

IN THE HIGH COURT OF JUDICATURE AT MADRAS**DATED :06.02.2017**

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
01.02.2017	06.02.2017

CORAM :**The Honourable Mr.Justice T.S.SIVAGNANAM****O.P.No.216 of 2011**

1.The Union of India,
Rep., by the General Manager,
Southern Railway, Park Town,
Chennai – 600 003.

2.The Divisional Railway Manager (Works),
Madras Division, Southern Railway,
Chennai – 600003.

3.The Senior Divisional Engineer (Works)
Madras Division, Southern Railway,
Chennai – 600 003.

..... Petitioners

Vs

1.M/s.Complex Pile Foundations,
Rep., by its Sole Proprietor,
Mr.K.Ramachandran,
presently having office at No.19/10,
Thalamuthu Street,
Annai Anjugam Nagar, GKM Colony,
Chennai – 600082

2.Mr.Hon'ble Justice A.S.Venkatachalamoorthy
(Former Chief Justice – High Court of Chattisgarh)
No.V-87 V Avenue,
Anna Nagar, Chennai - 600040

..... Respondents

Prayer: Original Petition filed under section 34(1) of the Arbitration and Conciliation Act, 1996 to set aside the award passed by the Sole Arbitrator (second respondent herein), dated 30.07.2009.

For Petitioner : Mr.V.Haribabu
For Respondents : Mr.K.Ramachandran
Party-in-person

ORDER

This petition has been filed by the Railway Administration challenging the award passed by the Hon'ble Arbitrator, dated 30.07.2009, in the matter of dispute between the first respondent and the Railway Administration arising out of an agreement, dated 10.10.2002.

2. The third petitioner called for tenders for the work of "Perambur Repair works in filter House Tank C-1 to C-4 (4Nos)" situated at Filter House located opposite to ICF Higher Secondary School, Ayanavaram. The 1st respondent participated in the said tender and was the lowest bidder. After due negotiations held on 15.07.2002, the petitioners issued the letter of Acceptance dated 18.07.2002 in favour of the first respondent for a total value of Rs.20,35,080/-.

3. The first respondent was allotted the work and the offer quoted by the first respondent at Rs.20,35,080/- was accepted. Agreement between the parties was entered into was 10.10.2002. The period for completion of the work was four months that is from 18.07.2002 to 17.11.2002. The contract involved repair of four steel tanks and according to the contract, the work should be over by 17.11.2002 and according to the petitioners, there was great delay in completion of the work, the first respondent failed to furnish the monthly bills and sign the same after due approval of the concerned authorities, did not complete all formalities as required under clause 43(i) of the General Conditions of Contract (GCC) and insisted upon refund of the Earnest Money Deposit (EMD) and Security Deposit (SD) without complying with the conditions in the GCC. It is further submitted that the petitioners had extended the contract several times, only at the instance of the contractor and all the requirements of the contractor were met. The contractor is required to inspect the site in terms of clause (7) of the Special Conditions of Contract (SCC) and acquaint himself with the conditions and other factors before quoting the rates and subsequently cannot complain about the same. On account of disputes, the matter was referred for arbitration wherein, the first respondent made a claim for Rs.36,75,800/-. The claims made by the first respondent in the

claim statement dated 11.09.2006, can be broadly summarised as follows:-

- (i) Payment for outstanding value of the original contract of Rs.8,00,000/-
- (ii) Damages towards additional establishment and over head cost Rs.9,01,300/-;
- (iii) Payment for additional items of work Rs.6,74,500/-;
- (iv) Payment for extra rates of Rs.4,00,000/-;
- (v) Additional cost of idling Rs.7,00,000/-;
- (vi) refund of EMD & SD etc., of Rs.2,00,000/-;
- (vii) Damages and
- (viii) cost of the Arbitrator to be quantified later.

4. The petitioners filed counter affidavit disputing and denying the claims made under each of the eight heads and they are briefly stated hereunder in *seriatim*.

i) the claimant did not complete all formalities as required under clause 43(i) of the GCC and delay in making payment is purely on the part of claimant's carelessness and without signing the documents, he is not entitled for payment;

ii) the claim will be hit by clause 43(i) of the GCC and the

petitioners are not liable to accord extension and the Hudsons formula cannot be adopted in the instant case, as the contract is within India between the Central Government and the contractor for the welfare of the society;

iii) there is no dispute for making payment for fresh/additional work other than the work covered by the contract and when the first respondent did not come forward to sign the bill and confirm with the sanctioning office, as required by clause 43(i) of the GCC question of *suomoto* payment does not arise;

iv) the extra work was never covered by the contract nor entrusted by the petitioners at any point of time;

v) the petitioners never delayed at any point of time on their part except to handing over the tank one by one immediately after the completion of the earlier work;

vi) the EMD & SD will be refund only after finalisation of the final bill, as per clause 53(i) of the GCC and the final bill is still pending, as the first respondent has not signed the same;

vii) interest cannot be demanded on an anticipated claim;

viii) The petitioners are ready and willing to pay all the necessary remuneration to the Hon'ble Arbitrator.

5. Apart from the counter affidavit, written arguments were also filed by the petitioners before the Hon'ble Arbitrator. The Hon'ble Arbitrator considered the matter in detail and after taking into consideration the oral and documentary evidence, passed an award

(i) direct the petitioners to pay a sum of Rs.14,13,548/- to the claimant with simple interest at 12% from 01.08.2004, till the date of award. Thereafter, the petitioners to pay interest at 15% per annum till the date of payment.

(ii) pay a sum of Rs.1,09,216/- towards the refund of EMD and SD together with interest at 12% per annum from 11.02.2008, till the date of award and thereafter, 15% till the date of realisation.

(iii) pay a sum of Rs.15,000/- as cost to the first respondent within four weeks from the date of award, failing which the amount will carry future interest at the rate of 15% from the date of the award.

(iv) the petitioners to pay a sum of Rs.50,000/- representing the amount already paid by the first respondent (Railways) to the Hon'ble Arbitrator on behalf of the petitioner towards Arbitration fee, this amount shall carry interest at 15% from 01.07.2009 till the date of award.

6. Mr.V.Haribabu, learned counsel for the petitioner elaborately referred to the factual aspects and invited the attention of this Court to the terms of contract and the conduct of the party and submitted that the Arbitrator failed to take into consideration the effect of clause 43(i) of the GCC, which clearly states that payment cannot be effected without signing of the bill and other aspects. It is submitted that the entire case of the railways is that all the four tanks cannot be handed over to the contractor, the contractor can perform work only in one tank at a time; extension was granted only because the contractor pleaded for the same and hence, the delay is only on the contract and he is not entitled to seek for damages alleging delay on the part of the Railway and they cannot be directed to pay interest.

7. The respondent appearing in person submitted that the tanks were not handed over to the first respondent within the currency of the contract and the Hon'ble Arbitrator has clearly examined all the documents and has considered the evidence of the Divisional Engineer and has recorded a factual finding that the delay is attributable to the Railway Administration and the Court may consider the written arguments filed by the respondent and confirm the award.

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

9. Before the Court proceeds to consider as to whether the petitioners have made out a case for interfering with the impugned award under Section 34, it would be first necessary to enumerate the contingencies, which are contemplated under Section 34, for this Court to interfere with the impugned award, which undoubtedly is a reasoned award.

10. It has been held in several decisions that the scope of enquiry under Section 34 of the Act, is very limited and the Court can interfere with an award, if the person challenging the award shows (a) he was under some incapacity; (b) there was no valid arbitration agreement; (c) proper notice of appointment of Arbitrator was not given; (d) the arbitral award deals with dispute not contemplated by or not falling within the terms of submission to the arbitration; (e) the composition of the Arbitral Tribunal was not in accordance with the agreement between the parties; (f) the dispute cannot be settled by way of arbitration; and (g) the award is in conflict with the public policy of the country.

11. After elaborately hearing the learned counsel for the petitioners, this Court is convinced to state that the petitioners have not been able to bring the challenge to the impugned award under any one of the seven contingencies or circumstances under which the Court can test the correctness of the award under Section 34 of the Act. Infact the endeavour of the learned counsel for the petitioner is to request to this Court to re-appreciate the evidence on record and come to a conclusion or give independent reasons on the oral and documentary evidence placed before the Hon'ble Arbitrator. This cannot be done in a petition under Section 34 of the Act.

12. Nevertheless since elaborate submissions were made by the learned counsel for the petitioners, this Court has examined the aspects as pointed out by the learned counsel and has tested the correctness of the said submission. The first and foremost aspect to be seen is whether the delay occasioned on account of the conduct of the Railway Administration or that of the contractor. While adjudicating claim no.(1) the Hon'ble Arbitrator took note of the evidence of the Senior Divisional Railway Engineer, who was cross examined on 25.11.2008 and 22.12.2008 wherein he agreed that the contractor has completed the

work, there is no left over works and there is no dispute with regard to the quality of the work and the work has been done in a satisfactory manner. If that was the stand taken by the Senior Divisional Railway Engineer, the witness, who was examined on the side of the petitioners, the Hon'ble Arbitrator rightly held that the Railways are not justified in deducting Rs.7,00,000/- applying the variation clause.

13. With regard to the claim for damages and extra rates, the Hon'ble Arbitrator has in great detail considered the said issue, taken note of the reasons recorded by the Superintending Engineer and Additional Divisional Engineer while granting extension. More importantly, it was pointed out that the first tank namely, tank No.4 itself was handed over after the currency of the agreement. The Hon'ble Arbitrator further pointed out that though there were several extensions, records were not placed by the Railway Administration and there was no rider agreement entered into between the parties. That part, the letters written by the contractor, dated 14.11.2003, to the Senior Divisional Engineer [Metro SR], was referred to, wherein the contractor stated that he had completed the work with reference to tank No.2 and handed over the same to the petitioners, the labourers are idling and he is waiting for arrangement of tank No.1 (raw water) for

replacement of eroded MS Ty rods etc., and requested for handing over of tank No.1. This request was accepted and extension was granted upto 31.01.2004. While doing so, the Railways specifically stated that no loss or inconvenience will be caused to the Railway Administration because of the extension.

14. As rightly pointed out by the Hon'ble Arbitrator even at that point of time, the Railway Administration did not dispute the contractor's contention that the delay was on the part of the Railways.

15. One more aspect with regard to the delay on the part of the Railway Administration was pointed out by referring to the time taken for furnishing the test report for certifying the paint quality and the test report took more than three weeks which delay also is attributable to the Railway Administration.

16. With regard to the aspect that the contractor ought to have inspected the site before acceptance of the work is concerned, the Hon'ble Arbitrator has recorded a finding as to what is the nature of the inspection that could have been done by the contractor. Infact, this Court queried the respondent contractor appearing in person as to what

was inspection done by him. In reply he stated that tank No.4 was empty, fully damaged corroded with mud which was inspected by him, but the remaining three tanks, the water was full and therefore, the condition inside the tank could not be inspected by him. This is precisely what has been recorded by the Hon'ble Arbitrator, while deciding the question No.4.

17. Thus having fixed the delay on the part of the Railway Administration, the Hon'ble Arbitrator has rightly computed the amount payable to the contractor after taking note of the part payment receipt and awarded, reasonable rate of interest at 12%.

18. Thus, the petitioners having not made out any case to bring the challenge to the impugned award on the parameters set out in Section 34 of the Act, no grounds have been made out to interfere with the impugned award. Accordingly, the Original Petition fails and it is dismissed.

06.02.2017

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Index : Yes/No
Internet:Yes/No

To

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T.S.SIVAGNANAM, J.

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Pre-Delivery Order in
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