

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.12.2016

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
14.12.2016	21.12.2016

Coram

The Hon'ble Mr.Justice T.S. SIVAGNANAM

O.P.No.676 of 2009

M/s.Sri Swarna & Co.,
 Represented by Managing Partner
 B.V.Reddy
 10/29, Thambu Chettry Street,
 II Floor,
 Chennai - 600 001.

.. Petitioner

vs

1.The Controller of Stores,
 Southern Railway,
 New Joint Office,
 Ayanavaram, Chennai - 600 023.

2.K.M.Unni,
 Sole Arbitrator,
 Deputy Chief Materials Manager,
 Southern Railway,
 Podanur, Coimbatore - 641 023.

.. Respondents

Prayer: Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 24.01.2009 made and published by the second respondent.

For Petitioner : Mr.S.Raghavan

For Respondents : Mr.V.G.Suresh Kumar

ORDER

This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) to set aside the award passed by the second respondent, the Sole Arbitrator dated 24.01.2009 in so far as the failure to consider the claim for compensation made by the petitioner on account of the default in refund of the Earnest Money Deposit (EMD) for the period 16.06.1999 and 13.10.2000.

2.The petitioner was awarded a transport contract by the Southern Railways vide contract dated 25.02.1999 for transportation of 3704 MTs of C.I. Scrap from various places of Southern Railway to the destination points. The petitioner had paid a sum of Rs.20,000/- as EMD and a sum of Rs.1,50,000/- as security deposit in the form of Bank Guarantee dated 27.03.1999. The allegation of the Railway Administration is that out of the estimated quantity of 3704 MTs of C.I. Scrap, the petitioner had transported only 1226.195 MTs and failed to execute the contract in respect of the balance quantity. The petitioner was advised to lift the available scrap immediately vide letter dated 20.03.1999 followed by reminders dated 07.12.1999 and 31.12.1999

respectively. The petitioner's case is that while awarding the contract, the respondent Railway administration should have taken into consideration the location, availability of material, etc and accordingly they should have fixed the period for completion. The allegation is that planning and estimation were not properly done by the Railway Administration resulting in the petitioner incurring heavy loss on waiting time and awaiting orders, etc. In the background of these facts, the petitioner submitted various claim petitions before the respondent Railway Administration which were not considered and ultimately the matter was referred for arbitration before the second respondent. Totally seven claims were made by the petitioner, of which, we are not concerned about Claim Nos.1 to 5 and what is required to be seen is only Claims Nos.6 and 7 which are as follows:

Claim No.6: Refund of EMD amount not refunded till date as under:

a) Tender No.S.199/TC/CI/Scrap 98/OT/11 due on 16.6.1999	Rs.12,100/-
b) Tender No.S/199/TC/CI/Scrap 98/RT/OT/004 due on 29.3.2000	Rs.10,820/-
c) Tender No.S199/TC/CI/Scrap 98/RT/OT/11 due on 5.6.2000	Rs.20,275/-
d) Tender No.S.199/TC/CI/Scrap LW/2000/OT/0012 due on 13.10.2000	Rs.20,000/-
Total	Rs.63,195/-

Claim No.7: Compensation towards default in refund of EMD of Rs.63,195/- from 16.6.1999 & 13.10.2000 for 7 years claimed	Rs.2,00,000/-
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3.Claim No.6 relates to refund of EMD furnished by the petitioner in respect of other contracts and not in relation to the subject contract and Claim No.7 is relatable to Claim No.6 as the petitioner's case is that these EMDs were unjustly withheld by the Railway Administration and therefore, they are liable for compensation. The Railway Administration in their reply to the claim statement with regard to Claim No.6 stated that so far as the four EMDs are concerned, the same will be refunded to the Contractor if found eligible. However, in respect of other claim for compensation for withholding the EMDs, there was no specific averments made in the reply. The petitioner filed a rejoinder to the counter reiterating their stand and submitted that the Railway Administration has taken seven long years and they are entitled for due compensation for the delayed submission of the EMD amount. Before the learned Arbitrator, the petitioner did not press Claim No.6(a) as they had received payment, Claim Nos.6(b) and 6(c) were allowed and Claim No.6(d) was rejected.

4. In this petition, the petitioner does not contest the rejection of Claim NO.6(d) by the Arbitrator but their contest is only restricted to the claim for compensation under Claim No.7. The learned Arbitrator, while considering the Claim No.7, has not discussed as to whether the petitioner is entitled for compensation or not, but has merely observed that the said claim relates to Claim No.6 for which award has been given by the Arbitrator. This has been questioned in this petition.

5. Mr. S. Raghavan, learned counsel for the petitioner, after elaborately referring to the factual matrix contended that the Sole Arbitrator has not even dealt with Claim No.7 where the petitioner had claimed compensation for the delayed refund of the EMD for over seven years and therefore the award requires interference.

6. Mr. V. G. Suresh Kumar, learned counsel for the Railway Administration submitted that so far as Claim No.6 is concerned, the Arbitrator has considered the claim and wherever it is admissible, he has directed refund and the claim for interest by the petitioner is not sustainable in the light of Clause No.16(2) of the General Conditions of Contract. In support of his contention, the

learned counsel referred to the decision of the Hon'ble Supreme Court in the case of *Sree Kamatchi Amman Constructions vs. Divisional Railway Manager (Works), Palghat and others* reported in **(2010) 8 SCC 767**.

7. Heard the learned counsels appearing for the parties and perused the materials placed on record.

8. The learned counsel appearing for the Railway Administration seeks to sustain the impugned award in so far as it relates to Claim No.7 by contending that in terms of Clause 16(2) of the General Conditions of Contract, no interest is payable and the said Clause reads 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.”

The above provision which is an agreement between the Contractor and the Railway Administration contemplates that no interest will be payable upon the EMD or the Security Deposit or amounts payable to the Contractor under the Contract.

9. In the facts and circumstances of the case, it has to be seen as to whether Clause 16(2) of the General Conditions of Contract is attracted? As noticed above, Clause 16(2) prohibits payment of interest upon the EMD or Security Deposit or amounts payable to the Contractor under the Contract. The emphasis should be made on the words “under the Contract”. Therefore, if for a specified Contract, the petitioner had furnished an EMD/Security Deposit and upon completion of the Contract when the petitioner is refunded the EMD/Security Deposit, no interest is payable in terms of Clause 16(2) of the General Conditions of Contract. This aspect has been considered and dealt with by the Hon'ble Supreme Court in the case of ***Sree Kamatchi Amman Constructions*** (supra) while construing Section 31(7) of the Act. The said provision deals with the power of the Arbitral Tribunal to award interest and circumstances where interest is not payable is when the parties have agreed so. Admittedly, the General Conditions of Contract has a clause which prohibits payment of interest on refund of EMD/Security Deposit. In the instant case, the refund sought for by the petitioner does not pertain to the EMD furnished by the petitioner for the subject Contract but pertains to four other contracts.

10. Therefore, in the considered view of this Court, the respondent

Railway Administration cannot invoke Clause 16(2) of the General Conditions of Contract to state that no interest is payable. In other words, the Claim No.6 related monies payable to the petitioner for the works performed by them and on completion they are entitled for refund of EMD. Thus, according to the petitioner, the EMDs were withheld unjustly for over seven years. The Arbitral Tribunal found the Claim Nos.6(b) and 6(c) to be sustainable, Claim No.6(a) was not pressed and Claim No.6(d) was rejected. As pointed out earlier, there was no finding rendered by the learned Arbitrator on Claim No.7 which pertains compensation. The learned counsel for the respondents would submit that the term compensation would mean interest and when the General Conditions of Contract specifically bars payment of interest, no interest is payable. The petitioner in their claim petition have not claimed interest but their claim is for compensation. If a person has a legitimate claim he is entitled to such payment within a reasonable time and if there is a delay in settlement of the claim, he is entitled to be compensated. This is precisely what the petitioner seeks.

11. In the light of the fact, this Court has held that Clause 16(2) of the General Conditions of Contract would not apply to the facts of the present claim and that the claim for compensation was not dealt with by the learned Arbitrator, the award would call for interference. While exercising powers

under Section 34 of the Act, there are limits to judicial reviewability of the awards passed by the Arbitrator. It may be true that reasonableness of an award is not a matter for the Court to consider unless the award is perverse. However, the reasons stated by the Arbitrator should not only be intelligible but should also be deemed to consider expressly or impliedly the specific points that were raised. However, there is no proposition that the Court should be slow to interfere with the Arbitrator's award even if the conclusions are perverse and even when the very basis of the award is wrong.

12. Bearing this legal principle in mind, if the impugned award is examined, it is clear that there is no reason much less intelligible reason assigned by the Arbitrator in respect of Claim No.7. In fact, the Arbitrator has not dealt with the petitioner's claim for compensation. This would be sufficient for this Court to hold that the award is liable to be set aside to that extent. That apart, when the respondents have not raised any objection before the Arbitrator with regard to the claim for compensation, the petitioner is entitled to the claim as made. Section 31(3) of the Act provides that an award must state reasons on which it is based unless it is an award on agreed terms or the parties have dispensed with the requirements of reasons.

13. In the light of the above, the impugned award is set aside in so far as

it rejects Claim No.7 made by the petitioner claiming compensation for the delayed refund in the EMDs furnished by the petitioner pertaining to other contracts and the matter is remanded to the Departmental Arbitrator who shall consider the said claim after notice to the parties. After hearing the parties and considering the documents that may be placed, the Sole Arbitrator shall pass the award within a period of two months from the date of receipt of a copy of this order.

14.In the result, this Original Petition is allowed with the above directions.

21.12.2016

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T.SIVAGNANAM,J.

cse

Pre-delivery order made in

O.P.No.676 of 2009

21.12.2016

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