

IN THE HIGH COURT OF JUDICATURE AT MADRAS**DATED : 17.03.2017**

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
27.02.2017	17.03.2017

CORAM :**The Honourable Mr.Justice T.S.SIVAGNANAM****O.P.No.77 of 2011**

- 1.The Union of India
Rep., by the General Manager,
Southern Railway,
Chennai.
 - 2.The Chief Engineer/Construction,
Office of the Chief Administrative Officer (Contracts),
Southern Railway,
Egmore, Chennai – 600008
- Petitioners

Vs

- 1.M/s.Appachi Gounder and Sons,
Rep., by Partner cum Power of Attorney Holder,
Mr.A.Swaminathan,
Son of Shri.K.Appachi Gounder Vavikadi,
K.S.Palayam, Perundurai Taluk,
Erode District.
 - 2.Hon'ble Mr.Justice S.S.Subramani (Retired),
E 104-11/2, 23rd Cross Street,
Besant Nagar, Chennai – 600 090.
- Respondents

Prayer: Original Petition filed under section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 to set aside the award passed by the Arbitral Tribunal, dated 16.01.2010.

For Petitioner : Mr.V.Radha Krishnan Senior counsel
for Mr.V.G.Suresh Kumar

For Respondents : Mr.Amalaraj S.Penkilapatti

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 Arbitral Tribunal, dated 16.01.2010. The first respondent is the claimant/contractor, who was awarded the contract for the Strengthening /extension / re-construction of 23 minor bridges between Rajapalayam and Sankaran Koil Stations. Letter of acceptance was issued on 10.10.2000, and the parties entered into an agreement on 07.03.2001, in agreement No.73/CN/2001. The contract was to be completed within six months i.e., on or before 09.04.2001 with the total value of Rs.1,38,23,688/-. The respondent contractor made a claim for payment of extra rates and other reliefs, which were not considered and the contractor raised a dispute and requested the matter for being referred for arbitration. However, it appears that the

Railway Administration did not immediately appoint an Arbitrator and O.P.No.90 of 2007, was filed under Section 11 of the Act and orders were passed appointing the Hon'ble Arbitrator to adjudicate upon the disputes. The Arbitral Tribunal allowed the claim Nos.1, 4, 5, 6, 7, 8, 11, 12 & 13. This award is put to challenge in this Petition.

2. Mr.V.Radha Krishnan learned Senior counsel assisted by Mr.V.G.Suresh Kumar, learned counsel for the Railway Administration contended that the major part of the award is granting extra rates for the works, which were performed by the contractor and the award is wholly unsustainable, since the contract does not provide for payment of extra rates, if the work is performed beyond the originally stipulated period. In this regard, the learned counsel referred to clauses 17(2) & (3) of the General Conditions of Contract (GCC) and submitted that there can be no claim for extra rates or escalation. Further, it is submitted that the contractor had signed 11 rider agreements agreeing to work at the same rates and the parties being bound by the terms of the contract, the Arbitral Tribunal cannot go beyond the contract. Therefore, it is the submission that when clauses 17(2)(3) of the GCC covers extra rates also coupled with rider agreement executed by the contractor, the award passed by the Arbitral Tribunal requires

interference. Further, it is submitted that though the contractor made request for extra rates in terms of the letters Exhibits C-31 & C-70, the same were not accepted by the Railway Administration and after being informed that extra rates would not be paid, the contractor continued and completed the work. In this regard, the learned Senior counsel placed reliance on the decision in the case of ***Sree Kamatchi Amman Constructions, vs. The Divisional Railway Manager-Works, Palghat Division (DB)***, reported in ***2007 (5) CTC 17***, which was affirmed by the Hon'ble Supreme Court in ***(2010) 8 SCC 767***. It is further submitted that in respect of claim Nos.5,7,8&9, the contractor having specifically accepted not to claim any extra rates, cannot maintain a claim for alleged idling. It is submitted that though the period of contract commenced on 10.10.2000, the contractor could not complete the works within the due data, due to delay in furnishing of drawings which was approved, according to the contractor only in February 2010 and further when it is the contention of the contractor that only in September 2002, the programme of work was discussed and speed restriction was imposed only during December 2002, the contention of the contractor that the men and machinery were idling from October 2000 till December 2002 for a period of 22 months is unbelievable and no prudent contractor will ever make ready men and machinery when he has clear knowledge that the work under the

contract could not be commenced due to the requirements of drawings and line-block not fulfilled. Further, it is submitted that the Arbitral Tribunal has awarded charges for idling for a period of 43 months, when the total period during which the contract has been performed itself is 43 months. Therefore, the very basis for calculating the alleged idling period is unsustainable. With regard to the award pertaining to loss of profit, it is submitted that the contractor had to establish prolongation and cost loss and that he could not utilise its men and machinery for other works and since the contractor failed to prove the same, no award could have been passed towards loss of profit. In support of such contention, reliance was placed on the decision in the case of ***Bharat Coking Coal Ltd., vs. L.K.Ahuja*** reported in ***(2004) 5 SCC 109***. Further, it is submitted that the interest awarded by the Arbitral Tribunal is excessive. In support of such plea, reliance was placed on the decision in the case of ***Mahanadi Coalfields Limited & Ors., vs. Dhansar Engineering Company Private Ltd & Anr.***, reported in ***(2016) 10 SCC 571***. With regard to the plea of excess rates, the learned Senior counsel referred to the decision of the Hon'ble Supreme Court in the case of ***Rashtriya Chemicals and Fertilizers Limited vs. Chowgule Brothers & Ors.***, reported in ***(2010) 8 SCC 563***; ***Bass Constructions vs. The Board of Trustees of the Port of Madras & Ors.***, reported in ***(2016) 8 MLJ***

501; Rajasthan State Mines & Minerals Ltd., vs. Eastern Engineering Enterprises & Anr., reported in **(1999) 9 SCC 283;** **W.B.State Warehousing Corporation & Anr., vs. Sushil Kumar Kayan & Ors.,** reported in **(2002) 5 SCC 679;** **Ramnath International Construction (P) Ltd., vs. Union of India** reported in **(2007) 2 SCC 453.**

3. Mr.Amalaraj S.Penkilapatti, learned counsel for the contractor submitted that in the present petition, the Railways have not challenged the award granted as against claim Nos.1,2,3,9,10&14. Further, in this petition, Railways have raised only six grounds and none of the grounds relate to the award under claim No.9, for damages towards cost of idling and under utilising of machinery, details etc. Therefore, at this stage, during the course of oral submission, the petitioner cannot challenge that portion of the award. Further, it is submitted that in ground No.1 of the petition, the petitioner has raised a contention referring to the rider agreement and clause 17(2) of the GCC and such plea was not raised before the Arbitral Tribunal and therefore, the petitioner should not be permitted to raise such a plea before this Court for the first time. It is further submitted that the Court cannot reappraise the exhaustive evidence and the finding rendered by the Arbitral Tribunal as regards these claims. With regard

to the plea that the petitioner having signed rider agreement cannot claim for extra rates, it is submitted that the contractor did not furnish any "no claim certificate" nor the railways issued certificate of full and final discharge and the Arbitral Tribunal has recorded that the contractor completed the work on 31.05.2004 and the Railways started writing letters to the contractor only after the Railways had received the Court notice in the petition filed by the contractor under Section 11 of the Act. Further, the final bill itself was prepared by the Railway Administration only during the arbitration proceedings. Further, it is submitted that the contractor has never given up his claim for damages in claim Nos.4,5,7&8, as the Railways had prepared its final variation statement only after the receipt of the notice in O.P.No.90 of 2007. That the rider agreements do not extinguish the contractor's claim for damages and it does not mention about damages for the losses suffered by the contractor on account of the default and delay on the part of the Railways.

4. Further, the inter-departmental communications, which were marked as R-21 series clearly shows that reason for which the extension was granted and it is evident that the extension was due to Railway's default. It is further submitted that clause 36 of GCC stipulates that a contractor shall suspend the works in the event of the

Railway Engineers in-charge ordering him to do so and in the case on hand, Railways failed to carry out its contractual duties of mitigating the various losses of the contractor by not managing the contract diligently and failing to order suspension of works. Further, the proviso to clause 36, namely clause 36(1)(c), stipulates the claimant's entitlement for compensation for idling in the event of suspension of works. It is submitted that in terms of Section 73 of the Contract Act, the claimant is entitled to maintain the claim for damages. Further, it is submitted that by letters dated 01.02.2002, 15.11.2002, 07.10.2003, 10.11.2003, the Contractor had reiterated that they were promised extra rates, but ultimately there was threat of termination meted out by the petitioner, when they sought for foreclosure of the contract. In support of his contentions, the learned counsel referred to the decision of the Hon'ble Supreme Court in the case of ***Ambica Construction vs. UOI*** reported in ***2006 (4) AR Law Reporter 228 (SC)***; ***K.N.Sathyapalan (Dead) by Lrs., vs. State of Kerala & Anr.***, reported in ***2006 12 Scale 654***, and the decision of the Delhi High Court in the case of ***Union of India (Ministry of Railways) and Ors., vs. J.Sons Engineering Corporation Ltd & Ors.***, reported in ***Manu/DE/1169/2015***; ***P.C.Sharma & Co., Vs. Delhi Development Authority*** reported in ***Manu/DE/7273/2011***; ***Mohan Construction Company vs. Delhi Development Authority & Anr.***,

reported in ***Manu/DE/3166, 2011; Delhi Development Authority vs. M/s.S.S.Jetley***, reported in ***Manu/DE/0861 2000 & Delhi Development Authority vs. Polo Singh & Co.***, reported in ***2003 (1) Arb., Law Reporter 270 (Delhi) (DB)***.

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

6. The first respondent claimant in its claim statement filed before the Arbitral Tribunal had raised 14 claims and the Award pertaining to claim Nos.4,5,6,7,8 & 9 is challenged by the petitioner Railway Administration in this petition. Apart from the same, the petitioner challenges the award of interest at 12% from 01.08.2006. So far as the claim No.4, is concerned, it relates to payment of extra rates for the items of work that were executed during the extended period of the contract. Claim Nos.5,7,8 & 9, are claims for damages for the loss suffered by the claimant on account of initial idling/wastage of its establishment, equipment, machinery, etc. Claim No.6, pertains to loss of profits.

7. The undisputed fact is that though the letter of acceptance was issued in favour of the first respondent claimant on 10.10.2000, the

agreement was executed only on 07.03.2001. The period within which the work was to be completed is six months i.e, on or before 09.04.2001. Admittedly, the work was not completed within the said period. The claim for extra rates as well as the claim for damages towards idling of equipment, machinery, infrastructure etc., all flow on account of the delay, which has occurred in the commencement of the work.

8. The claimant's case is that it invested enormous money, marshalled requisite resources for the immediate commencement of the contract work and the claimant was very diligent in mobilising the required materials, since the works to be executed is for 23 bridges that were spread over a length of 33 kms between the Rajapalayam and Sankarankovil Stations. The claimant would state that in spite of their repeated requests to the officials of the Railways to sort out the various hurdles such as failure to provide the RCC details and drawings for jacketing and the non-availability of mandatory sanction of the Commissioner of Railway Safety (CRS) for the insertion of temporary girders and the failure on the part of the Railways to provide necessary speed restrictions resulted in causing severe losses to the claimant. It is stated that in terms of the contract, Railways are required to produce the RCC drawings which alone will enable the contractor to procure

correct specification of materials and execute the work and on account of non-furnishing the RCC details and drawings, the contractor was unable to even commence the preliminary work of estimation. The RCC details and drawings were furnished only during February 2001, which prevented the contractor from commencing the work upto February 2001 i.e, for a period of four months, 10.10.2000 to February 2001, which period was completely wasted on account of Railways default. Further, the prior sanction of CRS is a pre-requisite to commence even a single work and such sanction was required for 15 bridges, out of the 23 bridges. On account of the failure to apply for and obtain the mandatory CRS sanction, the contractor was compelled to endlessly wait and unable to commence the work until the imposition of the Mega-block by which, there is complete stoppage of all train traffic which was imposed only on 15.09.2003 to enable the contractor to commence the work in 15 out of the 23 bridges. Thus, the work which was originally to be completed by 09.04.2001 was permitted to be commenced only on 15.09.2003, i.e., after about 30 months from the date of completion originally stipulated. Further, the Railways failed to provide requisite speed restrictions preventing the contractor from executing the works and after much persuasion only after December 2002, Railways started providing speed restrictions. This caused a delay of about 21 months beyond the original date of

completion. Therefore, the claimant had been making representation and they were asked to sign rider agreements extending the period of contract and 11 such agreements were executed by the contractor. It is submitted that the reason for executing rider agreements and extending the time for completion of contract periodically was on account of the failure on the part of the Railways to provide necessary materials/sanction.

9. It is the case of the claimant that the Chief Engineer had assured that on account of the delay in completion of the work, they would be paid extra rates and owing to this assurance they had executed rider agreement. However, ultimately when the claimants' request for extra rates was not considered and when the claimant requested for foreclosure, they were threatened with termination with risk and cost and this led to the dispute which was raised by the petitioner on 12.04.2004. However, the dispute was not referred for arbitration for nearly three years and the contractor filed O.P.No.90 of 2007, before this Court under Section 11 of the Act, in which the Hon'ble Arbitrator was appointed. Therefore, it is submitted that the extra rates claimed by the contractor and the damages claimed by them for idling of machinery and other infrastructure is just and reasonable and the Arbitral Tribunal had considered the same

elaborately and passed the award, which is a speaking award and therefore, prays that the award may be confirmed.

10. The Railway Administration does not dispute the fact that the contract was not completed within the time stipulated. The execution of the 11 rider agreements extending the period of contract from time to time is also not in dispute. However, the Railway Administration would contend that in terms of the rider agreement, the Contractor unequivocally agreed to the extension of time under clause 17(2) of GCC and also agreed that all other conditions as mentioned in the original contract shall remain unaltered. Therefore, it is contended that it is not open to the contractor to seek for extra rates having signed the rider agreement and agreed to complete the work on the same terms and conditions with no increase in the rate on account of the extension.

11. With regard to the claim for damages towards idling, the Railways would contend that the arguments put forth with regard to the claim for extra rates, will equally apply to that of idling and the facts and circumstances will clearly establish that no prudent contractor, who has done similar Railway work will make ready men and machinery when according to the contractor, he has full knowledge that the

contract could not be commenced due to the requirement of the drawings and line-block not being fulfilled. Consequently, the claim for loss of profit is also not tenable.

12. Before the Arbitral Tribunal, the claimant had marked 134 documents as Exhibits C1 to C134, and examined one witness Mr. Swaminathan as CW-1. The Railway Administration marked 29 documents, as Exhibits R1 to R29, but there was no oral evidence on the side of the Railways. Considering the oral and documentary evidence and the claim made by the contractor and the defence raised by the Railway Administration, the Arbitral Tribunal framed 19 issues for trial. Considering Exhibits C91A to C91G, the Arbitral Tribunal held that the drawings were supplied only during February 2001 and without the said drawings, the work could not be commenced and there was no explanation on the part of the Railways in their defence as what prevented them from supplying the drawings within a reasonable time. Further, the Arbitral Tribunal referred to the evidence of CW-1, who had categorically stated that the Railway Administration has not given any other anterior date of furnishing the drawings. In the absence of any cross examination of CW-1, the Arbitral Tribunal, taking note of the oral and documentary evidence held that the RCC designs and drawings were supplied belatedly, as there were furnished only during February

2001. With regard to the CRS sanction, the Arbitral Tribunal noted that in terms of Exhibit C-49, the Railways called for a meeting, asking the contractor to come over to discuss the programme of works and by that time more than 30 months had lapsed, though the contract was for only six months. The statement of defence was absolutely silent with regard to this delay. Further, the requirement for obtaining CSR sanction was not denied in the defence statement.

13. With regard to the speed restriction, the Arbitral Tribunal after taking note of Exhibits C36 & C37 held that such restriction was imposed after a delay of 21 months beyond the original contract period. While dealing with the extension of the period of contract, the Arbitral Tribunal after considering the evidence, held that whenever the contractor applied for extension, he had pointed out the reason for such extension and that the delay was due to the Railways either on account of non-submission of RCC designs and drawings, non-sanction of CSR or non-imposition of speed restriction. Further, the Arbitral Tribunal held that this fact, which was recorded by the contractor in his representation was not disputed by the Railways, but recommendations were made for extension of time under clause 17(2) of GCC. The Arbitral Tribunal held that if the extension is granted under clause 17(2) of the GCC, the contractor cannot be found at fault and

concluded that all extensions were granted under clause 17(2). Thus after elaborate discussion, the Arbitral Tribunal concluded that due to undue delay on the part of the Railways in not providing the requisite sanctions, approvals, drawings, etc., the work would not be proceeded and the contractor cannot be faulted.

14. While considering the contractor's entitlement for the final bill and the return of the security deposit, the Arbitral Tribunal noted that only after receipt of the notice from this Court in the application filed under Section 11 of the Act, the Railways became vigilant in writing letters to the contractor asking him to be present in their office to have measurement checked. Therefore, the Arbitral Tribunal concluded that the Railways was not prompt in making the payment and was harassing the contractor even to pay the admitted amount and therefore, the claim under the said head was admitted.

15. With regard to the claim for damages towards idling, the same was considered in issue Nos.6,7,8 &13. Taking note of the fact that the Railways did not dispute the delivery of the machinery at the works site as evidenced by Exhibits 96C to 96J, 97A to 97Y and C98A & C98B, the Arbitral Tribunal held that there was no dispute that all the machinery was brought to site. Further, Arbitral Tribunal noted that in

respect of agreement No.130/CN/2000, the total value of the work is Rs.41,00,000/-, and most of the work was completed before 31.04.2001, inspite of the extension granted. Therefore, the Tribunal rejected the stand taken by the Railways that the men and machinery were not idling. Thereafter, the Arbitral Tribunal considered the reasonable salary that would be payable to the engineers and staff, who are mandatorily to be appointed, took up for consideration regarding unutilisation of machinery and after considering Exhibits C93, 96D, 96E, 97A etc., held that the contractor has proved that he has purchased the machinery to be used for the contract and all the machinery were delivered at work site and under the belief that the contract would be over in six months, the machineries were taken to site, but were kept idle for more than three years and if the machinery had been rented out, the contractor would have earned out of the same and thus considering all the factors, the loss per month was estimated at Rs.2,34,000/-, and as the loss was much higher, the contractor had claimed only Rs.35,00,000/- and the same was awarded.

16. Similarly with regard to the cost of idling and unutilisation of scaffolding and shuttering materials etc., the claim was awarded after taking note of Exhibits C96A to C96N, C98A & C98F etc. The counter claims, which was raised by the Railway Administration, were negatived

and elaborate reasons have been assigned by the Arbitral Tribunal. Thus, the impugned award being a reasoned award, this Court cannot interfere with the award, unless and until the Railway Administration is able to make out a case for interference within the parameters laid down in Section 34(2) of the Act.

17. The sheet anchor of the arguments of the learned Senior counsel for the Railways is based on the decision of the Hon'ble Division Bench of this Court in the case of **Sree Kamatchi Amman Constructions**, (supra). In the said case, the contractor claimed compensation under various heads before the learned Arbitrator, two of the claims pertain to labour, which were rendered idle by the Railway Administration and losses suffered owing to, overstay at work. While considering the correctness of the award, which was affirmed by the learned Single Judge, the Hon'ble Division Bench held that considering the conditions of the agreement (clause 8 of the Special Conditions of Contract), the Arbitral Tribunal acted beyond its jurisdiction and therefore, the award being contrary to the terms of the contract, is open to interference by the Court under Section 34(2)(b)(ii) of the Act. The Hon'ble Division Bench therefore held that the Arbitral Tribunal could not have passed an award, which was contrary to the mutually agreed terms between the parties to the contract and therefore, liable

to be set aside. This decision when put to challenge before the Hon'ble Supreme Court, Hon'ble Supreme Court did not interfere with regard to this issue. The subtle yet marked distinction between the facts in ***Sree Kamatchi Amman Constructions***, (supra) and the present case is that the contractor has put forth his claim as a claim for damages/compensation. It is true that in terms of the rider agreement, the contractor is not entitled to extra rates, but such agreement cannot put fetters on the right of the contractor to claim for damages, which right is inherent in the contractor subject to the contractor establishing that the Railway Administration were at fault and he is liable to be compensative. In fact, the claim made by the contractor is in terms of the Section 73 of the Contract Act and this issue was not subject matter of consideration before the Hon'ble Division Bench in ***Sree Kamatchi Amman Constructions***, and therefore, the said case is distinguishable on facts.

18. The learned Senior counsel referred to the decision of the Hon'ble Supreme Court in the case of ***Ramnath International Construction (P) Ltd.***, (supra), which arose under the provisions of the Arbitration Act, 1940, interpreting clause 11(c) of the General Conditions of the GCC, it was held that the Arbitrator has misconducted himself in awarding compensation when under the contract, there is a

clear bar to any claim for compensation for delays in respect of which extensions have been sought and obtained. Further, it was held that payment of extra rates for work done beyond the agreement time, was held to be impermissible on account of the extension time granted, where the said contractor agreed to complete the work with no claim for compensation. Firstly, the said decision arose out of a case relating to the erstwhile GCC and the correctness of the award was tested in terms of the provisions of the 1940 Act. Therefore, this Court is of the opinion that the decision may not render assistance to the case of the Railways. While on this issue, it would be relevant to take note of clause 17(2) of the GCC, which reads as follows:-

(2) if in the opinion of the Engineers the progress of work has at any time been delayed by any act or neglect of the Railway's employees or by any other Contractor employed by the Railway under sub-clause (4) of Clause 20 of these conditions or by strikes, lock-outs, fire, unusual delay in transportation, exceptionally inclement weather, unavoidable casualties or any causes beyond the Contractor's control as by the reasons of proceedings taken or threatened by or dispute with adjoining or neighbouring owners or public authorities arising otherwise than through the Contractor's own default etc., or by delay authorized by the Engineer pending arbitration or in consequence of the Contractor not having

received in due time necessary instructions from the Railway for which he shall have specifically applied in writing to the Engineer or his authorized representatives or by any other cause which the Engineer shall decide to justify the delay, then the time of completion of the works may be extended for such reasonable time as the Engineer on behalf of the Railway may decide.

19. The Arbitral Tribunal has held that extensions have been granted under clause 17(2) of the GCC and the extensions were granted on account of no default on the part of the contractor. Though the Railway Administration before this Court would vehemently contend that in terms of clause 17(3) of GCC, no extra rates are payable coupled with the execution of the rider agreement, it is seen that such issue was not seriously contested before the Arbitral Tribunal, but is being contested only in this petition. In any event, the Arbitral Tribunal has done a thorough factual exercise, appreciated the oral and documentary evidence placed on both sides and in particular, the inter-departmental communications, which clearly show that the delay in completion of the contract was solely attributable to the Railways.

20. It is relevant to note that by letter dated 01.02.2002, the contractor had sent a letter setting out in detail the reasons for

extension of the currency of agreement and requested for extra rates for all the quantities executed/to be executed from 01.02.2004. Similarly, in letter dated 15.11.2002, (Exhibits C41) the contractor while requesting for extra rates pointed out the following:-

The currency of the Agreement was extended first from 10.04.2001 to 30.09.2001, secondly from 01.10.2001 to 31.01.2002 and for the third time from 01.02.2002, to 30.06.2002 as sought for extensions of currency vide our letters dated 02.04.2001, 22.09.2001 and 29.01.2002 mentioning the same reasons which was also acknowledged by the department vide its letter No.W.148/VS/30CN, dated 25.04.2001, letter No.W.148/VS/30CN, dated 03.10.2001 and letter No.W.148/VS/30CN dated 22.02.2002, wherein reference has been quoted to our above cited letters while granting extensions.

We had completed all possible works before 30.10.2001 and from that date onwards our establishment, men and machineries were idle and we had lost heavily to the tune of about 27.00 lakhs due to department's delay. The department has not obtained the CRS sanction for inserting the temporary girders, speed restrictions and delayed R.C.C. Detailed Drawings for jacketing and R.C.C., Box culverts (Bridges).

We personally met the then CE and Dy.Ces on many occasions and requested them to foreclose the work as per the agreement conditions of the contract, but they requested us to continue with the

works and promised that we will be suitably compensated by recommending extra rates for the works done beyond the original currency period.

The present Dy.DE is not willing to prepare the proposal for extra rates in spite of the instructions of the CE. The rates for this work was formulated in May 2000 taking into account that the prevailing market rates and the completion time of six months prescribed in the tender. The work contemplated to be completed in six months as per tender conditions is now dragging on for a period of nearly 25 months. As the market rates have gone up steeply the rates formulated by us in May 2000 have become unworkable. Therefore, we request the administration to grant the following extra rates as promised to us on many occasions for all quantities executed/to be executed from 10.04.2001 onwards.

21. The above communication was not denied by the Railways before the Tribunal nor there has been a cross examination on the said document. There are other communications sent by the contractor wherein they have recorded that the Chief Engineer and the Deputy Chief Engineer had assured the contractor that they will be adequately compensated and awarded extra rates, which lead to the signing of the rider agreements.

22. In the case of ***Bass Constructions vs. The Board of Trustees of the Port of Madras & Ors.,***(supra), relied on by the Railway Administration, the facts were entirely different, though it also pertain to extension of the period of contract. In the said case, the work was entrusted by the Port Trust to the appellant therein and appellant/claimant did not attribute the cause of the delay in completing the contract on the respondent Port Trust, but relied on a ban order issued by the Government of Tamil Nadu which affected the retrieval of stones. In such factual circumstances, the Hon'ble Division Bench held that the contractor was bound by the terms of contract and cannot claim any escalation. Therefore, the said decision is also distinguishable on facts.

23. The Hon'ble Supreme Court in the case of ***K.N.Sathyapalan (Dead) by Lrs., vs. State of Kerala & Anr.,*** (supra), was considering the question as to under what circumstances the Arbitrator was justified in granting compensation to the contractor for works done beyond the contract period. After referring to the decision in the case of ***P.M.Paul vs. UOI*** reported in ***1989 Supplementary 1 SCC 368***, and ***T.P.George vs. State of Kerala*** reported in ***(2001) 2 SCC 758***, it was held that once it was found that there was delay in execution of the contract due to the conduct of the respondent (State of Kerala

therein), it was liable for consequences of the delay namely, the increase in prices and such claim was held to be not outside the purview of the contract and arose as an incident of the contract and the Arbitrator had jurisdiction to make such an award. Further, it was held that ordinarily the parties would be bound by the terms agreed upon in the contract and in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the Arbitrator is vested with the authority to compensate the second party for the extra cost incurred by him as a result of the failure of the first party to live up to its obligations.

24. Thus, it is evidently clear that the impugned award is reasoned award, rendered after considering the oral and documentary evidence and the parties had full opportunity to put forth their respective contentions. The Arbitral Tribunal has followed the principles for award of compensation under Section 73 of the Indian Contract Act, 1872 and given cogent reasons for passing the award in favour of the claimant/contractor. The award of interest at 12% is just and reasonable.

25. Hence, for all the above reasons, the petitioners have not

made out any grounds to interfere with the impugned award under Section 34 of the Act. Consequently, the Original Petition fails and it is dismissed.

17.03.2017

pbn
Index : Yes/No
Internet:Yes/No

To

- 1.M/s.Appachi Gounder and Sons,
Rep., by Partner cum Power of Attorney Holder,
Mr.A.Swaminathan,
Son of Shri.K.Appachi Gounder Vavikadi,
K.S.Palayam, Perundurai Taluk,
Erode District.
- 2.Hon'ble Mr.Justice S.S.Subramani (Retired),
E 104-11/2, 23rd Cross Street,
Besant Nagar, Chennai – 600 090.

T.S.SIVAGNANAM, J.
pbn

Pre-Delivery Order in
O.P.No.77 of 2011

17.03.2017

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