with interest at the rate of 12% per annum, commencing from 04.07.2006, till the date of payment.

11.1. In addition, costs in the sum of Rs.75,000/- towards proportionate share of the Arbitrator's fee was also awarded, as the Southern Railway's share of the fee had been deposited by respondent No.1. Furthermore, towards Advocate's fee, a sum of Rs.25,000/- was awarded by the learned Arbitrator in favour of respondent No.1.

12. Based on the pleadings and the material placed before the learned Arbitrator, thirteen (13) issues were drawn up, which included, the issue pertaining to relief.

12.1. The learned Arbitrator, upon consideration of the issues involved, returned the following findings of fact :

(i) Respondent No.1 had obtained a three phase temporary electricity connection for a period of six (6) months, and had also undertaken to bear the expenses qua the said connection, at the work site.

(ii) Respondent No.1 had taken on lease one Theodelite instrument, on a returnable basis, to carry on the work at the work site.

(iii) Respondent No.1 had placed orders with Usha Martin Limited, for supply of pre-stressing material for the casting of PSC Box Girder, and thereafter, respondent No.1 had also placed orders with Kanta Enterprises for supply of 13 Electro Meric Bearings, at the rate of Rs.4840/- per item.

(iv) Payment was made to Kanta Enterprises.

(v) invoice was received from Usha Martin, in the sum of Rs.1,42,438.40p., against order placed for supply of pre-stressing materials.

(vi) Approval of the design mix was sought from the Engineer-in-Charge, the design mix was based on test reports, which were obtained with the help of respondent No.1. These reports concerned soil investigation, water test, and test reports qua cement. The test reports were obtained from Department of Civil Engineering in the Pondicherry College of Engineering.

(vii) Respondent No.1 requested for appointment of a site in-charge, so as to enable him to execute the earth work to form a bed for using PSC Box Girder. This request was made vide communication dated 08.06.2005 (See Ex.C.15), via this communication Southern Railway was also called upon to approve the sub-structure design.

(viii) Southern Railway, consequently, appointed one Mr.B.Ramamurthi to take up the earth work and works involved in casting of PSC Girders (See Ex.C.19).

(ix) Approval of detailed drawings for superstructure PSC was communicated to respondent No.1, on 16.06.2005 and, with regard to sub-structure and foundation, the communication was sent on 15.10.2005.

(x) Respondent No.1 made arrangement for fabrication of shuttering materials and formed works in line with Drawing No.20166. Since, new drawings was carried as SR/CN/23118, respondent No.1 was called upon to execute the subject contract in consonance of new drawings, which he was inclined to execute without change in rates and terms, as stipulated in the tender (See Ex.C.21).

(xi) The bridge plan was approved only on 29.06.2005 (See Ex.C.22).

(xii) The location of the proposed bridge, after award of the contract, was shifted from down-stream side to up-stream side, which necessarily required respondent No.1 to shift the mobilised establishment and infrastructure from down stream side to upstream side.

(xiii) There was a delay in recording initial levels, which would otherwise have facilitated early commencement of earth work. The delay, in this behalf, continued till 09.03.2005. The cumulative effect of the aforesaid was that Southern Railway, not only committed inordinate delay in carrying out their obligation under the contract, but also, mismanaged their affairs, which prevented timely execution of the subject contract by respondent No.1.

(xiv) Given the fact that the Southern Railway is responsible for the delay, it had no right to terminate the contract at the risk and cost of respondent No.1, after the expiry of its tenure on 13.11.2006.

(xv) Southern Railway had paid a cumulative sum of Rs.22,00,000/- to respondent No.1 towards the work undertaken, and that, the work which remained to be executed was worth Rs.1,49,64,486/-.

(xvi) Lastly, out of 495 sq. mtrs., shuttering material fabricated by respondent No.1, as per PSC drawings given by the Southern Railway, 180 sq. mtrs., was a total waste. Since, 495 sq. mtrs., was fabricated at the rate of Rs.4800/- per sq.mtrs., the total value of the material wasted, i.e., 180 sq. mtrs., at the rate of Rs.4800/- per sq. mtrs., would work out to Rs.8,64,000/-. Since, wasted material could be sold at Rs.20/- per kg., after making allowance for the same, respondent No.1 should be awarded Rs.7,00,000/- for wastage of fabricated shuttering material.

13. Given the aforesaid findings, Mr.V.G.Suresh Kumar, who appears for the Southern Railway, has confined his challenge to claims No.5 to 9 and claim No.11, all of which are money claims.

13.1. The argument of the learned counsel was that there was no material before the learned Arbitrator to award moneys, which he ultimately, went on to award, under claims No.5 to 9.

13.2. Insofar as claim No.11 was concerned, whereby, the learned Arbitrator, has effectively, awarded interest at the rate of 12% per annum, from 04.07.2006 till the date of payment. It was submitted that the said amount was not payable, in view of the prohibition contained in Clause 16(2) of GCC. In support of this submission, reliance was placed on the following judgments:

i. **Kamatchi Amman Constructions V. Divisional Railway Manager (Works), Palghat and others, (2010) 8 SCC 767;** and
ii. Union of India V. M/s.Bright Power Projects (I) P. Ltd., 2015 (7) Scale 638.

14. On the other hand, Mr.Amalaraj S.Penkilapatti, who appears for respondent No.1, relied upon the findings returned by the learned Arbitrator. It was the learned counsel's submission that the learned Arbitrator having examined and weighed the material on record, had returned findings of fact, which, this Court, while exercising power under Section 34 of the 1996 Act, ought to to interdict.

15. I have heard the learned counsel for the parties.

16. As noted in paragraph 12.1. above, it is quite clear that the learned Arbitrator has come to the conclusion that Southern Railway was solely responsible for the delay as well as for mismanaging the execution of the contract. Furthermore, the

learned Arbitrator clearly records, based on this conclusion, that Southern Railway ought not to have terminated the contract after it had expired by efflux of time, on 30.10.2006. Importantly, what is to be noticed is that at each stage, Southern Railway delayed the execution of the contract. Therefore, the time frame of seven (7) months, initially, stipulated under the contract had lost its relevance and essence.

17. Despite, Southern Railway being responsible for the delay, instead of extending the time, it chose to terminate the contract, and therefore, the learned Arbitrator recorded that the termination was not lawful. It was on account of these finding that claims No.1 to 4 were awarded in favour of respondent No.1.

18. Since, Southern Railway has laid challenge to claims No.5 to 9 and claim No.11, I am required to examine the tenability of the same.

19. Arguments advanced on behalf of Southern Railway, is that, there was no evidence whatsoever for awarding damages under claims No.5 to 9.

20. Having regard to this argument advanced, one would have to examine the claim for damages under each of these heads.

21. Insofar claim No.5 is concerned, it comprises of a claim for loss of damages of anticipated profits. Under this head, respondent No.1 had claimed a sum of Rs.22,00,000/-. Given the fact that Southern Railway has been found responsible both for the delay and mismanagement of the contract, in my view, the learned Arbitrator was right in awarding damages based on an estimation. The Supreme Court has approved such an approach in the following judgments :

i. A.T.Brij Paul Singh V. State of Gujarat, [(1984) 4 SCC 59].
ii. Dwaraka Das V. State of M.P., [(1999) 3 SCC 500]. and
iii. J.G.Engineers Private Limited V. Union of India, [(2011) 5 SCC 758].

21.1 In each of these cases, the Supreme Court has allowed anticipated profits in the range of 10% to 15%. The learned Arbitrator, in the instant case, has awarded damages for loss of profits at the rate of 7.5% of the value of the unexecuted work.

21.2. As indicated above, the value of the unexecuted work was a sum of Rs.1,49,64,486/-. Therefore, loss of profit at the rate of 7.5% worked out to Rs.11,25,000/-. In my view, there is no error, either in the approach adopted or, in the quantification of the amount. The challenge made qua claim No.5 is, therefore, rejected.

22. As regards claim No.6, against a claim in the sum of Rs.13,67,250/-, the learned Arbitrator has awarded a sum of Rs.6,75,000/-.

22.1. To be noted, this claim pertains to damages for wastage of Establishment and Infrastructure.

22.2. While awarding damages under this head, the learned Arbitrator has taken into account, it appears, Exs.C.53, C.5, C.16, C.14, C.23 and R.13.

22.3. A perusal of the exhibits, which were relied upon by the learned Arbitrator, would show that the exhibit relate to following aspects : Ex.C.53 is a communication dated 04.07.2016, addressed by respondent No.1 to Southern Railway, whereby, he demanded foreclosure of the contract, or, in the alternative, reference of disputes to arbitration. In the letter, several reasons are given as to why respondent No.1 could not complete the work in time. In the very same letter, there is also a reference to list of claims, in particular, qua damages suffered on account of wastage of establishment and infrastructure. Damages under this head have been quantified at Rs.8,00,000/-.

22.4. Damages with regard to idling and under-utilization of the labour and machinery, tools and plants were quantified, in the very same letter, at Rs.4,00,000/- and Rs.6,00,000/- respectively.

22.5. The learned Arbitrator noted this fact and, accordingly, reduced the claim of Rs.13,67,500/- to Rs.8,00,000/-, as adverted to in Ex.C.53 and finally awarded a sum of Rs.6,75,000/- towards damages on account of wastage of establishment and infrastructure.

22.6. The question, therefore, is, as to whether Rs.6,75,000/- awarded under this head is based on material relied upon by the learned Arbitrator.

22.7. In this connection, what is required to be noticed, is that, Exs.C.5, C.16 and C.23 relate to respondent No.1's requisition to obtain a temporary electric connection from TNEB. Via these annexures, while respondent No.1 asserts that he will bear the expenses and furnish the security deposit, the amount is not quantified.

22.8. Ex.C.14 is a communication dated 08.06.2005, addressed by respondent No.1 to Southern Railway, where a grievance is made that, as the design sub-structure had not been approved, he was held at site, resulting in his having to incur unnecessary expenses towards establishment and electricity. Accordingly, the letter concludes with a request for approving the sub-structure design with revised GAD, if necessary, as per the site condition.

22.9. Ex.R.13 is a communication dated 03.10.2006 issued by Southern Railway to respondent No.1, whereby, seven (7) days notice was given to make good the progress qua the subject contract, failing which, termination of the contract was threatened.

23. As would be seen, there is nothing in the exhibits, which would show as to the amounts, which, respondent No.1 had incurred towards establishment and/or infrastructure.

23.1. I must indicate here that the learned Arbitrator adverted to the fact that the cost of administrative staff and establishment were on the higher side, and that, the amounts claimed towards shed constructed for workers at site and qua medical and mess expenses for salaried class was also excessive. While reference is made to these aspects, what is not indicated is as to how the learned Arbitrator reached a figure of Rs.6,75,000/-, which is approximately 84% of the claimed amount.

24. Similarly, insofar as claim No.7 is concerned, which related to idling and under utilization of labour, against the claimed sum of Rs.3,26,250/-, a sum of Rs.3,00,000/- has been awarded.

24.1. Likewise, in respect of claim No.8, which related to wastage of idling and under utilization of machinery, against the claim of Rs.4,28,500/-, a sum of Rs.3,50,000/- has been awarded.

24.2. The learned Arbitrator, under these heads, also made a general observation, which is that, since, there was a change in location, inordinate delay and mismanagement in the execution of the contract by Southern Railway, the labour and machinery were kept idle, and were not, consequently, utilised to their full potential. Based on this reasoning, the learned Arbitrator has awarded under claim No.7, nearly 92% of the amount claimed, while under claim No.8, he has awarded nearly 82% of the amount claimed.

24.3. Upon reading of the findings returned by the learned Arbitrator in paragraph 24 of the impugned award, one is not able to fathom as to how the learned Arbitrator has reached the amounts awarded under these claims.

24.4. While I am a votary of the principle that an Arbitrator, given his experience in a given field, can employ a rough-and-ready method, at times, to quantify claims which defy mathematical exactitude the amounts awarded should be backed by some material and/or rationale.

24.5. In my view, the impugned award does not reveal, on the face of it, anything that could persuade me to sustain the amounts awarded under claims No.6, 7 and 8.

25. Insofar as claim No.9 is concerned, in my view, the learned Arbitrator has set out a measure, based on which, he has arrived at the amount awarded.

25.1. Under this head, respondent No.1 claimed a sum of Rs.8,64,000/- towards damages for wastage of shuttering material fabricated, in line with drawing No.20166, which was subsequently, changed by the Southern Railway. The changed drawing was numbered as : SR/CN/21118. As indicated above, the fact that this change was brought about by the Southern Railway, has been recorded by the learned Arbitrator.

25.2. Learned counsel for the Southern Railway has brought on record nothing to show that this finding was not correct. In awarding, a sum of Rs.7,00,000/- under this head, the learned Arbitrator has made the following relevant observations :

> " ......
>
> 25. .... The change of PSC drawing by the respondent was on 12-6-2005, which was 17 days before the expiry of the original contract period. The claimant had to fabricate the shuttering materials as per the PSC drawings given by the Railway Administration to an extent of 495 sq.mts. at the value of Rs.4800/- per sq.mtr. Out of 495 sq.mts., 180 sq.mtrs., became waste totally, the value of which will work out to Rs.8,64,000/-. It is not in dispute that 1 K.G. of waste fabricated material can be sold to Rs.20/- per K.G. If that amount is deducted from and out of Rs.8,64,000/-, awarding of a sum of Rs.7,00,000/- will meet the ends of justice and accordingly, a sum of Rs.7,00,000/- is awarded towards wastage of

> shuttering materials fabricated. The point is answered accordingly."

25.3. In my view, the amount awarded has a basis, and therefore, no interference is called for in respect of claim No.9.

26. This brings me to the last claim, which is under challenge, i.e., claim No.11.

26.1. Under this head, the learned Arbitrator has awarded interest at the rate of 12% p.a. from 04.07.2006, till the date of payment. The record shows that 04.07.2006 is the date when respondent No.1, sought appointment of an Arbitrator.

26.2. Counsel for Southern Railway has assailed the grant of interest to respondent No.1 on the sole ground that under Clause 16(2) and 64.5 of GCC the same is barred. The said clauses read as follows :

> "16(2) No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon.
>
> .....
>
> 64.5. Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is

made."

26.3. In my view, the challenge qua grant of pendente-lite interest would have to be sustained, in view of the ratio of judgments of the Supreme Court in **(i) Kamatchi Amman Constructions V. Divisional Railway Manager (Works), Palghat and others, (2010) 8 SCC 767;** and (ii) **Union of India V. M/s.Bright Power Projects (I) P. Ltd., 2015 (7) Scale 638.**

26.4. Having said so, interest would have to be paid on the sum awarded at the rate of 12% p.a. from the date of the award, till the date of payment.

26.5. I may only to indicate respondent No.1's counsel fairly conceded that given the state of the law, as it stands today, the challenge by Southern Railway, to grant of pendente-lite interest would have to be sustained. It is held accordingly.

27. Given the foregoing discussion, the award of amounts under claims No.6, 7 and 8 is set aside. Insofar as award of interest under claim No.11 is concerned, the award is set aside only qua the period commencing on 04.07.2006, and ending on the date of award.

27.1. In other words, on the awarded amount, interest would run at the rate of 12% per annum from 08.09.2011, till the date of payment. Therefore, the total amount awarded under claim Nos.1

to 10 would get reduced from Rs.35,00,000/- to Rs.21,75,000/-. Thus, simple interest at the rate of 12% per annum would be paid to respondent No.1 on the said amount, i.e., Rs.21,75,000/- from 08.09.2011, till the date of payment.

28. The captioned petition is, accordingly, partly allowed, *albeit,* in the aforesaid terms.

01.11.2016

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RAJIV SHAKDHER, J.

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