

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.02.2017

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THE HONOURABLE MR.JUSTICE T.S. SIVAGNANAM

O.P. Nos. 87 & 88 of 2007

M/s. Kottukulam Engineers (P) Ltd.,
Constructions Co.P Ltd.,
rep.by its Managing Director,
398 (Old No. 766, Poonamallee High
Road), Kilpauk,
Chennai 600 010.

..Petitioner in O.P.No.
87 of 2007

M/s. Nellai Concrete Products &
Constructions Co.P. Ltd.,
rep. by its Managing Director,
766, Poonamallee High Road,
Kilpauk,
Chennai 600 010.

..Petitioner in O.P. No.
88 of 2007

Vs.

1. The Principal Chief Engineer,
Southern Railway,
Park Town,
Chennai 600 003.

2. Smt. Vijaya Kanth,
F.A. & C.A.O./Constructions,
Southern Railway,
Egmore, Chennai - 8.

..Respondents in both
O.P.s

Prayer in O.P. No.87 of 2007: Petition under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the arbitration award dated 19.10.2006 passed by the 2nd respondent in the dispute between the petitioner and the 1st respondent and direct the 1st respondent to refund the amount of Rs.1,04,51,114/- illegally recovered from the

petitioner with interest @ 18% per annum from the date of recovery till the date of payment and direct the 1st respondent to pay the cost of the proceedings.

Prayer in O.P. No. 88 of 2007:Petition under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the arbitration award dated 19.10.2006 passed by the 2nd respondent in the dispute between the petitioner and the 1st respondent and direct the 1st respondent to refund the amount of Rs.13,21,768/- illegally recovered from the petitioner with interest @ 18% per annum from the date of recovery till the date of payment and direct the 1st respondent to pay the cost of the proceedings.

For Petitioners :: Mr.A. Jenasenan

For Respondents :: Mr.V.G. Sureshkumar

COMMON ORDER

Though both the original petitions have been filed challenging two different awards passed by the learned Arbitrator, since both the cases arise out of similar contracts, pertaining to supply of Pre-stressed Mono Block Concrete Sleepers and the case against the petitioners, as projected by the Railway Administration, is also identical, the matters are clubbed and heard together and are disposed of by this common order.

2. The respective petitioners were awarded contracts for manufacture and supply of Pre-Stressed Mono Block Concrete Sleepers, vide agreement dated 09.12.1991 with the completion period of 5 years from 01.05.1990 and agreement dated

16.12.1993, with the completion period of 5 ½ years from 18.01.1993 respectively. The base price of sleeper was mentioned as Rs.377.41 as of 01.05.1990 and the contracts also provided for price variation, on the increasing cost, as on 01.05.1990, based on the base price of the components, namely, HTS wires, Special Cement and Wages. Consequent upon HTS wires being supplied free by the Railway Administration from April 1995/1996, the price per sleeper was reduced. During the currency of the agreements, the Railway Board, vide letter dated 28.03.1995, modified the input level and escalation parameters with a direction to the parties to implement the same, after negotiating with the existing contractors. It is not in dispute that both the petitioners had accepted implementation of the revised norms with effect from 01.10.1996 as per the negotiations held on 12.01.2000 and their letter dated 12.01.2000. Consequent upon the said letter, Rider Agreements were executed on 05.08.2000 & 05.07.2000 respectively. The Railway Administration noticed that while implementing the revised norms, formalised through Rider Agreements, it was found that excess payments were made to the petitioners for sleepers, on or after 01.10.1996 and accordingly, the excess payments were withheld and thus, the payments, which were withheld, were claimed by the petitioners and it was not acceded to and therefore, the petitioners requested the General Manager to refer the matter for arbitration. Accordingly, the General Manager, by letters dated 03.11.2003, appointed the 2nd respondent as the Sole Arbitrator, to adjudicate the dispute between the parties.

3. Before the learned Arbitrator, the petitioner in O.P. No. 87/2007 - M/s. Kottukulam Engineers (P) Ltd., Constructions Co.P Ltd., made the following claims:

"CONTRACTOR'S CLAIM

Sl. No.	Description of Claim	Claim Amount
	<i>Refund of amount incorrectly recovered as per details below:</i>	
1.	<i>Recovery made from the bill of M/s. Concrete Products & Construction Company for M/s. Kottukulam Engineers Pvt. Ltd.</i>	<i>Rs. 13,21,768/-</i>
2.	<i>Interest on the above amount recovered @ 15% per annum from 19.4.2002 to 30.4.2003</i>	<i>Rs. 2,04,783/-</i>
3.	<i>Interest @ 15% per annum from 1.5.2003 till the arbitration award.</i>	<i>Not quantified</i>
4.	<i>Interest a may be awarded by the Arbitrator after publication of Award till payment.</i>	<i>Not quantified</i>
5.	<i>Cost of Arbitration</i>	<i>Not quantified</i>
	<i>Note: We reserve our right to amend/modify the list of claims</i>	

4. The petitioner in O.P. NO. 88/2007 , M/s. Nellai Concrete Products & Construction Company Private Limited, made the following claims:

"CONTRACTOR'S CLAIM

Sl.No.	Refund of amount incorrectly recovered as per details below:	Claim Amount
1.	Recovery made from M/s. Nellai Concrete Products & Construction Company Pvt. Ltd. Recovery made from M/s. Concrete Products & Construction Company for M/s. Nellai Concrete Products & Construction Company Pvt. Ltd. CPCC/ABU/BG/12 dated 1.4.02 <i>Total</i>	Rs. 51,46,397/- Rs. 53,04,717/-

<i>Sl.No.</i>	<i>Refund of amount incorrectly recovered as per details below:</i>	<i>Claim Amount</i>
		<i>Rs. 1,04,51,114/-</i>
<i>2.</i>	<i>Interest on the above amount recovered @ 15% per annum from 19.4.2002 to 30.4.2003</i>	<i>Rs. 16,19,207/-</i>
<i>3.</i>	<i>Interest @ 15% per annum from 1.5.2003 till the date of arbitration award.</i>	<i>Not quantified</i>
<i>4.</i>	<i>Interest a may be awarded by the Arbitrator after publication of Award till payment.</i>	<i>Not quantified</i>
<i>5.</i>	<i>Cost of Arbitration</i>	<i>Not quantified</i>
	<i>Note: We reserve our right to amend/modify the list of claims</i>	

5. The Arbitrator adjudicated the claims and have passed awards rejecting both the claim petitions, which have been challenged by the respective petitioners in these original petitions.

6. Learned counsel for the petitioners, elaborately, narrated the facts of the case and stated that the petitioners have been continuously supplying Pre-Stressed Mono Block Concrete Sleepers to the Railway Administration and they were their exclusive purchasers and they have been carrying on satisfactory work for the Railways and their supply contracts commenced from 1983. It is further submitted that pursuant to the decision of the Railway Board, the 1st respondent called upon the petitioners to attend negotiations to accept certain revised norms pertaining to input level and escalation parameters and the petitioners, vide letters dated 12.01.2000, agreed to the same with the specific condition that the Rider Agreements will take effect from 01.10.1996 and it is submitted that the above said letter dated 12.01.2000 given by the

respective petitioners was accepted by the Railway Administration and Rider Agreements dated 05.08.2000 & 05.07.2000 respectively were signed incorporating the said condition. After the signing of the Rider Agreements, the bills were presented by the petitioners and after the verification of the bills, payments were effected to the petitioners during January, 2001. It is submitted that after nearly one year, the respondent Railways have come forward with this claim and effected recovery without notice to the petitioners, which was questioned before the learned Arbitrator. However, the learned Arbitrator, erroneously appreciated the said factual issues and dismissed the claim petitions. On the above grounds, the learned counsel for the petitioners sought interference of the impugned awards.

7. Per contra, learned counsel appearing for Railways would submit that the learned Arbitrator has thoroughly analysed the factual position and found that the payments effected to the petitioners were required to be made in terms of the Rider Agreements, as the annexure to the Rider Agreements provides the base month and date for the purpose of calculating the rates, which were not adhered to, in respect of certain payments and they are entitled to rectify the mistake, when excess payments have been received by the petitioners.

8. Heard Mr.A. Jenasanen, learned counsel for the petitioners and Mr.V.G. Sureshkumar, learned counsel for the Railways and perused the materials on record.

9. In a catena of decisions, the Honourable Supreme Court has reiterated that

Courts, while exercising power under Section 34 of the Arbitration and Conciliation Act, 1996, shall not act as an Appellate Court and examine the factual findings recorded by the learned Arbitrator. Equally well settled is the legal principle that Courts, while exercising jurisdiction under Section 34 of the said Act cannot go into the merits of the findings rendered by the learned Arbitrator nor can it substitute its opinion with that of the findings of the learned Arbitrator. In other words, the scope for interference of this Court in an award passed by a learned Arbitrator, in exercise of its jurisdiction under Section 34 of the said Act, is very limited and strictly confined to the contingencies contained in Section 34(2) of the Act. Bearing in mind, this legal principle, if we examine the awards passed by the learned Arbitrator, it is evident that the award passed in both the claim petitions is a reasoned one. There is no perversity in the approach of the learned Arbitrator nor such a ground has been canvassed by the petitioners. The contention of the petitioners is that though the Rider Agreements were agreed to be given effect to, with effect from 01.10.1996, arbitrarily, the said date was rolled back to 1990 and the recovery effected on the petitioners is erroneous. As noticed above, the respective petitioners, vide letter dated 12.01.2000, gave consent that the Rider Agreement shall be implemented with effect from 01.10.1996. This has been incorporated in the respective Rider Agreements dated 05.08.2000 & 05.07.2000. However, the petitioners have failed to notice that the respective Rider Agreements contain an annexure, which gives details of the basic price and other payments and dates of such payment. The Chairman and Managing Director of the respective petitioner Companies have signed the annexure as well. The annexure clearly shows that the base month taken is 01.05.1990. Therefore, though the Rider Agreements came

into effect from 01.10.1996, while calculating the amounts payable, the base month is

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very crucial and relevant. The contracts having been agreed to by the parties and the petitioners having been fully aware of the conditions contained therein, cannot contest the recovery effected by the Railways, on account of its miscalculation. The contention that the petitioners have received payment in January, 2001 and that this recovery effected belatedly is hardly a reason to set aside the impugned awards. There cannot be any estoppel in such cases, since the amount paid to the petitioners is not liable to be paid. Therefore, the wrong committed by the officials of the respondent Railways can hardly be a ground to justify the claim of the petitioners that recovery shall not be effected. The petitioners had full opportunity before the learned Arbitrator, who has considered all the issues and has dismissed the claim petitions. As the petitioners have failed to bring the challenge to the impugned awards within the parameters of Section 34(2) of the Act, the challenge made to the impugned awards have to necessarily fail and the original petitions are dismissed.

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