IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.02.2018

CORAM

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

O.P.No.165 of 2015

1.The General Manager,
Southern Railway,
Park Town, Chennai-600 003.

2.The Chief Engineer/North/MS,
Construction, Office of the
Chief Administrative Officer,
Southern Railway, Egmore,
Chennai-600 008. ..Petitioners

Vs.

1.T.K.Alikutty,
Government Contractor,
Thondi Kadavathu,
Athavanad Post-376 301.
Thirunavaya, Malappuram District,
Kerala State.

2.Shri O.Ramachandran Nambiar,
(Retired District Judge) (Arbitrator),
Opposite to Thankam Tourist Home,
Saint Benedict Road, Ernakulam North,
Ernakulam, Kerala-682 018. .. Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Arbitral Award dated 01.09.2011 pertaining to disputes arising out of Agreement No.358/CN/2001 insofar as the Award relating to claim Nos.1, 2 and 7 are concerned.

For Petitioners : Mr.C.V.Ramachandra Murthy

For Respondents : Ms.K.Aparna Devi for
Mr.P.Subba Reddy for R1

ORDER

A contract was awarded in favour of the first respondent by the petitioners as per the Agreement dated 19.12.2001 on 30.11.2001. Time was fixed for completion of the contract as six months. The contract was extended for nine times upto 30.01.2006. Even after the last extension granted, the work was completed.

2. The first respondent invoked the arbitration clause by raising seven claims. Claim No.3 was rejected. Claim Nos.1, 2 and 4 to 7 were awarded in part. Insofar as the claim Nos.4 to 6 awarded by the Tribunal is concerned, the petitioners have duly complied with. Thus, we are concerned with claim Nos.1, 2 and 7. Claim No.1 is with respect to the claim made towards escalation price in completing the work. For this, a sum of Rs.13,15,125/- was sought for. The Tribunal awarded a sum of Rs.6,63,512/-. The Tribunal has passed the award by taking note of the admitted fact that there was an abnormal increase in the price of construction materials, labour and transport charges etc. The fact that the

prices have been revised by the Kerala Public Works Department as well as the petitioners for the subsequent years also was taken note of. That the petitioners did not dispute this factum was also recorded. The agreement did not place any fetters on the right of the first respondent to make a claim for escalation for additional costs incurred was considered by the Tribunal. A factual finding has been rendered by the Tribunal that the delay in execution of the work occurred on the fault of the petitioners. The petitioners did not hand over the site within the time.

3. The learned counsel appearing for the petitioners would submit that Clause 17.2 of the General Conditions of Contract would prohibit such a claim. The first respondent itself has admitted the original rate. The first respondent did not make a claim in the monthly statement as per Clause 43(1) of the General Conditions of Contract. The quantum has been fixed without any basis and there is no clause provided for escalation,

4. The learned counsel appearing for the first respondent would submit that as the findings of the Tribunal are based upon the fact, the same has to be confirmed.

5. The Tribunal did consider the facts in their perspective. The delay

had occurred due to the failure of the petitioners and there is no denial on the escalation price. In fact, the awarding of the contract by the petitioners for the subsequent years to that of the Contract Agreement dated 19.12.2001 by taking note of the escalation price was also taken note of. In such view of the matter, this Court is of the view that there is no error in the award passed by the Tribunal. The quantum was fixed by taking into consideration of relevant materials. The reliance made on Clauses 17.2 and 43.1 of the General Conditions of Contract and a letter dated 09.10.2002 also cannot be accepted. We are dealing with the case, in which, the petitioners were found fault with for causing delay. The letter dated 09.10.2002 has to be seen contextually. The said letter cannot be taken note of for the subsequent extensions. Merely because, the first respondent did not make an additional claim at an earlier point of time, he cannot be stated to have been estopped from making the claim, when there is no clause for escalation, the Tribunal can go into the said issue, especially, based upon a finding that the delay was caused by the petitioners. In such view of the matter, Clause 72 of the General Conditions of Contract also cannot be pressed into service as against the first respondent.

6. Coming to the claim No.2, which is with respect to the increase in

the quantity of work qua earth filling, increase in the quantity is not in dispute. The receipt of the admitted payment will not take away the right of the first respondent in making the claim. The Tribunal has rightly taken into consideration Clause 25 of the General Conditions of Contract, which deals with variation and quantities. Thus, it was rightly held that there is a violation of Clause 25 of the General Conditions of Contract committed by the petitioners. The Tribunal has held that it would not be possible for any contractor to do their work on the basis of the original contract even after four years, when such delay was created by the petitioners. Therefore, the contentions raised on the ground of payment received without protest and reliance upon Clause 43 of the General Conditions of Contract cannot be countenanced.

7. Coming to the last issue, it is with respect to the interest payable on claim Nos.1 and 2 pendente lite. The Tribunal, after considering Clause 6.2 of the General Conditions of the Contract and Section 31(7) of the Arbitration and Conciliation Act, 1996, made a distinction that for awarding any extra contractual relief, the aforesaid provisions would not apply. This in the considered opinion of this Court is contrary to the law laid down by the Apex Court as considered by this Court in O.P.No.188 of 2010 and 289 of 2014 dated 02.02.2018 and the following paragraphs

would be apposite.

23.Judgments have been relied upon both for and against by the learned counsel appearing for the parties. It is a settled law that an issue or a decision made in ignorance of certain provisions and without conscious consideration could never be termed as binding. Unfortunately, in the cases relied upon by the learned counsel appearing for the first respondent, the clauses, namely Clauses 46, 51, 52 and 64(5) were not brought to the notice of the Court. In cases where they were brought, they were accepted and followed in favour of the Railways.

24.In **Union of India vs. Pradeep Vinod Constructions**, supra, Clauses 46, 51, 52 and 64(5) were not brought to the notice of the Court. The Apex Court gave a factual finding on the case involved that interest awarded was in terms of the contractual obligation. It is to be noted that though the earlier decisions were quoted, they were not held to be bad in law. On the contrary, it has been held that if the contract expressly bars the award of interest *pendente lite*, the same cannot be awarded by the Tribunal. The Apex Court referred the judgment of a three Bench judgment in **Tehri Hydro Development Corpn.Ltd. v. Jai Prakash Associates Ltd.,** reported in **(2012) 12 SCC 10**, the following paragraph would be of relevance:

> *"34. Thus, our answer to the reference is that if the contract expressly bars the award of interest pendente lite, the same cannot be awarded by the*

arbitrator. We also make it clear that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal, as ouster of power of the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court, it would be for the Division Bench to consider the case on merits."

25.Reliance has been made by the learned counsel for the first respondent on the judgment of the Delhi High Court in **Union of India vs. N.K.Garg & Co.,** reported in **Manu/DE/4099/2015**, on the scope and application of the Interest Act, 1978. This Court is afraid that in the aforesaid judgment also, the other provisions of the GCC have not been considered. Furthermore, this decision was made without taking into consideration the other decisions of the Apex Court.

26.**In Union of India vs. M/s.Susaka Pvt. Ltd.**, the issue of applicability of Clause 13 (3) of the GCC was raised for the first time before the Apex Court. Though the Apex Court took note of Section 31 (7) (a) (b), the issue having not raised, the contention was rejected on the principle of a waiver by the appellant. Hence, the said judgment also would not help the case of the first respondent.

27.In **Union of India vs. Ambica**

Constructions, referred to supra, the general principle that the Tribunal is bound to decide the dispute as per the agreement has been reiterated through the following paragraph:

" ..The court can exercise the power specified in Second Schedule of the Act. However, Arbitrator is not a court. Arbitrator is the outcome of agreement. He decides the disputes as per the agreement entered into between the parties. Arbitration is an alternative forum for resolution of disputes but an Arbitrator ipso facto does not enjoy or possess all the powers conferred on the courts of law. "

28.Taking note of the existence of Clause 64 (5), this Court has held in **Union of India vs. M/s.Emjay Constructions**, supra, dated 03.02.2009 that the conditions do not contemplate payment of any interest. The following paragraphs would be of relevance:

29. According to clause 64(5) of the GCC, whether the arbitral award is for the payment of money, no interest shall be payable on the whole or any part of the money for any period till the date on which, the award is made. In respect of these clauses, the second respondent/ Arbitrator deemed it reasonable to grant the rate of 12% per annum as interest on the total sum awarded, which, in my view, is absolutely incorrect and which is contrary to the clauses contained in the contract. Therefore, I am inclined to set aside the grant of 12% interest on the total sum awarded, which accrued from 14.12.2004 till 23.6.2006. Hence, this grant of interest is set aside. In so far as the future *interest granted at the rate of 18% per annum is to be upheld because clause 64(5) does not prohibit grant of future interest. But, the future interest would not be given to the EMD and SD as clause 16(7) GCC prohibits the same. It is made very clear that no interest whether past or future can be given with regard to the EMD and SD.*

30. In fact, Sec.31(7) (a) of the Act 1996 will also prohibit granting of any interest if otherwise agreed to by the parties. In this case, clauses 16(3) and 64(5) of the General Conditions of Contract do not contemplate payment of any interest and therefore no interest could be granted by ignoring these clauses.

29.A similar view has also been expressed by a Division Bench of Andhra Pradesh High Court in **V.K.Engineering Constructions**, referred supra, in the following manner:

"55.Even the submission of the learned counsel for the 1st respondent that fact that GCC of December, 1998 contains specific prohibitory clause in Clause 64(5), reading thus:

> *"64(5) Where the arbitral award is for the payment of the 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."*

would make it abundantly clear, in view of conspicuous absence of a similar clause in predecessor GCC in force when the agreement was entered into by inference that the power of arbitral tribunal was not curtailed, does not assist the claim of the 1st respondent to interest, *pre-reference and pendente lite, in view of the principle as to bar to award interest laid down by the Hon'ble Supreme Court in the line of decisions referred to hereinbefore and in the presence of prohibition contained in Clause 16(2) (old) and 16(3) (modified) of GCC which are similar and identical.*

30.In **Sri Chittaranjan Maity vs. Union of India**, supra, which is rendered very recently, it has been held by the Apex Court that when the agreement prohibits any payment of interest, the same cannot be awarded. Following are the necessary and relevant paragraphs:

"16. Admittedly, the GCC, governing the contract between the parties, contains a clause which bars the payment of interest, which is as under:

"16(2) – No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract, but government securities deposit in terms of sub-clause (1) of this clause will be repayable (with) interest accrued thereon."

17. Relying on a decision of this Court in M/s. Ambica Construction vs. Union of India (2017) SCC OnLine SC 678, (C.A.No.410 of 2008, disposed of on 26.04.2017) learned senior counsel for the appellant submits that mere bar to award interest on the amounts payable under the contract would not be sufficient to deny payment on pendente lite interest. Therefore, the Arbitrator was justified in awarding the pendente lite interest. However, it is not clear from

M/s. Ambica Construction (supra) as to whether it was decided under The Arbitration Act, 1940 (for short 'the 1940 Act') or under the 1996 Act. It has relied on a judgment of Constitution Bench in Secretary, Irrigation Department, Government of Orissa and Others. vs. G.C. Roy (1992) 1 SCC 508. This judgment was with reference to the 1940 Act. In the 1940 Act, there was no provision which prohibited the Arbitrator from awarding interest for the pre-reference, pendente lite or post award period, whereas the 1996 Act contains a specific provision which says that if the agreement prohibits award of interest for the pre-award period, the Arbitrator cannot award interest for the said period. Therefore, the decision in M/s. Ambica Construction (supra) cannot be made applicable to the instant case.

....

21. In Union of India vs. Bright Power Projects (India) Private Limited (2015) 9 SCC 695, a three-Judge Bench of this Court, after referring to the provisions of Section 31(7)(a) of the 1996 Act, held that when the terms of the agreement had prohibited award of interest, the Arbitrator could not award interest for the pendente lite period. It has been held thus:

> *"10. Thus, it had been specifically understood between the parties that no interest was to be paid on the earnest money, security deposit and the amount payable to the contractor under the contract. So far as payment of interest on government securities, which had been deposited by the respondent contractor with the appellant is*

concerned, it was specifically stated that the said amount was to be returned to the contractor along with interest accrued thereon, but so far as payment of interest on the amount payable to the contractor under the contract was concerned, there was a specific term that no interest was to be paid thereon.

11. When parties to the contract had agreed to the fact that interest would not be awarded on the amount payable to the contractor under the contract, in our opinion, they were bound by their understanding. Having once agreed that the contractor would not claim any interest on the amount to be paid under the contract, he could not have claimed interest either before a civil court or before an Arbitral Tribunal." Therefore, it is clear that the appellant is not entitled for any interest on the amount awarded by the Arbitral Tribunal."

Therefore, it is clear that the appellant is not entitled for any interest on the amount awarded by the Arbitral Tribunal."

8. Thus, in the light of the aforesaid pronouncement, the artificial distinctions sought to be made by the Tribunal cannot be sustained in the eye of law. The Tribunal did not take into consideration Clause 64.5 of the General Conditions of Contract as considered by this Court referred to supra. These clauses would form part of the agreement *inter se* parties and thus, binding. When once they form part of the agreement, the Tribunal is also barred from awarding any interest. In such view of the

matter, the claim awarded by the Tribunal insofar as the claim No.7 is set aside. Accordingly, this original petition stands partly allowed insofar as claim No.7 alone. No costs.

16.02.2018

raa

M.M.SUNDRESH,J.

raa

O.P.No.165 of 2015

16.02.2018