

In the High Court of Judicature at Madras

Dated : 08.2.2017

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

Original Petition No.256 of 2013

The Project Director, Tamil Nadu
Road Sector Project, Highways
Department, Adyar, Chennai-20.

...Petitioner

Vs

1.M/s.RNS Infrastructure Ltd.-
GPL (JV), Hubli-580030.

2.Mr.M.V.S.Rao, Presiding Arbitrator,
Bangalore-560034.

3.Mr.S.Sivaraman, Arbitrator,
Chennai-41.

4.Mr.N.R.Venkatesh Prasad, Arbitrator,
Bangalore-560003.

...Respondents

PETITION under Section 34 of the Arbitration and Conciliation Act,
1996 to set aside the award dated 30.4.2012 passed by the Arbitral Tribunal
comprising of respondents 2 to 4.

For Petitioner :

Mr.S.T.S.Murthy, AAG assisted by
Mr.Venugopal, SGP

For Respondent-1 :

Mr.Vijay Narayan, SC for
Mr.Prasad Vijayakumar

ORDER

This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act), for setting aside the arbitration award dated 30.4.2012 passed by the Panel of Arbitrators namely respondents 2 to 4 herein.

2. The facts, which are necessary for testing the validity of the award, could be briefly stated as follows :

The respondent is a joint venture consisting of two companies namely M/s.RNS Infrastructure and Gayathri Projects Limited. The respondent was awarded the contract for upgradation of 117 Km road from Ramanathapuram to Tuticorin. Originally, the project length was 117.90 KM and the revised length was 114.695 Km. The contract value, which was originally fixed, was Rs.119,26,00,842/-. Subsequently, since there was major change in the scope of work namely the work of upgradation got converted into one of reconstruction, the petitioner, who awarded the contract, revised the value of the contract to Rs.155,93,66,638/-. According to the petitioner, the overall increase in the quantum of work was about 31%.

3. In terms of the initially conceived project namely a project for upgradation, an agreement dated 30.11.2005 was entered into, which was pursuant to a letter of acceptance dated 14.10.2005. The start date, as

originally envisaged, was 16.12.2005 with a time for completion as 36 months to end with 15.12.2008 whereas the project was completed only on 30.12.2009. It is important to note that the nature of work was in terms of the concept of Bill of Quantities (hereinafter called the BOQ) and in terms of the contract, the quantities given in the BOQ are estimated provisionally and are given to provide a common basis for bidding. The basis of payment will be the actual quantities of work ordered and carried out as measured by the Contractor, verified by the Engineer and valued at the rates and prices, bid in the priced BOQ where applicable and otherwise at such rates as the Engineer may fix within the terms of the contract.

4. The BOQ shall, except in so far as it is otherwise provided under the contract, includes all construction plant, labour, supervision, materials, etc., together with all general risks, liabilities and obligations set out or implied in the contract.

5. As admitted by the petitioner, the work was actually completed by the first respondent on 31.12.2009 and the bills submitted by the first respondent in terms of the BOQ were settled. Ultimately, disputes arose between the petitioner and the first respondent and in terms of Clause 67, which deals with settlement of disputes, the Contractor/the first respondent approached the Engineer for a decision in the matter in accordance with

Clause 67.1 of the agreement. It appears that the Engineer's decision was not acceptable to the first respondent and that they invoked the jurisdiction of the Disputes Resolution Board in accordance with Clause 67.2 of the agreement. It appears that the Disputes Resolution Board, in principle, agreed with the statement made by the first respondent. However, the petitioner herein invoked Clause 67.3 of, which provides for arbitration indicating its intention to commence arbitration on the claims made by the first respondent vide their letter dated 24.1.2011 and the petitioner appointed an Arbitrator vide their letter dated 21.2.2011. The first respondent appointed their Arbitrator by letter dated 21.3.2011 and both the Arbitrators appointed the Presiding Arbitrator vide memo dated 20.5.2011. Thus, a three Member Arbitral Tribunal was constituted in accordance with Clause 67.3 of the agreement.

6. Before the Arbitral Tribunal, the claim made by the first respondent/ Contractor was broadly on the following heads namely

- (i) liquidated damages
- (ii) overhead costs
- (iii) loss of profit
- (iv) extra costs incurred for completion beyond the period and
- (v) payment of interest.

7. The above claims, when submitted by the first respondent, were

sub-divided as follows :

- (i) Claim No.1.a. : Redetermination of the time extension and refund of the liquidated damages levied;
- (ii) Claim No.1.b. : De-freezing of the price indices pertaining to the work carried out during the period beyond the disputed extended time for Sections 1, 2 and 3 and payment of the difference amount;
- (iii) Claim No.2.a. : Idling of machinery;
- (iv) Claim No.2.b. : Fixed overhead expenses;
- (v) Claim No.2.c : Loss of profit;
- (vi) Claim No.3 : Revised rate for quantity executed beyond the original completion date; and
- (vii) Claim No.4 : Claim for interest.

8. The Arbitral Tribunal allowed the claims under all the heads, but not to the extent as claimed by the first respondent. However, the first respondent had not challenged the award as against the disallowed portions. With regard to the claim for interest, the Arbitral Tribunal awarded pendente lite interest at 10% as against the claim for 18% and interest at 18% from the date of award till date of realization.

9. Mr.S.T.S.Murthy, learned Additional Advocate General appearing for the petitioner initially referred to the factual matrix in detail and submitted

that though there was a change of scope of work overall by 31%, the cost of work was revised to Rs.155 Crores as against the original contract value of Rs.119 Crores, that the contract being a BOQ contract, the claim made by the first respondent was grossly inflated and without jurisdiction, that the Arbitral Tribunal, without appreciating the scope of work and the terms and conditions of the contract, had erroneously awarded various sums under the aforesaid heads and that the entire award is put to challenge by the petitioner as being against the terms of the Public Policy of the State.

10. According to the learned Additional Advocate General, though the contract was invited by a single tender for a total length of 114.695 Km, they were divided into four sections namely

- (i) Ramanathapuram to Edampadal
- (ii) Sayalkudi to Kulathur
- (iii) Kulathur to Tuticorin and
- (iv) Edampadal to Sayalkudi.

The length of each of the sections was separately mentioned and the time for completion also was stipulated in the contract.

11. It has to be noted at this juncture that the contract, which is being referred to and relied upon by both the parties, was the contract, which was originally entered into with the petitioner on 30.11.2005 i.e much prior to the change in the scope of work and the revision in the value of work.

12. It is further submitted that after the bills, submitted by the contractor in terms of the BOQ, were processed and settled, the contractor has come forward with a claim seeking extension of time. In this regard, the learned Additional Advocate General has circulated a tabulated statement furnishing details pertaining to the extension of time sought for by the contractor, extension granted by the petitioner and the date of actual completion of work, which are quoted as hereunder :

<i>Section</i>	<i>EOT claimed by the contractor</i>	<i>EOT granted by the employer/petitioner</i>	<i>Date of actual completion of work</i>
<i>Section 1</i>	<i>19.6.2008</i>	<i>27.3.2008 (except 1.22 Km) 14.5.2008 (for 1.22 Km)</i>	<i>1.4.2009</i>
<i>Section 2 Bridge 122 & 123</i>	<i>08.5.2009 24.7.2009</i>	<i>13.2.2009</i>	<i>30.12.2009</i>
<i>Section 3 Bridge 129 & 130</i>	<i>08.7.2009 30.7.2009</i>	<i>10.4.2009</i>	<i>01.12.2009</i>
<i>Section 4</i>	<i>08.3.2010</i>	<i>31.12.2009</i>	<i>Not applicable</i>

13. On a perusal of the above statement, it is evident that the contractor was allowed to perform beyond the extension of time granted by the petitioner and it is not in dispute that the work has been completed to the satisfaction of the petitioner.

14. The contention of the petitioner is that the work was completed beyond the time extension granted and therefore, there is a delay and that

the claims made by the contractor are not sustainable.

15. However, the moot question would be as to from what date, the date for completion should be reckoned or in other words, what would be the start date for each of the sections would be a relevant factor, since it is an undisputed fact that the scope of the work stood altered and though the agreement was signed on 30.11.2005, even according to the petitioner, the drawings were approved only on 21.2.2007.

16. In the background of these facts, this Court has to test the correctness of the impugned award. Before this Court proceeds to do so, it would be worthwhile to point out the scope of jurisdiction of this Court while exercising its power under Section 34 of the Act. An application for setting aside the arbitral award has to be brought within the ambit of Sub-Section (2) of Section 34 and the Courts have held that the jurisdiction of this Court under Section 34 is not as that of an Appellate Court to re-appreciate the evidence available before the Arbitral Tribunal in order to interfere with the findings of fact recorded by the Arbitral Tribunal and substitute the same with the findings or opinion of the Court.

17. Thus, in other words, the scope of interference has been clearly circumscribed and limited as lucidly explained by various courts. It is not out of place to make a reference to the decision in the case of **ONGC Ltd. Vs.**

Saw Pipes Ltd. [reported in 2003 (5) SCC 705] wherein the scope of the Court's jurisdiction under Section 34 of the Act was under consideration. The Hon'ble Supreme Court considered the meaning that can be assigned to the phrase 'public policy of India' occurring in Section 34(2)(b)(ii) of the Act being alive to the subtle distinction in the concept of "enforcement of the award" and "jurisdiction of the court in setting aside the award" and the decision in ***Renusagar Power Co.Ltd. Vs. General Electric Co. [reported in 1994 Supp. (1) SCC 644]*** and held in ***Saw Pipes Ltd.,*** as follows : _

"The term 'public policy of India' in Section 34 was required to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged before it becomes final and executable in contradistinction to the enforcement of an award after it becomes final. Having that distinction in view, with regard to Section 34, this Court said that the expression 'public policy of India' was required to be given a wider meaning. Accordingly, for the purposes of Section 34, this Court added a new category - patent illegality - for setting aside the award. While adding this category for setting aside the award on the ground of patent illegality, the Court clarified that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against public policy. Award could also be set aside if it was so unfair and unreasonable that it shocks the conscience of the court."

18. Bearing this legal principle in mind, this Court proceeds to examine the correctness of the findings rendered by the Arbitral Tribunal and at the first instance, this Court considers the findings of the Tribunal with regard to Claim No.1.a.

19. The discussions on the said claim started from paragraph 8.5 and the Arbitral Tribunal held that it cannot agree with the submission of the petitioner herein that the EPM section of 12 Km length in Section 1 was available for the claimant/the first respondent herein to work as it is evidenced by the claimant that this is not true and as a matter of fact, re-investigation was carried out even in the EPM section and this EPM section in question was cleared for construction on 5.3.2007, which is a date later than that of issue of revised design for other part of Section 1. The Tribunal held that the averment that the Engineer agreed without any change to the revised programme given by the claimant/the first respondent herein is a bald statement, as Ex.R.4 produced before the Tribunal is nothing but the letter of the first respondent herein submitting the revised programme and not an evidence for acceptance by the Engineer, which he should have done after consultation with the first respondent herein.

20. The Tribunal further found as a matter of fact that the petitioner's

acceptance in principle is the reason for the delay and found fault with the petitioner for having not demonstrated the reasonability of time determined by him for executing the changed scope of work by stating that the employer had granted extension of time in a fair and justifiable manner, which has adequately compensated the first respondent herein, is nothing but a bald statement. Therefore, the Tribunal further held that extensions granted are arbitrary and unilateral, done without consulting the first respondent. The Arbitral Tribunal further held that consequential upon the delay of 14 to 18 months, the first respondent was prevented from executing the original scope of work affecting the productivity and due to change in scope of work, the first respondent had to execute the changed scope of work by increasing the resources and it was totally a different ball game.

21. The Arbitral Tribunal accepted the case of the first respondent herein that they could not perform the contract till the drawings were given after the drawings were given, it was found that the design has been changed. Consequently, there has been a change in the scope attracting Section 52 of the Indian Contract Act and referring to Clause 6.4 of the General Conditions of Contract (GCC), the Arbitral Tribunal held that the first respondent is entitled to compensation.

22. Similarly, the other findings recorded from paragraph 8.13 clearly

show that the Arbitral Tribunal appreciated the entire scope of work, took into consideration the documents produced and thereafter came to the conclusion that the first respondent was entitled to compensation. Further, the Arbitral Tribunal took up for consideration with regard to the re-determination of extension of time and refund of the deposit. The finding is at paragraph 9.1.3. In the said paragraph, the Arbitral Tribunal clearly brought out the factual position that there has been initial delay in giving the drawings and that the drawings were given with changed design, resulting in change of scope of work and consuming more time for execution enormously and that the petitioner herein had not applied its mind in giving extension of time with the change in scope of work from upgradation to reconstruction for the entire stretch of road and the section-wise completion had become redundant and the first respondent herein having completed the entire project within the extension of time granted for the complete stretch of road, it cannot be held liable for payment of any liquidated damages and if any collected, was ordered to be refunded.

23. The learned Additional Advocate General submitted that there is a total non application of mind on the part of the Arbitral Tribunal in passing the award under the said head and that it is bereft of reasons.

24. Though it is the claim of the contractor that they have completed

the entire project within the time given, it is not in dispute that the other sections have been completed with a long delay beyond the original time period prescribed and the extension of time granted. However, in the preceding paragraph, the Arbitral Tribunal recorded factual findings by the Arbitral Tribunal, which are not based on presumptions and surmises, but are borne out of records, communications and evidence placed before the Tribunal.

25. Therefore, any interference to such findings would undoubtedly amount to reviewing the award passed by the Arbitral Tribunal as if this Court is exercising appellate jurisdiction. Hence, there are no reasons for interfering with the findings rendered with regard to Claim No.1.a.

26. With regard to de-freezing of price indices, which is Claim No.1.b., the same reasoning, which would be applicable to Claim No.1.a., would equally apply to Claim No.1.b. The Arbitral Tribunal reiterated that while granting extension of time, the petitioner did not apply their mind. This finding stems out of the undisputed fact that there was a total change in the scope of work from upgradation to reconstruction. Hence, essentially, there should have been a re-working of entire terms of the agreement, revised price fixation, time schedule, etc. For the reasons best known to them, the petitioner unilaterally extended time and it has been faulted by Arbitral

Tribunal as being an outcome of total non application of mind. Therefore, Claim 1.b., which falls out of Claim No.1.a., also does not call for interference.

27. With regard to Claim No.2.a., pertaining to idling of machinery, this finding was seriously opposed by the learned Additional Advocate General by submitting that this finding is totally devoid of merits and that there are no reasons assigned as to how Rs.3.41 Crores was awarded to the first respondent herein under the said head.

28. Though this argument appears to be impressive at the first blush, a closer reading of the findings proves otherwise. The Arbitral Tribunal took into consideration Section 54 of the Indian Contract Act, thereafter proceeded to analyze the factual position and calculated the claim for idling of machinery in a scientific manner, by adopting the procedure and also taking into consideration the letter of the petitioner, which was marked as Ex.R.2-1. The said communication, which is a tabulated statement, sets out the location, completion of erection of machinery, date of obtaining statutory approval and when commission/production started. Ex.R.2-2 is a document, which shows the statutory clearance obtained on various dates.

29. Thus, a scientific approach has been adopted by the Arbitral

Tribunal for calculating the charges towards idling of machinery and the Arbitral Tribunal had taken the date as per the schedule of dates as found in Ex.R.2-1, which is a document signed by the petitioner's Engineer. After considering the entire aspect, the weighted average was taken and the machinery component of 22% of the financial progress achieved was considered and the amount was awarded. There is no reason for this Court to substitute such a finding in the absence of any proof or in the absence of any document to dislodge their own documents Ex.R.2-1 and Ex.R.2-2. Thus, the finding on this aspect should be confirmed.

30. With regard to Claim 2.b., it deals with overhead costs. Once again, the learned Additional Advocate General vociferously contended that there is absolutely no finding recorded by the Arbitral Tribunal and the award passed by the Arbitral Tribunal is against the public policy, especially when the work performed by the contractor is a road laying work in public interest.

31. The said claim pertains to overhead costs. On a perusal of the reasons given by the Arbitral Tribunal, it is seen that it has made an in-depth consideration of the claim made by the first respondent, which had claimed overhead cost at 15%. However, the Arbitral Tribunal did not, mechanically, accept the said claim, but examined the matter in full and after satisfying

themselves that overhead cost has been incurred, proceeded to consider as to what would be the appropriate percentage for compensation towards overhead costs. Thus, by adopting the guidelines in the MORTH Data Book, which has made recommendations for compensation towards overhead component, the Arbitral Tribunal arrived at weighted average at 9.39% as against the claim made at 15% and such claim was fixed on the prime cost and not on the final cost. Thus, this Court finds that the award under the head 'overhead cost' is supported by proper reasoning, which shows that the Arbitral Tribunal applied its mind to the facts as well as standard established procedure and rendered a finding and this Court does not propose to upset such a finding with regard to Claim 2.b.

32. Loss of profit has been claimed under Claim 2.c., and considering the amount, which has been awarded, namely Rs.31 lakhs and odd has been awarded as against the claim of Rs.3.50 Crores, this Court is of the opinion that the Arbitral Tribunal considered all the aspects and awarded the said amount and that there is no reason to interfere with the said finding.

33. With regard to the claim of extra costs beyond the contract period, the learned Additional Advocate General made elaborate submissions as to how the Arbitral Tribunal had erroneously awarded a huge amount towards extra costs.

34. The learned Additional Advocate General submitted that the award of a sum of Rs.10,07,23,370/-, with regard to Claim No.3, is highly excessive. It is submitted that the claimant has been paid price escalation, in terms of Sub-Clause 70.3 of COPA and any fluctuations in the market are to be absorbed by this provision and the parties having accepted the revised construction programme and bill of quantities and when the period is extended on the grounds, as provided for, in the contract, the revision of rate of any item, at any time, till the completion of the work, will not be permitted under the terms of the contract. Further, it is submitted that there is no provision in the original contract for revising any item rate, when the same is executed beyond the original contract period, all variations referred to in Clause 51 and any addition to the contract price required to be determined pursuant to Clause 52.2 of COPA, which states that items accounting for change of amount more than 2% of the contract price and the actual quantity of work executed exceeds or falls short by 25% of the BOQ, the rates will have to be varied.

35. The learned Additional Advocate General referred to the letter given by the first respondent/claimant dated 12.2.2009 wherein the claimant has accepted the fact that the rate, as per analysis, works out to Rs.482.50 considering the actual site condition, such as lead, cost of borrow areas, use

rate of equipments and price of petroleum products as prevailed at the time of offer of bid and that the rate is higher than BOQ rate. However, as per the conditions of the contract, since the first respondent/claimant had not given notice till the specified time, they were not entitled to claim this rate or price or extra payment at this distance of time.

36. Therefore, the learned Additional Advocate General contends that when such a stand has been taken by the first respondent/claimant, they are clearly estopped from raising a claim before the Arbitral Tribunal claiming extra cost for the work carried out beyond the period of contract. Further, it is submitted that the amount awarded by the Arbitral Tribunal under the said head is excessive and requires interference. Thus, it is his submission that the first respondent, having accepted the increase in the value of the contract from about Rs.119 crores to about Rs.156 crores, cannot object/protest against the revised contract and seek revised rates for quantities, especially, when the same has been factored in the revised rate, which is almost 125% the initial contract value.

37. In reply, learned Senior Counsel appearing for the first respondent/claimant submitted that the letter referred to by the learned Additional Advocate General dated 12.2.2009, in response to the letter sent by the petitioner dated 12.2.2009 and it pertains to the change in rate or

price of item No.305.9 (ii) – construction of embankment from approved borrow pits in accordance with Clause 52.2 of the COPA and in respect of the said item of work, the first respondent/claimant has not claimed any default and therefore, the said reply given by the petitioner dated 12.2.2009 is of no consequence to the present proceedings. Further, the learned Senior Counsel submitted that the Arbitral Tribunal has not awarded the entire sum, as claimed by the claimant, which was Rs.22,09,71,592/-, but has awarded only Rs.10,07,23,370/- and the Arbitral Tribunal has given detailed reasons as to how the claimant is entitled to only the said amount, as has been awarded.

38. This claim was taken up for consideration by the Arbitral Tribunal and the discussion starts from paragraph 9.6. With regard to the contention raised by the claimant as well as the petitioner/respondent, in paragraph No. 9.6.3, the Arbitral Tribunal has given its finding. The undisputed fact, as noticed earlier, is that there was a drastic change in the scope of work, as the work of upgradation had become work of reconstruction and there was change in design and admittedly, the project did not begin on the start date originally envisaged. The delay was more than 14 months. The contract had to be performed within a period of 36 months and the contention of the first respondent/claimant is that going by the date of revised price, it was submitted that the first respondent/claimant had completed the work well within 36 months, ie., by 34 months and it would be unreasonable on the

part of the petitioner to contend that the time for completion of the contract should be reckoned either from the original start date or from the date unilaterally fixed by the petitioner on a request made by the petitioner for extension of time. After noting the change in the scope of work, the Arbitral Tribunal held that the petitioner was solely responsible to arrive at the new reciprocal promises with new contract price/new rates and new completion time with due consultation with the claimant as required as per the terms of the contract. Thus, by applying Section 73 of the Indian Contracts Act, the Tribunal held that the claimant is entitled for compensation.

39. This Court is in full agreement with the view expressed by the Arbitral Tribunal. The claim made by the claimant is for compensation and the revision of rates, which were done by the petitioner, on account of change of scope of work may not have any impact on the present claim. Further, the Court finds that the revision of rates has been factored solely by considering the change in the scope of work and the consequent revision of BOQ. However, one important aspect, which has been lost sight of by the petitioner, is the delay in commencement of the project, which is not attributable to the first respondent/claimant.

40. In paragraph 9.6.4, the Arbitral Tribunal has clearly pointed out that

(i) the quantities available at the time of submission of the claim to the Arbitral Tribunal was based on measurements and quantities available at that point of time and correct quantity of the items could be accounted only after final account was prepared;

(ii) In the calculation of rate analysis, the component of transportation of bitumen was omitted; and

(iii) to avoid duplication, the price adjustment component which was included in claim No.1.b namely, de-freezing of price indices, was separately calculated and deducted from the claim amount.

41. While testing the correctness of the manner, in which, the Arbitral Tribunal arrived at the said figure, on a reading of paragraph No.9.6.5, it is evident that the Arbitral Tribunal gave due consideration to the claim for revised rates in respect of various category of works and resolved to allow 8% provided for in the MORTH data for ROAD items and use rate of machinery was calculated by deriving scheduled life in hours from scheduled life in years considering 8 hours day, 25 days month. Based on these parameters, the hourly use rates of all the machinery were worked out, the interest on average annual investment was re-calculated in accordance with the formula IS 11590:1995, as the Arbitral Tribunal opined that the said formula has more clarity than the guidelines given by the Indian Road Congress, but disallowed the overhead component in the use rate of

machinery and took note of other factors and considered the price adjustment for the new rates, taking January 2009 as the base month. Thus, the award passed by the Arbitral Tribunal, having been a reasoned award, with full justification, more particularly on technical aspects, cannot be set at naught in a proceeding under Section 34 of the Act.

42. The Hon'ble Supreme Court in the case of ***Associated Builders Vs. Delhi Development Authority [reported in (2015) 3 SCC 49]*** considered the scope of Section 34 of the Act and it was pointed out that the 1996 Act was enacted in order to provide for an arbitral procedure, which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the Tribunal gives reasons for an arbitral award to ensure that the Tribunal remains within the limits of its jurisdiction and to minimize the supervisory roles of Courts in the arbitral process. Further, it was pointed out that none of the grounds contained under Sub-Section (2)(a) of Section 34 deals with the merits of the decision rendered by an arbitral award. It is only when the award is in conflict with public policy of India that the merits of arbitral award are to be looked into, under certain specified circumstances. After taking note of the decisions in

(i) ***Renusagar Power Co. Ltd.,***

(ii) ***Saw Pipes Ltd.,***

(iii) ***Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation***

[reported in (2006) 4 SCC 445)],

(iv) McDermott International Inc. Vs. Burn Standard Co. Ltd.

[reported in (2006) 11 SCC 181],

(v) Centrotrade Minerals & Metal Inc. Vs. Hindustan Copper Ltd.

[reported in (2006) 11 SCC 245],

(vi) Delhi Development Authority Vs. R.S.Sharma & Co.

[reported in (2008) 13 SCC 80)]

and various other decisions, the Hon'ble Supreme Court culled out the legal principles and held that the jurisdiction of the Court is very limited while testing the correctness of the award, under Section 34 of the Act and the Court cannot act as an Appellate Authority.

43. If the submissions made on behalf of the petitioner are to be accepted, then this Court would be falling foul of the law laid down by the Hon'ble Supreme Court and it would be converting itself into an Appellate Court over the award passed by the Arbitral Tribunal, precisely, which the Court cannot do. Therefore, the finding rendered by the Arbitral Tribunal in respect of the claim made by the claimant in this regard is confirmed.

44. At this stage, this Court would wish to point out that in paragraph No.8.27, the Arbitral Tribunal has also reiterated with regard to the change in scope of work.

45. The last issue to be decided is as to whether the Arbitral Tribunal is justified in granting the relief with regard to the claim for interest. The Arbitral Tribunal has awarded pendente lite interest as well as interest from the date of the award till the date of payment. The interest awarded pendente lite is only 10% simple interest, that too, from the date of claim made by the claimant to the Engineer, i.e, on 20.3.2010 till the date of the award. In the considered view of this Court, there is nothing unreasonable or arbitrary in the exercise of such discretion by the Arbitral Tribunal and the interest, being only simple interest, that too, only from March, 2010, calls for no interference. The second limb of interest aspect, which was ordered is with regard to the interest from the date of the award till the date of payment. The Arbitral Tribunal awarded interest @ 18% simple interest per annum.

46. The learned Additional Advocate General submitted that the interest awarded by the Arbitral Tribunal is excessive, as it directed interest to be paid at 18% per annum from the date of the award till the date of payment. By referring to the decision in the case of ***Krishna Bhagya Jala Nigam Ltd. Vs. G.Harischandra Reddy & another [reported in (2007) 2 SCC 720]***, he submitted that the Hon'ble Supreme Court had interfered with the award of interest in the said case and both pendente lite interest and

future interest were reduced to 9%.

47. The learned Senior Counsel appearing for the first respondent/claimant, on the other hand, submitted that in terms of Section 31(7)(b) of the Act, the Arbitral Tribunal, may or may not award interest and in cases, where the award does not specify the rate of interest, the Statute prescribes the rate of interest to be 18% per annum from the date of the award till the date of payment. In such circumstances, when the Arbitral Tribunal specified the rate of interest, the claimant cannot be worse off, in the challenge to the impugned award by the petitioner. Further, framers of the Statute were conscious of the fact that a person, who litigates on an Arbitral Award, if unsuccessful, would be imposed with interest, punitive in character and therefore, there is distinction between pendente lite interest and post award interest. In the case of **Krishna Bhagya Nigam Ltd.**, the Hon'ble Supreme Court, while prefacing a finding, stated that they do not wish to interfere with the award, made certain observations with regard to economic reforms in the country and in their wise discretion, reduced the rate of interest. Therefore, this decision cannot be said to be laying down the principle of law that rate of interest should be 9%.

48. In **Sayeed Ahmed & Company Vs. State of Uttar Pradesh & Others [reported in (2009) 12 SCC 26]**, the Hon'ble Supreme Court considered the specific aspect as regards the rate of interest, which could be

awarded under Section 31(7)(b) of the Act and held as follows:

"25. The Arbitrator awarded interest at the rate of 18% per annum on Rs.24,18,586, 14% per annum on the amount found due on finalization of the final bill and 12% per annum on the security deposit amount if any that has to be refunded. As noticed above, clause (b) of sub-section (7) of Section 31 of the Act provides that if the award does not otherwise direct, the amount awarded shall carry interest as directed by the award and in the absence of any provision of 18% per annum. Any provision in the contract barring interest, will therefore operate only till the date of award and not thereafter.

26. The Arbitrator has awarded interest at three different rates on three different amounts which are all less than 18% per annum. The said award of interest by the arbitrator is not contrary to Section 31(7)(b) of the Act. Unless the award of interest is found to be unwarranted for reasons to be recorded, the Court should not alter the rate of interest awarded by the arbitrator. The High Court has not assigned any reasons for reducing the rate of interest to 6% per annum. Therefore, such reduction cannot be sustained."

49. Thus, it was pointed out that in terms of Section 31(7)(b), if the award does not otherwise direct, the amount awarded would carry interest as

directed by the award and in the absence of any provision of 18% per annum, any provision in the contract barring interest will, therefore, operate only till the date of award and not thereafter. Taking note of the fact that the Arbitrator awarded three different rates on three different amounts, which are less than 18% per annum and noting that the award of interest is not contrary to Section 31(7)(b) of the Act, held that unless the award of interest is found to be unwarranted, for the reasons recorded, the Court should not alter the rate of interest awarded by the Arbitrator.

50. As noticed above, the Arbitral Tribunal has awarded two rates of interest, namely, pendente lite interest and post award interest. So far as pendente lite interest is concerned, the Arbitral Tribunal considered the entire facts and awarded only 10% simple interest, that too, from 20.3.2010. Therefore, there is no reason to hold that such rate of simple interest, that too, from 2010, is either unreasonable or arbitrary.

51. With regard to post award interest, once again, the Arbitral Tribunal, after considering the facts, awarded only simple interest @ 18% per annum from the date of award till the date of payment. In the absence of any challenge to the rate of interest awarded on the grounds circumscribed under Section 34(2)(b), this Court is of the considered view that the interest awarded by the Tribunal requires to be confirmed and the same is,

accordingly, confirmed.

52. While deciding Claim No.3, the Arbitral Tribunal, in paragraph No.8.28, had given elaborate reasons. It may not be necessary for this Court to refer to all the reasons assigned therein and suffice to note the reasons with regard to extension of time and revision of rates.

53. The Arbitral Tribunal framed a question as to whether the extension of time granted by the petitioner was accepted by the first respondent herein and after taking note of the facts, answered the said question in the negative i.e, in favour of the first respondent herein and held that the first respondent herein amply demonstrated that they had objected to the quantum of extensions given as not reasonable and not scientifically arrived and it is not adequate for the execution of the changed scope of work. Further, the price adjustment is only an adjustment to the value of the work done, consequent to increase or decrease in the price indices and not a compensation for having incurred additional expenditure for any reason not attributable to the first respondent herein.

54. With regard to revision of rates, the Arbitral Tribunal framed a question as to whether the contention that there is no provision in the contract to revise the rate is correct and the said question was answered with an emphatic "NO", as, even as per the original contract, there is a provision

in Clause 6.4 that when the contractor suffers delay and incurs cost, the Engineer shall, after consultation with the Employer and the Contractor, determine the amount of such cost and the same shall be added to the contract price and in the said finding, the contention raised by the petitioner, by referring to Clauses 70.1 and 70.3 was impliedly rejected by the Arbitral Tribunal.

55. This Court has also perused the annexures along with the award of the Arbitral Tribunal and finds that Annexure-4 is a statement showing financial implication pertaining to new rates for five key items for the work carried out beyond original contract period. Annexure-4 is a tabular statement containing the value of the work executed beyond the original contract period at new rate and after setting out the defects, scientific method has been adopted as per established guidelines and the correct financial implication has been quantified as Rs.100,723,370/-. Annexure-4 is only a summary of month-wise details and page Nos.128 to 166 of the award are statements where a detailed calculation has been given, which has been summarized as Annexure-4 at Page No.127.

56. Thus, the Arbitral Tribunal, by considering the materials on record and after giving due weightage to all the terms of the contract, passed an award and it would be highly unfair, either to term the award as perverse or

if such a contention is put forth by the petitioner. Therefore, the petitioner has not made out any case to interfere with the impugned award.

57. Accordingly, the original petition fails and the same is dismissed.

08.2.2017

Index : Yes
Internet : Yes

RS/NV

T.S.SIVAGNANAM,J

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