

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.10.2017

DATED: 11.10.2017

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THE HONOURABLE MR. **JUSTICE M.M.SUNDRESH**

O.P.No.670 of 2016

Shree Pachamuthu & Co.,
Rep. by its Managing Partner
P.Murugesan,
New No.3/248, Old No.2/183,
K.Vadugapatty P.O.,
Konganapuram (Via),
Salem-637 102.

..Petitioner

Vs.

1.The Union of India,
Rep. by its General Manager,
Southern Railway, Head Quarters Office,
Park Town, Chennai-600 003.

2.The Divisional Railway Manager (Works),
Palghat Division, Southern Railways,
Palghat, Kerala.

.. Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Arbitration Award dated 30.07.2016 in so far as the Claim Nos.1 and 5 to 7 are concerned.

For Petitioner : Mr.S.Doraisamy

For Respondents : Mr.P.T.Ramkumar

ORDER

The respondents invited tender for the work of transportation of Permanent Way(P-Way) materials from various engineering stores to Aden/Shoranur Sub Division. The petitioner's offer was accepted and accordingly, the work was awarded by the proceedings dated 30.07.2016. An agreement was accordingly entered into between the parties for the value of Rs.88,50,000/-

2. Disputes have arisen with respect to the payment to be made. Accordingly, the petitioner has invoked the arbitration clause in the agreement. The Arbitral Tribunal allowed the claim in part while rejecting the claims 1 and 5 to 7.

3. Claim No.1 is with respect to the additional payment, by reading serial No.1 sub clauses (i) and (ii) together in schedule B of the agreement, which are as under:

“(i) Lead upto 50 km.,	1400	per MT	Rs.1500/- Rupees one thousand five hundred only
(ii)Lead beyond 50km & upto 800km	1080000 tonne km		Rs.6.25/- Rupees six and twenty five paise only”

The other claims rejected are with regard to the damages, interest and cost in conducting the Arbitral proceedings with respect to the petitioner.

4. The learned counsel appearing for the petitioner would submit that sub clauses (i) and (ii) of the serial No.1 of Schedule B of Annexure-III are to be read together. While there is no difficulty with respect to payment of Rs.1500/- per metric tonne for Lead upto 50 kms, the said amount will have to be added upto Lead beyond 50 kms for Rs.6.25/- per tonne km. As an award has already been granted, though partially, in favour of the petitioner, the cost and interest component along with damages also will have to be paid.

5. The learned counsel appearing for the respondents would submit that the petitioner has not made any such claim for three years. Therefore, it is not open to it to contend to the contrary. The payment upto 50 kms forms a separate category and 50 kms and above belong to another. Therefore, they cannot be read in unison. Higher amount is fixed for the first category in order to facilitate the tenderer for a smaller extent. This practice is being followed uniformly. Therefore, it cannot be said that the petitioner is aggrieved over it. If the contention of the petitioner is accepted, it would cross way beyond the agreed amount of Rs.88,50,000/- which is

impermissible in law. As per the special conditions of the contract and clause contained in GCC, there is no question of payment of damages, interest and cost. In support of his contention, the learned counsel has made reliance upon the following decisions.

- 1.OIL AND NATURAL GAS CORPORATION VS. WIG BROTHERS BUILDERS AND ENGINEERS PRIVATE LIMITED ((2010) 13 Supreme Court Cases 377); and**
- 2.SREE KAMATCHI AMMAN CONSTRUCTIONS V. DIVISIONAL RAILWAY MANAGER (WORKS), PALGHAT AND OTHERS ((2010) 8 Supreme Court Cases 767).**

6. Insofar as the claim No.1 is concerned, as rightly submitted by the learned counsel for the respondents, the petitioner has made the belated claim only on 17.10.2012, i.e., after a period of three years. While raising the earlier bills, no such claim was made. Schedule 1 sub clauses (i) and (ii) operate on different situations. Therefore, the payment is with respect to the extent. The Court is not supposed to interpret the clause in a different way other than the one mentioned in the agreement. Hence, for 50 kms and above, the amount fixed for the distance upto 50 kms cannot be added. Hence, while transporting the materials beyond 50 kms, the rate of 6.25 per tonne km is alone made applicable. The Arbitral Tribunal has

rightly took into consideration of a similar contract though involving a third party in this regard. A factual finding has been given to the effect that the schedule and conditions of other contracts being different, cannot be compared with each other. Therefore, inasmuch as a similar contract involved in a third party having the similar clause has been treated as that of the petitioner's case, even the interpretation sought to be made cannot be accepted. There is no explanation as to why the petitioner has not raised this issue earlier and while raising the bills.

7. Coming to the other issues, the terms of the contract only provide for extension of time and not for compensation or damages. Similarly, clause 64.5 speaks about non payment of interest. As per clause 64.6, the cost of arbitration shall be borne by the respective parties. The following clause as discussed above would be relevant.

“(iii) Extension of time for delay due to Railway:- In the event of any failure or delay by the Railway to hand over the Contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause due whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter

the character thereof or entitle the Contractor to damages or compensation there for but in any case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable.”

“64.5. Where the Arbitrary award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.

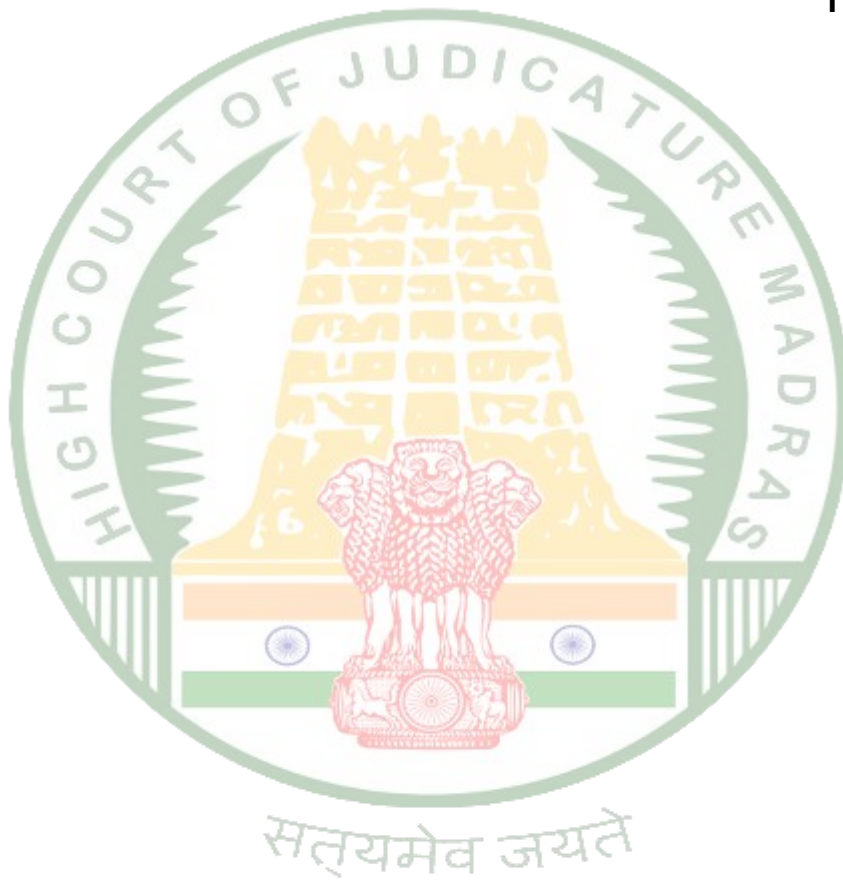
64.6. The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator(s) as per the rates fixed by the Railway Administration from time to time.”

8. Considering the very same issue, it has been held by the Apex Court in **OIL AND NATURAL GAS CORPORATION VS. WIG BROTHERS BUILDERS AND ENGINEERS PRIVATE LIMITED ((2010) 13 Supreme Court Cases 377)** that when the terms of the contract provided only for extension of time in the case of delay attributable to an employer then, there is no question of entitlement to any compensation or damages. Similarly, in **SREE KAMATCHI AMMAN CONSTRUCTIONS V. DIVISIONAL RAILWAY MANAGER (WORKS), PALGHAT AND OTHERS ((2010) 8 Supreme Court Cases 767)**, it was held that when a clause provides for non payment of interest, an Arbitral Tribunal shall not award it.

9. Thus, this Court does not find any error warranting interference under Section 34 of the Arbitration and Conciliation Act, 1996. Accordingly, the original petition stands dismissed.

11.10.2017

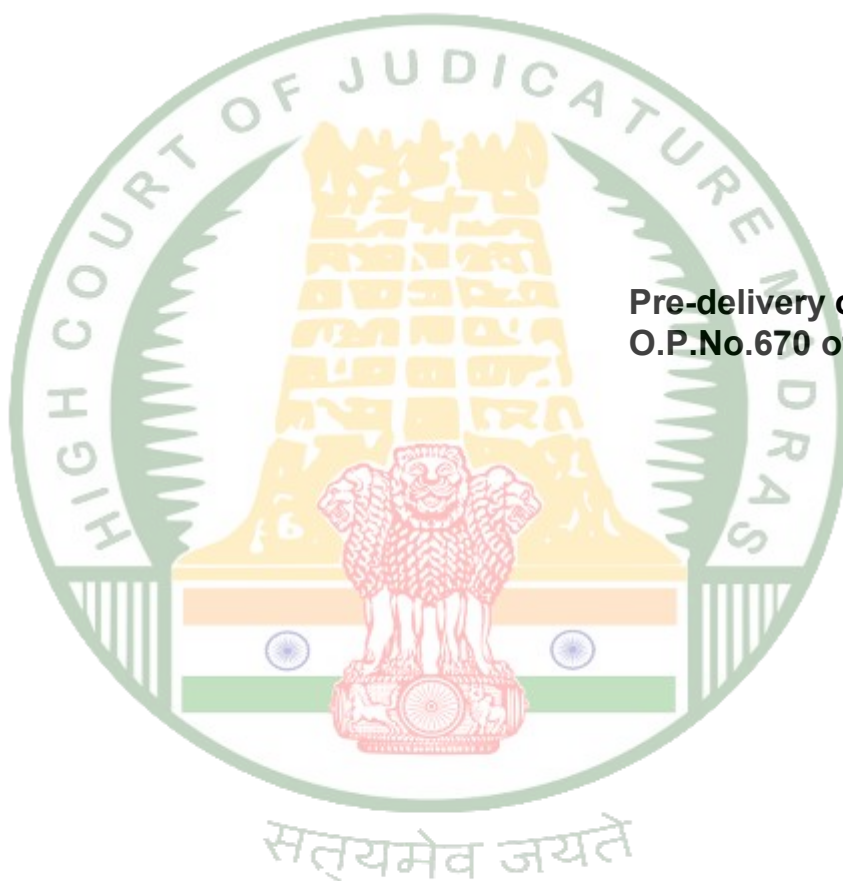
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M.M.SUNDRESH,J.

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**Pre-delivery order in
O.P.No.670 of 2016**

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