

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

Original Petition Nos.485 and 44 of 2009

Original Petition No.485 of 2009:

M/s Engineering Projects (I) Ltd,
Rep. By Mr.M.V.Saxena, General Manager,
3D-EC Chambers, 92, GN Chetty Road,
T.Nagar,
Chennai - 600 017.

... Petitioner

Vs.

1. The General Manager,
Southern Railways,
Head Office,
Chennai - 600 003.
2. The Chief Engineer,
Metropolitan Transport Project,
(Railways) Poonamallee High Road,
Egmore,
Chennai - 600 008.

... Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 12.04.2008 passed by the Learned Arbitrator in relation to disputes arising out of Agreement No.MTP/CIVIL/370 - 2000.

For Petitioner : Mr.C.Ramesh

For Respondents : Mr.M.T.Arunan

* * * * *

O.P.No.44 of 2009:

1. The General Manager,
Southern Railway,
Head Office, Chennai - 600 003.
2. The Chief Engineer,
Metropolitan Transport Project,
(Railways) Poonamallee High Road,
Egmore, Chennai - 600 008.

... Petitioners

vs.

1. M/s. Engineering Projects (I) Ltd.,
Represented by Mr.M.N.Thakur, Manager Technical,
No.3, D - E C Chambers,
92, G.N. Chetty Road,
T.Nagar, Chennai - 600 020.
2. Hon'ble Mr.Justice K.Venkataswami (Retd.),
No.75 (Old No.36), First Avenue,
Indira Nagar, Chennai - 600 020.

..Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 12.04.2008 in relation to disputes arising out of Agreement No.MTP/CIVIL/370 - 2000.

For Petitioner : Mr.M.T.Arunan

For 1st Respondent : Mr.C.Ramesh

COMMON ORDER

These Petitions are filed challenging the Arbitral Award dated 12.04.2008 in relation to disputes arising out of Agreement No.MTP/CIVIL/370 - 2000.

2. As the issue involved in both these cases is one and the same, the Original Petitions are taken up for disposal by a common order.

3. For the sake of convenience, the parties herein are referred to by their names.

4. The claimant in the case on hand is M/s.Engineering Projects (I) Ltd. (hereinafter referred to as 'the Company'). The Company was awarded the work of construction of MRTS - phase II, Tirumailai - Velacheri - pile foundation and construction of station building works, General RCC works in columns, beams, slabs of station Building at Indira Nagar by the Southern Railways under contract No.MTP/CIVIL/370-2000 vide Agreement dated 14.09.2000 for a contract value of Rs.5,66,34,800/-.

5. As disputes arose between the Company and the Southern Railways, the Company approached the General Manager, Southern Railways so as to set up a Arbitral Tribunal to arbitrate the claims raised by them. Pursuant thereto, the claim of the Company was raised before the Arbitral Tribunal and after hearing both the parties, the learned Arbitrator allowed four claims raised by the Company and rejected rest of the claims.

6. Details of the Claims of the Company accepted by the Arbitral Tribunal, are as follows:

Claim No.	Description of claims	Amount awarded (Rs.)
6	Payment for temporary cofferdam arrangements for casting pile cap in canal portion, (c), (c & d) rows Annexure IV 'A'.	69,50,023/-
8	Interest at 24% per annum wherever applicable.	18% interest from the date of award ie. 12-04-2008 till date of payment ie.20-06-2008.
10	Refund of Security Deposit comprising of i) BG No.69/2000 dt. 16-08-2000 for Rs.3 lakhs ii)Cash deducted from bills Rs.24,84,927/-	27,84,927/- *after deducting Railways dues of Rs.46,814/- from the total SD of Rs.28,31,741/-
14	Cost of arbitration	1,41,000/-

7. Aggrieved by the rejection of the claims made, the Claimant/Company has approached this Court by filing Original Petition No.485 of 2009 and challenging the Arbitral Award as regards the grant of claims to the Claimant/Company, the Southern Railways has come forward with Original Petition No.44 of 2009.

8. During the pendency of the Arbitration proceedings, a sum of Rs.69,50,023/- (Rupees Sixty Nine Lakhs Fifty Thousand and Twenty Three only) was paid to the Claimant/Company by the Southern Railways towards payment of temporary cofferdam arrangements for fasting pile cap in canal portion, (c), (c & d) rows as found in Annexure IV 'A'.

9. The issue that has to be gone into in O.P.No.44 of 2009 filed by the Southern Railways is with regard to grant of interest during the pendency of the Arbitration proceedings.

10. Learned counsel appearing for the Claimant/Company, relying upon a decision of the Supreme Court in the case of **Reliance Cellulose Products Ltd. vs. ONGC Ltd.** reported in (2018) 9 SCC 266, submitted that an Arbitrator has power to grant pre-reference interest under the Interest Act, 1978 as well as pendente lite and future interest. For better appreciation of the case, relevant portion of the said decision is extracted hereunder:

"24. A conspectus of the decisions that have been referred to above would show that under the 1940 Act, an arbitrator has power to grant pre-reference interest under the Interest Act, 1978 as well as pendente lite and future interest. However, he is constricted only by the fact that an agreement

between the parties may contain an express bar to the award of pre-reference and/or pendente lite interest. Since interest is compensatory in nature and is parasitic upon a principal sum not having been paid in time, this Court has frowned upon clauses that bar the payment of interest. It has therefore evolved the test of strict construction of such clauses, and has gone on to state that unless there is a clear and express bar to the payment of interest that can be awarded by an arbitrator, clauses which do not refer to claims before the arbitrators or disputes between parties and clearly bar payment of interest, cannot stand in the way of an arbitrator awarding pre-reference or pendente lite interest. Thus, when one contrasts a clause such as the clause in *Second Ambica Construction case* [*Ambica Construction v. Union of India*, (2017) 14 SCC 323 : (2018) 1 SCC (Civ) 257] with the clause in *Tehri Hydro Development Corpn. Ltd.* [*Tehri Hydro Development Corpn. Ltd. v. Jai Prakash Associates Ltd.*, (2012) 12 SCC 10 : (2013) 2 SCC (Civ) 122] , it becomes clear that unless a contractor agrees that no claim for interest will either be entertained or payable by the other party owing to dispute, difference, or misunderstandings between the parties or in respect of delay on the part of the engineer or in any other respect whatsoever, leading the Court to find an express bar against payment of interest, a clause which merely states that no interest will be payable upon amounts payable to the contractor under the contract would not be sufficient to bar an arbitrator from awarding pendente lite interest under the 1940 Act. As has been held in *First Ambica Construction case* [*Union of India v. Ambica Construction*, (2016) 6 SCC 36 : (2016) 3 SCC (Civ) 36] , the grant of pendente lite interest depends upon the phraseology used in the agreement, clauses

conferring power relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on what items the power to award interest has been taken away and for which period. We hasten to add that the position as has been explained in some of the judgments above under Section 31(7) of the 1996 Act, is wholly different, inasmuch as Section 31(7) of the 1996 Act sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered."

11. A reading of the above decision would clearly show that the same is not applicable to the facts of this case. The case referred to above arose prior to the enactment of the Arbitration and Conciliation Act, 1996. In the case on hand, the entire claim is based on the Arbitration Act, 1940. The Apex Court, in the said case, has held that unless there is a clear and express bar to the payment of interest that can be awarded by an Arbitrator, clauses which do not refer to claims before the Arbitrators or disputes between parties, cannot stay in the way of an Arbitrator awarding pre-reference interest. The Apex Court has further held in paragraph 24 of the said decision that inasmuch as Section 31(7) of the 1996 Act sanctifies Agreements between the parties and states that the moment the Agreement says otherwise, no interest becomes payable right from the date of the cause of action until the Award is delivered.

12. Hence, I am of the view that the relief sought by the Claimant/Company, insofar as grant of interest is concerned, is bad in law.

13. The other issue to be decided is with regard to loss of profit arising out of misrepresentation by the Claimant/Company about the depth of pile and also the expenses incurred for earth work in cutting and filling.

14. The parties have entered into an Agreement on 04.05.2000 and 12 months' time was fixed for the completion of work. But, the work was factually completed only on 29.04.2002 after getting 5 extensions. Though, it is the contention of the Claimant/Company that at the completion of work, the depth of 1 m dia varied between 4.8 metres to 9.9 metres and in respect of .75 m dia, the average depth was between 3.4 and 9.18 metres, the Agreement entered into between the parties would make it very clear that the normal depth of pile would be between 10 to 15 meters and in the case on hand, the exact depth of pile could not be ascertained.

15. That being the case, the contention of the Claimant/Company that there is suppression by the Railways and that they have to compensate for the loss, cannot be accepted. Though the Claimant/Company has carried out

the work in the extended period, as per clauses 17(2) and 17(3) of the General Conditions of Contract, the extension of period shall not entitle the Claimant/Company from getting more benefits than what is mentioned in the Agreement. The contention of the Claimant/Company that clauses 17(2) and 17(3) are independent of each other, cannot be accepted, as, admittedly, the work has been delayed and the Agreement has been extended periodically.

16. For the sake of convenience clauses 17(2) and 17(3) of the General Conditions of Contract, are extracted as under:

“CL.17(2) of G.C.C: If in the opinion of the Engineers, the progress of work at any time been delayed by any act or neglect of the Railway employees or by any other contractor employed by the Railways 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 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 Railways 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 works may be extended for such reasonable time as the Engineer on behalf of the Railways, may decide.

Cl.17(3) of G.C.C: In the event of any failure or delay by the Railways to hand over to the Contractor possession of the lands necessary for the execution of the work 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 Railways due to any other cause 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 damage or compensation thereof (emphasis supplied) but in any such case, the Railways may grant such extension/extensions of completion date as may be considered reasonable.”

17. Clauses 17(2) and 17(3) of the General Conditions of Contract, whether read in isolation or together, would not entitle the Claimant/Company to claim interest on damages. In terms of clause 16(2) and 64(5), interest cannot be granted contrary to the clauses in the General Conditions of Contract. The Arbitrator has proceeded on the basis that for the work continued beyond the time prescribed, the Claimant/Company would be entitled to get the difference in the rate of interest, as he has invested the money. Since, it would run counter to the clauses of the General Conditions of

Contract, I am of the view that the Arbitrator ought not to have granted rate of interest to the Claimant/Company.

18. Hence, in view of the above, the Original Petition No.44 of 2009 filed by the Southern Railways is allowed and Original Petition No.485 of 2009 filed by the Claimant/Company is dismissed. No costs.

18.12.2018

Index : Yes
Speaking Order : Yes
(tsg/aeb)



WEB COPY

S.VAIDYANATHAN,J.

(tsg/aeb)



Common Order in

O.P.Nos.485 and 44 of 2009

WEB COPY

18.12.2018