

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.11.2016

Coram

The Honourable **Mr.Justice RAJIV SHAKDHER**

O.P.No.655 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.496/VM-KPD/11/CN (6292) entered into between the petitioners and respondent No.1 and thus render justice.

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For Petitioners : Mr.V.G.Suresh kumar

For Respondent : Mr.Amalaraj S.Penkilapatti

ORDER

1. This is a petition filed, under Section 34 of the Arbitration and Conciliation Act, 1996 (in short "the 1996 Act") to assail the award dated 07.09.2011.

2. The challenge arises in the background of the following broad facts :

2.1. The petitioners, i.e., Southern Railway, had floated a tender for execution of the works described as : "reconstruction of Bridge No.346 at Km.128/6-7 [Exg.7x12.19 M Steel Girder] as 8 x 12.20 M PSC 'I' Girder between Arani Road Kannamangalam Stations as part of Villupuram – Katpadi GC Project".

2.2. Respondent No.1 submitted his bid. Upon bids being opened, respondent No.1 was declared successful and, accordingly, a Letter of Acceptance (LOA), dated 13.04.2005, was issued in favour of respondent No.1.

2.3. The total value of the contract was a sum of Rs.1,56,38,656/-. As per the contract, the work was to commence on 13.04.2005 and was required to be completed on or before 12.11.2005. Therefore, in effect, respondent No.1 was given a period of seven (7) months to complete the contract.

3. The admitted case of the parties before me is that the

contract was not executed. Respondent No.1, however, claimed that on account of the contract not going through, he had incurred losses and therefore, needed to be compensated and/or reimbursed qua the following : damages for the loss of anticipated profits ; damages for wastage of Establishment and Infrastructure, Overheads and Loss of Professional Opportunity ; damages for unlawful retention and non-payment of the claimed amount, i.e., in effect pendente-lite interest, interest against this claim was sought from 04.07.2006, till the date of award and, also for the period falling, post pronouncement of the award; refund of Earnest Money Deposit (in short "EMD"); and lastly, towards cost.

3.1. The petitioners, however, refuted to these claims.

4. The record shows that pursuant to a petition filed under Section 11 of the 1996 Act, a former Judge of this Court, was appointed as an Arbitrator.

5. The learned Arbitrator, upon entering reference qua the disputes raised by respondent No.1, passed the impugned award, based on the documentary evidence adduced by the parties. The parties, notably, had agreed not to lead oral evidence.

5.1. During the course of the arbitration proceedings, the learned Arbitrator framed the following eight (8) issues :

- "1) Whether the Arbitrator has not jurisdiction to entertain the claim statement to arbitrate the dispute between the claimant and the respondents?
- 2) Whether the LOA, as agreed, could not be enforced due to the default of the claimant or due to the default of the respondents?
- 3) Whether the claimant is entitled to refund of the EMD?
- 4) Whether the claimant is entitled to damages for loss of anticipated profits due to the non execution of contract works because of Railway's default? If so to what amount?
- 5) Whether the claimant is entitled to damages for wastage of establishment, infrastructure Overheads and loss of professional opportunity allegedly suffered by the claimant due to the alleged Railway's default? If so to what amount?
- 6) Whether the claimant is entitled to interest ? If so at what rate?
- 7) Whether the claimant is entitled to costs?
- 8) To what relief?"

5.2. Upon consideration of the material placed before him and, after hearing the counsel for the parties, the learned Arbitrator allowed the following claims made by respondent No.1 :

(i) Claim in respect of loss of anticipated profits. The sum claimed under this head was Rs.23,30,798/-; the learned Arbitrator awarded profit at the rate of 5% of the contract value, which was

quantified at Rs.7,76,933/-.

(ii) Claim made towards damages incurred for wastage of Establishment, Infrastructure, Overheads and Loss of Professional Opportunity suffered by respondent No.1. Under this head respondent No.1 had claimed a sum of Rs.4,86,000/-, the learned Arbitrator, while noting that accounts were not produced, awarded a sum of Rs.1,23,067/-.

(iii) Claim made qua pendente lite interest at the rate of 12% per annum, albeit, on a sum of Rs.9,00,000/- from 04.07.2006, till the date of payment.

(iv) the claim for refund of EMD in the sum of Rs.50,000/-.

(v) lastly, a direction was issued to the petitioner to pay a sum of Rs.75,000/-, as their share of the fee to be paid to him, i.e., the Arbitrator, (which was paid by respondent No.1) along with further cost of Rs.25,000/-, towards Advocate's Fee.

6. Given the aforesaid, broad facts, learned counsel for the Southern Railway submitted that the award was erroneous insofar it directed payment of interest, even though it was prohibited under Clause 64.5. of the General Conditions of Contract (in short "GCC"). It was, therefore, the learned counsel's submission that this part of the award was clearly erroneous.

6.1. It was next contended by the learned counsel for Southern Railway that the claims with regard to anticipated profits,

damages for wastage of Establishment and Infrastructure Overheads and Loss of Professional Opportunity ought not to have been allowed, in view of absence of evidence.

6.2. Learned counsel, however, did not contest the directions contained in the award with regard to refund of EMD.

7. Mr.Amalaraj, who advanced submissions on behalf of respondent No.1, conceded that the award of interest at the rate of 12% per annum from 04.07.2006, till the date of payment was clearly contrary to the judgments of the Supreme Court.

7.1. Learned counsel, however, submitted that respondent No.1 would be entitled to interest at the rate of 12% per annum, post the date of the award, till the date of payment.

7.2. As regards, other two claims allowed in favour of respondent No.1, Mr.Amalaraj, submitted that the learned Arbitrator, based on the material placed before him, had come to a correct conclusion, and therefore, no interference, was called for by this Court, while exercising jurisdiction under Section 34 of the 1996 Act.

7.3. More specifically, as regards the direction issued by the learned Arbitrator to allow the claim pertaining to loss of profits, learned counsel relied upon the following judgments of the Supreme Court :

- 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].

7.4. Insofar as other claims were concerned, which related to damages qua wastage of Establishment, Infrastructure and Overheads and Loss of Professional Opportunity, it was the learned counsel's contention that the learned Arbitrator had employed a rough and ready method, taking into account the fact that some amount of expense would have been incurred, after the LOA was issued, and therefore, even this direction did not require any interference.

8. I have heard the learned counsel for the parties and perused the record.

9. In my view, clearly, the direction to award interest was contrary to the ratio of the judgments of the Supreme Court in the case of **Sree Kamatchi Amman Constructions V. Divisional Railway Manager (Works), Palghat and Others, (2010) 8 SCC 767** and **Union of India V. M/s.Bright Power Projects (I) Pvt. Ltd., (2015) 7 Scale 638**. The Supreme Court in **Kamatchi**

Amman Constructions case has held that the Arbitrator has no power to grant pre-reference and pendente lite interest under Section 31(7)(a) of the 1996 Act, if, parties have agreed to the contrary. (See paragraph 12 at page No.770.) Clause 64.5. of the GCC, plainly prohibits payment of interest. The said clause reads as follows :

“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.”

10. That being said, Mr.Amalaraj, is right in his submission that interest could have been awarded by the learned Arbitrator, post the date of award, and therefore, that part of the award, which grants interest at the rate of 12% per annum, from 04.07.2006, till the date of the award is severed, and accordingly, set aside.

10.1. Remaining part of the direction, which is that, interest will be paid by the Southern Railway at the rate of 12% per annum, from the date of the award, till the date of payment is sustained.

10.2. Furthermore, the direction issued by the learned Arbitrator that interest will not run on the amount, which represented the EMD, is not contested before me by Mr.Amalaraj. The reason for that is quite obvious, as EMD was furnished by respondent No.1 in the form of a Fixed Deposit (FD) and Southern Railway has been directed by the learned Arbitrator to refund the

FD; a direction which, naturally, will enure to the benefit of respondent No.1 along with accrued interest.

11. Insofar as the claims pertaining to loss of profit is concerned, in my view, Mr.Amalaraj is right in contending that respondent No.1 is entitled to moneys against the said claim. This is so, as the learned Arbitrator has recorded that the contract could not be completed due to reasons attributable to the Southern Railway. A finding of fact in this behalf has been recorded in paragraphs 9 and 10 of the impugned award.

11.1. A perusal of the finding so recorded would show that the General Administrative Drawings (GAD) had to be revised, as there was an error in the earlier drawings submitted to respondent No.1.

11.2. It is, in this background that the learned Arbitrator awarded the claim for loss of profits at the rate of 5% of the total contract value. The said sum, as indicated above, was quantified at Rs.7,76,933/-.

11.3. In my view, no error of law, much less, a patent error can be found in the conclusion reached by the learned Arbitrator. The judgments of the Supreme Court in the case of : A.T.Brij Paul Singh, Dwaraka Das and J.G.Engineers Private Limited have held that in case of breach of contract, the aggrieved party is entitled to make a claim for loss of profits. In A.T.Brij Paul Singh, the Supreme Court has held that 15% of the value of the work could be claimed

as loss of profits. In this particular case, the physical execution of the contract could not take place, as found by the learned Arbitrator, due to faults attributable to the Southern Railway. The fact that the learned Arbitrator has only awarded 5% of the contract value, according to me, is both fair and reasonable and, therefore, requires no interference.

12. This brings me to the claim, whereby, damages towards wastage of Establishment, Infrastructure, Overheads and Loss of Professional Opportunity were awarded, Mr.Amalaraj says that out of a total claim in the sum of Rs.4,86,000/- made under this head, only a sum of Rs.1,23,067/- has been awarded.

12.1. According to Mr.Amalaraj, the amount awarded was reasonable. In support of this submission, learned counsel took me through the details of the claim made.

12.2. A perusal of the same would show that the claim in the sum of Rs.4,86,000/- comprised of various heads, which included moneys defrayed towards salaries paid to field and administrative staff and, in respect of other miscellaneous expenses such as maintenance of vehicles, fuel, inspection of site and for interfacing with railway officials, etc.

12.3. The learned Arbitrator, while dealing with this head, as has been correctly pointed out by Mr.V.G.Suresh Kumar, recorded that respondent No.1 did not produce the accounts and, therefore,

the sum claimed, i.e., Rs.4,86,000/- could not be awarded. However, learned Arbitrator, thereafter, went on to award a sum of Rs.1,23,067/-, based on the rationale that respondent No.1 "should have incurred some expenditure, after securing LOA in his favour".

12.4. The question posed before me, is that, is this "a plausible view" ?.

12.5. Counsel for Southern Railway says the view is contradictory and not plausible. In my view, the Arbitrators are known to apply rough-and-ready method for awarding some claims in respect of which, evidently, material of mathematical accuracy is not available.

12.6. The question is whether the band-width available under such a principle is inexhaustible. The answer has to be necessarily in the negative. That being said, the Court has to, then, examine whether what has been awarded based on this principle is reasonable, and thus, would be covered by the principle "a plausible view".

12.7. Before I hold one way or the other, I may only quote the observation of the Supreme Court in **Municipal Corporation of Delhi V. Jaggannath Ashok Kumar, AIR 1987 SC 2316**, which gives credence to the rough and ready approach often adopted by Arbitrators, while adjudicating upon disputes.

"..... The Arbitrator in our opinion is the sole judge of the quality as well as quantity of evidence and

it will not be for this Court to take upon itself **the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence the Court might have arrived at a different conclusion than the one arrived at by the arbitrator but that by itself no ground in our view for setting aside the award of an arbitrator.**

It is familiar learning but requires emphasis that section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before an arbitrator. P.B.Mukharji, J. as the learned Chief Justice then was, expressed the above view in Haji Ebrahim Kassam Cochinwall V. Northern Indian Oil Industries Ltd., AIR 1951 Calcutta 230 and we are of the opinion that this represents the correct statement of law on this aspect. Lord Goddard, C.J. in Mediterranean & Eastern Export Co. Ltd., V. Fortress Fabrics Ltd., [1948] 2 All .E.R. 186 observed at page 188/189 of the report as follows :

"A man in the trade who is selected for his experience would be likely to know and indeed to be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case according to the affidavit of sellers they did take the point before the Arbitrator that the Southern African market has slumped. Whether the buyers contested that statement does not appear but an

experienced Arbitrator would know or have the means of knowing whether that was so or not and to what extent and **I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavour to uphold Awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them.** If an Arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside his award." This in our opinion is an appropriate attitude."

In this case the reasons given by the arbitrator are cogent and based on materials on record. In Stroud's Judicial Dictionary, Fourth Edition, page 2258, states that it would be unreasonable to expect an exact definition of the word "reasonable". Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in

which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. But making must be satisfied with the reasonableness within reach ; and in cases not covered by authority, the verdict of a jury or the decision of a judge sitting as a jury usually determines what is "reasonable" in each particular case. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. See the observations, in *Re a Solicitor* [1945] K.B. 368 at 371 of the report.

After all an arbitrator as a Judge in the words of Benjamin N.Cardozo, has to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". F Indeed reading the award of the arbitrator, one would say that he acted reasonably and rationally."

(emphasis is mine)

13. A perusal of the aforesaid observation would suggest that a rough-and-ready method can be employed by the Arbitrators given their experience in dealing with such matters.

14. The Arbitrator, as indicated hereinabove, is a former Judge of this Court. Having regard to his experience, I am not inclined to interfere with the directions contained in the award in

respect of claim for damages towards wastage of Establishment, Infrastructure, Overheads and Loss of Professional Opportunity given the material and his appreciation of the same.

15. In view of the above, the petition is partially allowed to the extent that the direction contained in the impugned award granting interest at the rate of 12% per annum from 04.07.2006 till the date of the award is excised. Interest at the said rate will, however, be paid to respondent No.1 from the date of the award, till the date of payment.

16. Only to reiterate the direction contained in the impugned award vis-a-vis EMD and costs payable to respondent No.1 are not agitated before me by the learned counsel for the Southern Railway.

17. Accordingly, the award is interfered with to the extent, indicated above.

18. The captioned petition is disposed of, in the aforesaid terms, leaving the parties to bear their own costs.

01.11.2016

RAJIV SHAKDHER, J.

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