

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.09.2018

CORAM

THE HONOURABLE Mr.JUSTICE M.SATHYANARAYANAN
and
THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

O.S.A.No.279 of 2018
and CMP.No.12804 of 2018

- 1.The Union of India
Rep by the General Manager
Southern Railway, Chennai.
- 2.The Chief Engineer/Construction
Office of the Chief Administrative
Officer (Contracts)
Southern Railway, Egmore,
Chennai - 600 008. ... Appellants/Petitioner

Vs.

- 1.M/s.Appachi Gounder and Sons
Rep. by Partner cum Power of Attorney Holder
Mr.A.Swaminathan
S/o.Shri.K.Appachi Gounder Vavikadi
K.S.Palayam, Perundurai Taluk
Erode District.
- 2.Hon'ble Mr.Justice S.S.Subramani (Retd.,)
E-104-112, 23rd Cross Street
Besant Nagar, Chennai - 600 090.
... Respondents/Respondents

Prayer : Original Side Appeal filed under Order 36 Rule 1 of Original Side Rules r/w. Clause 15 of Letters Patent, to set aside the order dated 17.03.2017 made in O.P.No.77 of 2011 on the file of High Court of Madras. Original Petition filed to set aside the award of 2nd respondent dated 16.1.2010 made in relation to disputes arising out of Agreement No.73/CN/2001.

For Appellants : Mr.R.Thiagarajan, Senior Counsel
Assisted by Mr.P.T.Ramkumar &
Mr.K.Muthamil Raja

For Respondents : Mr.Amalaraj S.Penkilapatti
Assisted by Mr.J.Chandrasekaran &
Ms.Maria Sathya

JUDGEMENT

[Order of the Court was made by M.SATHYANARAYANAN, J.]

By consent, this Original Side Appeal is taken up for final disposal.

2. The appellants herein are the respondents in the impugned order dated 16.01.2010 made in O.P.No.90 of 2007 and the first respondent is the claimant in the said Original Petition.

3. For the sake of convenience, the array of parties referred to in O.P.No.90 of 2007 is adopted in this appeal.

4. The first respondent/claimant has filed the said Original Petition stating among other things that he and the appellants/respondents have entered into a contract regarding gauge conversion from Quilon-Tenkasi-Tirunelveli-Tirchendur and Tenkasi-Virudhunagar, Virudhunagar-Tenkasi proposed strengthening /Extension/Reconstruction of Minor Bridge No.132, 135, 137, 138, 140, 142, 145, 146, 148, 149, 158, 159, 159(a), 160, 162, 163, 164, 171, 172, 182, 185, 188 and 193 to Broad Gauge between Rajapalayam and Sankarankoil stations, in all 23 bridges.

5. The first respondent was awarded the contract as per Letter of Acceptance dated 10.10.2000 and a formal agreement was also executed on 07.03.2001 and as per the said agreement, the contract has to be completed within six months from the date of acceptance. The work is to commence on 10.10.2000 and has to complete on or before 09.4.2001, and the total value of the contract is Rs.1,38,23,688/-. The contract awarded to the claimant was a part of the larger project and 23 bridges are to be located in a distance of 32 km., (i.e., between Km 590/00 and Km 622/00), and annexures "A to D" of the contract would describe the various items of work to be done.

6.1. It is the specific case of the claimant/first respondent that he has spent huge amounts and marshalled all the requisite resources for the immediate commencement and successful completion of the contract within six months time and despite that, the work could not be proceeded, as the appellants/respondents did not discharge their obligations in time, and in fact they delayed to provide the RCC details till February, 2001, without which, even the preliminary work could not be started. In view of the delay, atleast four months period got elapsed.

6.2. It is also alleged by the first respondent/claimant that before proceeding with the work, prior sanction from the Commissioner of Railway Safety has to be obtained, and such sanction was required for fifteen bridges out of twenty three bridges and the mandatory procedure of said sanction is provided in the Indian Railways Permanent Manual clauses 1301 to 1305 in

Chapter XIII. In spite of such mandatory requirement, the appellants/respondents failed to apply and obtain sanction, and as a consequence, the claimant was made to wait endlessly until the imposition of the Mega Block and complete stoppage of all train traffic with the imposition of line block and power block on 15.09.2003, which resulted in a delay of 30 months and therefore, the work could not be completed in time. Therefore, the claimant had lodged 14 claims and made a total claim for Rs.1,62,72,759/-.

7. The appellant-Railways/respondents objected to the said claim, contending among other things, the claimant is not entitled to any amount as per the terms of the agreement and also in view of the formal agreement and they also placed reliance on Clause No.40 and 32 of the General Contract.

8. Objections have been raised by the respondents in respect of claims 1 to 12 and they did not have any specific objection as to claim No.13, which speaks about the damages to unlawful retention and non-payment of claims 1 to 12 (pendente lite interest from April 2004 till the date of Award) and for post award period at the rate of 24% per annum.

9. The learned Arbitrator has framed 19 issues and Issue No.17 pertains to entitlement of interest, as claimed by the claimant. During the course of arbitral proceedings, on behalf of the claimants, 134 documents were marked as Exts.C1 to Ext.C134, and on behalf of the claimant, one Swaminathan was examined. On behalf of the respondents, Exts.R1 to Ext.R29 was marked and no oral evidence was let in. The learned Arbitrator, upon perusing/considering the claimant's statement, defence statement, oral and documentary evidences, held that the claimant is not entitled to any amount under issues 10, 11 and 14 and however in respect of rest of the claims, he is entitled to certain amount and therefore, passed an award dated 16.01.2010, determining the amount that the appellants/respondents are liable to pay.

10. The respondents/Railways, aggrieved by the award dated 16.01.2010, filed Original Petition No.77 of 2011 before this Court, under Section 34(ii)(b) of the Arbitration and Conciliation Act, 1996 (in short "Arbitration Act 1996"), praying to set aside the said arbitral award passed by the Arbitrator Tribunal.

11. One of the grounds raised by the Railways in the said Original Petition (O.P.No.77 of 2011), - Ground No.5, they have raised a point that as per Clause 64.5 of the General Conditions of Contract, no interest shall be paid for any period till the date of the award and therefore, the award of interest under Claim No.13 by the Arbitrator is wholly unsustainable. However, it appears that the said ground has not been urged at the time of advancing arguments before the learned Single Judge.

12. The learned Single Judge, after going through the entire materials as well as the various decisions relied on by the respective counsels appearing for the parties, found that the impugned award is a reasoned award and that came to be rendered after considering the oral and documentary evidence and that the parties had full opportunity to put forward their respective contentions and further recorded that the Arbitral Tribunal has followed the principles under Section 73 of the Indian Contract Act, 1872 for awarding compensation and also given cogent reasons while passing the award in favour of the claimant/contractor and further held that the award of interest at the rate of 12% is just and reasonable. The learned Judge, citing the said reasons, dismissed the Original Petition, vide impugned order dated 17.03.2017. Challenging the legality of the said order, the present appeal is filed.

13. Mr.R.Thiagarajan, learned Senior Counsel assisted by Mr.P.T.Ramkumar and Mr.K.Muthamil Raja, learned counsel appearing for the appellants has invited the attention of this Court to Clause No.64.5 of the General Conditions of Contract of Civil Engineering Works of Southern Railways and as per the said clause "where the Arbitral 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". The learned Senior Counsel appearing for the appellants would submit that though several grounds have been raised in this appeal, the only question to be adjudicated in this appeal is to the award of pendente lite interest by the learned Arbitrator, in respect of Claim No.13 and further urged that in the light of the specific clause prohibiting the Arbitrator to award such interest, the impugned award passed by the Arbitrator in awarding the said interest, is liable to be set aside. The learned Senior Counsel appearing for the appellants, in support of his submissions, has placed reliance on the judgment rendered by the Hon'ble Supreme Court in Reliance Cellulose Products Ltd., Vs. Oil and Natural Gas Corporation reported in [2018 (9) SCALE 88].

14. Per contra, Mr.Amalaraj S.Penkilapatti, learned Counsel appearing for the first respondent would submit that the said point, though raised as a ground in the appeal, the same was not argued in the original petition and therefore, the learned Judge did not have an occasion to consider the said question and developing the said argument would submit that since it amounts to waiver, the said point cannot be adjudicated in this appeal and in support of his submission, he placed reliance on the judgment dated 18.12.2017 in Civil Appeal No.8530 of 2009, rendered by the Hon'ble Supreme Court in Union of India Vs. M/s.Susaka Pvt. Ltd., & Ors.

15. This Court paid it's best attention to the rival submissions and also on the materials placed before this Court.

16. It is relevant to extract the claims made by the first respondent/claimant in the Arbitral proceedings :

1	Payment of Final Bill as per Railway . Accounts along with Refund of Security Deposit and Earnest Money Deposit (by returning the original)	Rs.1,30,000/- plus refund of Security and Earnest Money
2	Payment of extra rates for the quantities of work that were operated in excess of the contract permitted variations in quantity.	Rs.20,00,000/-
3	Payment of extra rates for the quantities of work that were operated less than the contract permitted reduction (26%)	Rs.11,00,000/-
4	Payment of extra rates for the items of work that were executed in the extended period of the contract.	Rs.20,00,000/-
5	Damages for loss suffered by the claimant on account of initial idling/wastage of its establishments in infrastructure and overheads and their costs suffered in the extended period of contract	Rs.31,47,080/-
6	Damages for the loss of anticipated profits suffered by the claimant due to non-operation of variations of work @ 15% of the value of the unexecuted work.	Rs.2,95,679/-
7	Damages towards the cost of the idling and under utilization of labour suffered by the claimant.	Rs.17,00,000/-
8	Damages towards cost of idling and under utilization of the scaffoldings, shuttering and other materials suffered by the claimant.	Rs.7,00,000/-
9	Damages towards the cost of idling and under utilization of machinery, tools and plants suffered by the claimant.	Rs.35,00,000/-
10	Damage for the loss of turnover, professional opportunity and business due to the inordinate extension of contract is also disputed by the respondent. The respondent accuses the claimant for the long delay.	Rs.35,00,000/-

1	Payment of Final Bill as per Railway Accounts along with Refund of Security Deposit and Earnest Money Deposit (by returning the original)	Rs.1,30,000/- plus refund of Security and Earnest Money
1	Declaration that, the Railways is not entitled to Hire Charges for staying materials for the extended period of contract.	NIL
1 2	Declaration that, the Railways is not entitled to Hire Charges at the enhanced new hire rates for the staying materials	NIL
1 3	Damages towards unlawful retention and non payment of the above claims (pendilite interest from April 2004 till date of Award) and for post award period all at the rate of 24% p.a.	To be quantified during award.
1 4	Cost of securing appointment of Arbitration and for legal and technical counsel and fees of the arbitrator.	To be quantified during award.
	TOTAL CLAIM ;	Rs.1,62,72,759/-

17. In the defence statement, the appellants who were arrayed as respondents, had raised their objections in respect of Claims 1 to 12. It is pertinent to point out at this juncture that Claim No.13 pertains to damages towards unlawful retention and non payment of the above claims (pendente lite interest from April 2004 till date of Award) and for post award period at the rate of 24% p.a.). Therefore, even before the learned Arbitrator, the appellants, who are arrayed as respondents, did not object to the claim made by the claimant as to the pendente lite interest from April '2004 till the date of the award.

18. Be that as it may, though the ground was raised as to the award of the pendente lite interest by the Arbitrator, a perusal of the impugned order passed in O.P.No.77 of 2011, which is the subject matter of challenge in this appeal would indicate that no arguments have been advanced on the said claim. When this Court has put a specific question to the learned Senior Counsel appearing for the appellants, who, on instructions, would submit that such an argument with regard to the pendente lite interest by the Arbitrator has not been advanced.

19. A perusal of the judgment in Union of India Vs. Susaka
<https://hcservices.courts.gov.in/hcservices> Ors. cited supra, would indicate that the appellant

therein namely Union of India has referred to clause 13(3) of its General Conditions of Contract (GCC) with its first respondent, Susaka Pvt. Ltd., which provides that no interest will be payable on the Earnest Money or Security Deposit or the amounts payable to the contractor under the contract, except Government Securities and therefore, the first respondent therein was not entitled to claim interest on any articles. The Hon'ble Supreme Court of India in Susaka's case, in paragraph Nos.20 to 28 of the said judgment, has observed as follows:

" 20. It is not in dispute that the appellant did not raise the plea based on clause 13(3) of the GCC against respondent No.1 at any stage of the proceedings either in their reply filed before the Arbitral Tribunal or/and in submissions except raising it, for the first time, before this Court in this appeal.

21. On the other hand, we find that in Section 11 (5) proceedings, the appellant did not raise this objection in their reply and instead gave their express consent to refer the issue of award of interest payable on various claims (1 to 17) to Arbitral Tribunal considering the said claim to be arbitrable under the contract.

22. In our opinion, the appellant could have registered their objection before the Single Judge at the time of making a reference to the Arbitral Tribunal by pointing out Clause 13(3) of GCC or could have reserved their right to raise such objection before the Arbitral Tribunal. It was, however, not done.

23. Not only that, we further find that the appellant, in their reply, filed before the Arbitral Tribunal also did not raise this plea and allowed the Arbitral Tribunal to adjudicate the said issue on merits.

24. If the appellant was so keen to place reliance on clause 13(3) of GCC to defeat the claim of respondent No.1 relating to the award of interest on various claims, then it was necessary for the appellant to have raised such plea specifically, in their reply, before the Arbitral Tribunal. No such plea was raised even before the Arbitral Tribunal.

25. Though we find that the appellant raised this ground, for the first time, in Section 34 proceedings [see-ground (cc)] before the Single Judge but again this ground was not pressed at the time of arguments. It is clear from the perusal of

the Single Judge's order. Not only that, the appellant again did not raise this plea before the Division Bench.

26. In the light of aforementioned factual scenario emerging from the record of the case, we cannot grant any indulgence to the appellant (Union of India) to raise such plea for the first time here. In our view, it is a clear case of waiver or/and abandonment of a plea at the initial stage itself.

27. Everyone has a right to waive and to agree to waive the advantage of a law made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy. *Cuilibet licet renuntiare juri pro se introducto.* (See Maxwell on The Interpretation of Statutes 12th Edition at page 328).

28. If a plea is available whether on facts or law, it has to be raised by the party at appropriate stage in accordance with law. If not raised or/and given up with consent, the party would be precluded from raising such plea at a later stage of the proceedings on the principle of waiver. If permitted to raise, it causes prejudice to other party. In our opinion, this principle applies to this case."

20. In the considered opinion of the Court, the above cited decision is fully applicable to the facts of this case for the reason that Claim No.13 made by the first respondent/claimant pertains to award of *pendente lite* interest and however no defence has been raised in the said claim. The learned Arbitrator has framed the following 19 issues during trial and so far as issue No.17 is concerned, it pertains to the said claim of interest.

- i) Whether the contract work was completed in time and if not, who is responsible for the delay?
- ii) Whether the Railway Department discharged its primordial obligation of furnishing the RCC details and PSC drawings to the contractor in time? And what is the date as which the Railway department furnished the requisite details and PSC drawings to the claimant for the various bridges?
- iii) Whether the Railway obtained the mandatory sanction from the Commissioner of Railway safety for the commencement of the contract work in the running line for the 15 out of 23 bridges?

- iv) Whether the Railways discharged its duty of providing the mandatory "Speed-restriction" in time to the claimant? And when did the railways provide "speed restriction" for the execution of the contract work?
- v) Whether the claimant is entitled to the final bill as per Railway accounts, and return of the Security Deposit and Earnest Money Deposit?
- vi) Whether the claimant is entitled to claim damages for the idling and under utilization of labour? And, if so, what is the amount that the claimant is entitled for?
- vii) Whether the claimant is entitled to claim damages for the idling and under utilization of machinery, tools and plants, and if so, what is the amount that the claimant is entitled for?
- viii) Whether the claimant is entitled for damages for the idling/wastage of its establishment, infrastructure and overheads due to the extension of the contract? And, if so, what is the amount that the claimant is entitled for?
- ix) Whether the claimant is entitled to any compensation for the anticipated profits due to the non-operation of the various items of the contract work? And if so, what is the amount the claimant is entitled for?
- x) Whether the claimant is entitled for any extra rates for the quantities of work that were operated in excess of the contract permitted variation of quantities (i.e. + 25%), and if so, what is the amount that the claimant is entitled for?
- xi) Whether the claimant is entitled to extra rates for the quantities of work that were operated less than the contract permitted reduction of quantities (i.e., - 25%), and if so, what is the amount that the claimant is entitled for?
- xii) Whether the claimant is entitled extra rates for the work executed in the extended period of the contract? And if so, what is the amount that the claimant is entitled for?

- xiii) Whether the claimant is entitled for damages for the idling and under utilization of its scaffoldings, shuttering and other materials? And, if so, what is the amount that the claimant is entitled for?
- xiv) Whether the claimant is entitled for the damages for the loss of turnover, professional opportunity and business due to inordinate extension of the contract? And if so, what is the amount he claimant is entitled?
- xv) Whether the claimant is entitled for a declaration that the Railway Administration is entitled to levy hire charges for the staying materials for the extended period/during the contract?
- xvi) Whether the claimant is entitled for a declaration that the Railway Administration is not entitled to pay hire charges at the enhanced new hire rates for the materials?
- xvii) Whether the parties are entitled for interest as claimant?
- xviii) Whether the parties are entitled for any other reliefs, like costs etc., due to circumstances of the instant case?
- xix) Whether the respondent is entitled to administrative expenses of a lump-sum of Rs.1 Lakh as claimed by it?"

21.1 The learned Senior Counsel has placed heavy reliance upon the Reliance Cellulose case which lay down the proposition that 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 cause of action until the award is delivered. No doubt Clause 64.5 of the General Conditions of Contract stipulates that no interest shall be payable, where the Arbitral award is for the payment of money, on whole or in part of the money till the date on which the award was made. Unfortunately, despite the specific claim No.13 has been made by the first respondent/claimant, no defence has been raised to the said claim and the learned Arbitrator while dealing with the same in Issue No.17, has given the above said finding. Though award of pendente lite interest has been raised as a ground in O.P.No.77 of 2011, no arguments have been advanced on the said ground. In the light of the decision rendered in Susaka's case cited supra, it amounts to waiver and therefore, the appellants are precluded from raising the said plea as a ground in this appeal.

21.2 In the considered opinion of the Court, the learned Judge on an independent application of mind to the materials placed, has thoroughly considered and analysed the factual aspect and legal position of the case, and rightly concluded to dismiss O.P.No.77 of 2011 and this Court finds that there is no error apparent on the face of the record to interfere with the findings given by the learned Judge. It is also to be noted at this juncture that the purpose of the Arbitration Act is for a speedy disposal of the claim and interference and such an interference is very limited under Section 37(1)(c) of the said Act. This Court having found that there is no merit in this appeal, is of the considered view that this Original Side Appeal deserves dismissal and accordingly, it is dismissed. In the circumstances of the case, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

To

1. The Sub Assistant Registrar, Original Side, High Court, Madras.

+ 2 ccs to Mr. P.T. Ramkumar & K. Muthamil Raja, Advocate SR.61561

+ 3 ccs to Mr. Amalaraj, S. Penkilapatti, Advocate SR.61194

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