IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.12.2018

CORAM:

THE HONOURABLE MR. **JUSTICE S.VAIDYANATHAN**

Original Petition Nos.549 and 550 of 2013

D.Karthikeya ... Petitioner in both O.Ps.

vs.

1. The Union of India,
represented by the
Chief Engineer/Construction,
Central Construction Office,
Southern Railway,
Egmore, Chennai 600 003.

2. The Deputy Chief Engineer/Construction,
Southern Railway, Trichirapalli.

3. Manjula Rangarajan
Financial Advisor and Chief Accounts Officer,
Southern Railway, 7th Floor, MMC,
Chennai 600 003.
(Presiding Arbitrator)

4. Prafulla Varma,
Chief Engineer/Track Procurement,
Headquarters Office,
Southern Railway,
Park Town, Chennai 600 003.
(Arbitrator)

5. S.P.Vavre
Chief Electrical Locomotive Engineer,
Headquarters Office, Southern Railway,
Park Town, Chennai 600 003,
(Arbitrator) ... Respondents in both O.Ps.

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Petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 28.03.2013 passed by the Sole Arbitrator with reference to the dispute arising out of the Agreement No.285/CN/2004, dated 10.07.2004 and Agreement No.319/CN/2004, dated 26.07.2004, respectively.

For Petitioner in both O.Ps. : Mr.S.Raghavan

For Respondents 1 & 2 in both O.Ps. : Mr.P.T.Ramkumar

COMMON ORDER

Seeking to set aside the Arbitral Award dated 28.03.2013, the petitioner is before this Court by way of the above two Original Petitions. Since the issue in both the cases is one and the same, the Original Petitions are taken up for disposal by a common order.

2. It is seen that the Petitioner herein was awarded two works by the Respondents/Southern Railways vide two different Agreements. As per the Letter of Acceptance dated 31.03.2004 issued by the Southern Railways, the Petitioner was engaged for the construction of the proposed Earth works, minor bridges and protective works from km 97 to km 120 between Pukaravari and Thalaivasal Stations as part of Cuddalore-Vridhachalam-Salem Gauge conversion works, within a period of 7 months and the value of the work is Rs.2,13,58,034/-. The original currency of the Agreement expired on 30.10.2004 and it was extended from time to time upto 31.07.2007, under clause 17(A)(ii) of the General Conditions of Contract.

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3. Likewise, as per the Letter of Acceptance dated 07.04.2004 issued by the Southern Railways, the Petitioner was engaged for the construction of the proposed Earth works, minor bridges and protective works from km 120 to km 142 between Thalaivasal and Attur Stations as part of Cuddalore-Vridhachalam-Salem Gauge conversion works, within a period of 7 months and the value of the work is Rs.2,34,65,726/-. The original currency of the Agreement expired on 06.11.2004 and it was extended from time to time upto 30.04.2006.

4. Subsequently, the Southern Railways reduced the scope of the work drastically and closed the Agreement. The request for foreclosure was made by the Petitioner herein vide letter dated 01.12.2005. Thereafter, the Petitioner approached the General Manager of Southern Railways for the appointment of Arbitrators to decide the disputes raised by him. The Arbitral Tribunal, by Award dated 28.03.2013, allowed partially only one claim towards Establishment and Overhead charges amounting to Rs.99,000/- and granted interest thereon at 10% per annum on Rs.99,000/- from the date of the Award.

5. Learned counsel for the Petitioner submitted that the Petitioner executed the work as per the tender conditions and that the work could not be

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completed within the time stipulated due to heavy rains and various other reasons. It is his contention that while considering the claim for loss of profits, the Arbitrator failed to consider the fact that extension of time to complete the work was granted only as per the provisions under clause 17(A)(ii) of the General Conditions of Contract. In support of his stand, he relied on an Apex Court decision in the case of **Dwaraka Das vs. State of Madhya Pradesh, AIR 1999 SC 1031,** wherein, it is held that 'claim of expected profits is legally admissible on proof of the breach of contract'. Relevant portion of the said decision is extracted hereunder:

> "9. The claim of the petitioner for payment of Rs.20,000 as damages on account of breach of contract committed by the respondent-State was disallowed by the High Court as the appellant was found to have not placed the material on record to show that he had actually suffered any loss on account of the breach of contract. In this regard, the appellate court observed:
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> > "It is not his case that for due compliance of the contract he had advanced money to the labourers or that he had purchased materials or that he had incurred any obligations and on account of breach of contract by the defendants he had to suffer loss on the above and other heads. Even in regard to the percentage of profit he did not place any material on record but relied upon assessment of the profits by the Income Tax Officer while assessing the income of the contractors from building contracts."
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> Such a finding of the appellate court appears to be based on wrong assumptions. The appellant had never claimed Rs 20,000 on account of alleged actual loss suffered by him. He had preferred his claim on the ground that had he carried out the contract, he would have earned profit of 10% on Rs 2 lakhs which was the value of

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> the contract. This Court in *A.T. Brij Paul Singh* v. *State of Gujarat* [(1984) 4 SCC 59] while interpreting the provisions of Section 73 of the Contract Act, 1872 has held that damages can be claimed by a contractor where the Government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, the court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was observed: (SCC pp. 64-65, paras 10-11)
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> > "What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit."

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6. It is further submitted by the learned counsel for the Petitioner that the Petitioner is entitled to enhancement of rates vide Claim Nos.4, 5 and 6 of the Arbitration Award and that the Petitioner is not pressing the relief with regard to the other items that has gone against him in the Arbitration Award. According to the learned counsel, when the work has been entrusted

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to the Petitioner and time has been extended periodically to complete the work, the Petitioner ought to have been granted the relief of enhancement of rates by 25% and the Arbitrator ought not to have rejected his claim. To strenghthen his arguments, learned counsel further relied on yet another Apex Court decision in the case of **K.N.Sathyapalan vs. State of Kerala, reported in (2007) 13 SCC 43,** wherein, it is held as under:

> "**32.** Ordinarily, the parties would be bound by the terms agreed upon in the contract, but 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 costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and *Alopi Parshad case* [(1960) 2 SCR 793 : AIR 1960 SC 588] and also *Patel Engg. case*[(2004) 10 SCC 566] . As was pointed out by Mr Dave, the said principle was recognised by this Court in *P.M. Paul* [1989 Supp (1) SCC 368] where a reference was made to a retired Judge of this Court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this Court in *T.P. George case* [(2001) 2 SCC 758]."

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7. In reply, learned Standing Counsel appearing for the Respondents/Railways contended that the claim of the Petitioner with regard to Loss of Profit and with regard to enhancement of rates vide Claims Nos.4, 5 and 6 may not be acceptable and stated that the Arbitrator has rightly

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awarded the claim in terms of the General Conditions of Contract.

8. Learned Standing Counsel for the Railways submitted that the Letter of Acceptance given by the Petitioner on 31.03.2004 and 07.04.2004 with regard to the two contracts, require him to complete the work in seven months from the date of Letter of Acceptance. As the progress of the work was very poor and expenditure booked was nil, it was informed to the Petitioner that a mega block was proposed to be sanctioned from 01.04.2005 to execute the insertion of precast RCC boxes under line block. But, the Petitioner was not ready to execute the work. Learned counsel further submitted that the Petitioner had not made any earnest efforts to execute the earthwork simultaneously and concentrated only on casting of the precast boxes. As the work could not be completed, time was extended from time to time, in terms of clause 17(A)(ii) of the General Conditions of Contract.

9. It is further stated by the learned Standing Counsel that as there was no physical progress of work from 25.07.2007 to 31.05.2012, the Petitioner requested the Administration to foreclose the Agreement dated 01.12.2005 without any liability. Based on the request, the Agreement was finalized with 80.50% savings of the overall Agreement value and the final bill was paid on 31.05.2010 apart from refund of security deposit to the Petitioner.

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10. Learned counsel for the Railways drew the attention of this Court to the Arbitral Award, wherein, the learned Arbitrators while dealing with claim No.1 pertaining to 'Loss of Profits', has held that as the work dragged on for more than three and a quarter years, the Petitioner was unable to obtain other contracts and work to the tune of Rs.1,71,94,323/- was not executed and represents the unused portion of the contract.

11. According to the learned Standing Counsel for the Railways, the contract amount was Rs.2 crores and odd and the Petitioner completed work only to the extent of 8.23% of the contract, which works out to approximately Rs.20 lakhs. He went on to contend that having executed 8.23% of the contract, the Petitioner is seeking more than 100% of the contract amount to the tune of Rs.2 crores and 10 Lakhs, when he had actually agreed to work as per the terms of the Contract, without seeking for enhancement of rates.

12. It is further contended by the learned Standing Counsel for the Railways that in terms of clause 42.1 of the General Conditions of Contract, the Petitioner may not be entitled to any compensation for reduction in the quantum of work done by him and the claim for compensation towards loss of profit is not at all justified. The Arbitrator came to the conclusion that clear deskbound estimation was done in the present case and quantities were not projected accurately based on a proper survey and had it been properly

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assessed, the Petitioner would not have been led to believe that a large work would be at hand. Hence, the Arbitrator came to the conclusion that tender could have been called prematurely as stated by the Petitioner and quantities were inaccurately assessed.

13. As the finding of the Arbitrator in respect of Idle Labour and Idling of Machinery and Equipment, is a fact finding one, learned Standing Counsel for the Southern Railways submitted that the same need not be interfered with. As far as the Petitioner's claim for enhancement of rates is concerned, learned counsel submitted that the same is not at all justified, more particularly, in the light of the General Conditions of Contract.

14. Heard the learned counsel on either side and perused the material documents available on record.

15. It is not in dispute that the Petitioner was awarded two different Contracts to be completed within seven months from the date of Letter of Acceptance and the value of the same is more than Rs.2 crores, each. Under the guise of enhancement of rates, the Petitioner cannot try to get entire 100% of the contract amount, when, as per the Arbitral Award, the Petitioner has completed only 8.23% value of the contract work. Further, in terms of clause 17(A)(ii) of the General Conditions of Contract, extension of time can be

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granted, but, the same rates, terms and conditions of the Contract would be applicable during the extended period.

16. It is no doubt true that the contract was extended from 2004 to 2007 and there could have been escalation of costs. The Petitioner would have been justified in demanding the same after execution of the Contract work. But, he cannot try to enrich himself without doing any work. As per the Indian Railways Standard Conditions of Contract, more particularly, in the light of clause 61(3), the Contractor shall have no claim to any payment of compensation or otherwise, howsoever on account of any profit or advantage which he might have derived from the execution of the work in full but which he did not derive in consequence of determination of contract.

17. In this case, the Petitioner, as stated supra, has not executed the contract work in toto and he has rendered only 8.23% value of the agreed work. The decision cited by the learned counsel for the Petitioner in the case of **K.N.Sathyapalan** *(cited supra)* may not be applicable to the facts and circumstances of the case on hand. As in the case referred to therein, there is failure on the part of the party in completing the contract. But, in the case on hand, the Petitioner has not completed the work even during the extended period of time.

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18. With eyes wide open, when two contracts have been entered into by the Petitioner with the Respondent/Southern Railways, a different interpretation cannot be given, by-passing the said clauses in the contract. Even assuming for the sake of argument that a different interpretation of the contract can be given, there is no justification on the part of the Petitioner in demanding escalation of costs and also demanding profit, when he has not carried out the contract work in entirety. Thus, in view of this Court, the Arbitral Award is a finding of fact and there is no reason to interfere with the same.

Accordingly, these Original Petitions are dismissed. No costs.

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Index : Yes/No

Speaking order : Yes/No

Note to Registry:

Issue copy of this order on or before 27.02.2019.

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S.VAIDYANATHAN,J.

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Common order
in
O.P.Nos.549 and 550 of 2013

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