

***IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

*** HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND**

*** HON'BLE MS. JUSTICE J. UMA DEVI**

**+C.M.A.Nos.1253 of 2009, 28 of 2010, 552 of 2010, 634 of 2011,
1106 of 2011 and 1219 of 2011**

%Date: 24-10-2018

C.M.A.No.1253 of 2009

#Between:

The Union of India, Department of Railways,
Represented by the General Manager,
South Central Railways, Rail Nilayam,
Secunderabad and another

And

M. Krishna Prasad, Proprietor,
M/s. Prasad Engineering Services, 8/22-3,
Anicut Road, Ranganayakulapet, Nellore
and another

... Appellants

... Respondents

C.M.A.No.28 of 2010

#Between:

The Union of India, Department of Railways,
Represented by the General Manager,
South Central Railways, Rail Nilayam,
Secunderabad and another

And

M. Krishna Prasad, Proprietor,
M/s. Prasad Engineering Services, 8/22-3,
Anicut Road, Ranganayakulapet, Nellore
and another

... Appellants

... Respondents

C.M.A.No.552 of 2010**#Between:**

M. Krishna Prasad, Proprietor,
M/s. Prasad Engineering Services, 8/22-3,
Anicut Road, Ranganayakulapet, Nellore

... Appellant

And

The Union of India, the Department of Railways,
The General Manager, South Central Railway,
Rail Nilayam, Secunderabad and 2 others

... Respondents

C.M.A.No.634 of 2011**#Between:**

M. Krishna Prasad, Proprietor,
M/s. Prasad Engineering Services, 8/22-3,
Anicut Road, Ranganayakulapet, Nellore

... Appellant

And

The Union of India, the Department of Railways,
The General Manager, South Central Railway,
Rail Nilayam, Secunderabad and 2 others

... Respondents

C.M.A.No.1106 of 2011**#Between:**

M. Krishna Prasad, Proprietor,
M/s. Prasad Engineering Services, 8/22-3,
Anicut Road, Ranganayakulapet, Nellore

... Appellant

And

The Union of India, the Department of Railways,
The General Manager, South Central Railway,
Rail Nilayam, Secunderabad and 2 others

... Respondents

C.M.A.No.1219 of 2011**#Between:**

The Union of India, Department of Railways,
 Represented by the General Manager,
 South Central Railways, Rail Nilayam,
 Secunderabad and another

... Appellants

And

M. Krishna Prasad, Proprietor,
 M/s. Prasad Engineering Services, 8/22-3,
 Anicut Road, Ranganayakulapet, Nellore
 and another

... Respondents

! Counsel for the Appellant : Mrs. K. Aruna, standing counsel for
 Railways

^ Counsel for Respondents : Mr. M. Krishna Prasad,
 Party-in person

<GIST:**> HEAD NOTE:****? Cases referred**

- 1) 2006 (11) SCC 181
- 2) 2015 (1) Arb LR 354 (Madras)

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN

AND

HON'BLE MS. JUSTICE J. UMA DEVI

**C.M.A.Nos.1253 of 2009, 28 of 2010, 552 of 2010, 634 of 2011,
1106 of 2011 and 1219 of 2011**

COMMON JUDGMENT: *(per V. Ramasubramanian, J)*

All these appeals are under Section 37 of Arbitration and Conciliation Act, 1996. Since all the appeals are between the same parties and they arise out of three arbitration proceedings in respect of three independent contracts entered into between the parties, we have taken up all the appeals together for disposal.

2. We have heard Smt. K. Aruna, learned standing counsel for the South Central Railways and Mr. M. Krishna Prasad, the Contractor appearing as party in person.

3. In some appeals, the South Central Railways is the appellant and in the other appeals, the contractor is the appellant. Therefore, we shall refer to the parties as "South Central Railways" and "the contractor" for the purpose of easy reference.

4. The South Central Railways entrusted certain items of work to the contractor, under three different contracts bearing (1) T.No.21/S/96/T1, dated 14-03-1997, (2) T.No.27/S/96/T1, dated 2-5-1997, and (3) T.No.34/S/97/T1, dated 12-01-1998. Wherever it is necessary, we shall refer to these contracts as "contracts 1, 2 and 3 respectively" for the purpose of easy reference.

5. Disputes arose between the South Central Railways and the contractor. Since all the three contracts were independent of each other, the disputes that arose under each one of these contracts were referred to an Arbitrator. In respect of the disputes relating to contract No.1, the Arbitrator was appointed on 6-11-2001. In respect of the disputes arising under contract No.2, the Arbitrator was appointed on 6-11-2001. In respect of disputes arising under contract No.3, the Arbitrator was appointed on 05-03-2001.

6. In the disputes arising under contract No.1, the contractor made a total of 19 heads of claims, listed as Claim Nos.1 to 14 and Claims A to E. In the disputes arising under contract No.2, the contractor made claims under 10 different heads. In the dispute under contract No.3, the contractor made claims under 9 different heads.

7. On 24-11-2004, an award in Award No.439 of 2000 was passed, allowing all claims except two and disallowing the claims under Items 10 and 11 in the disputes arising under contract No.1

8. Similarly, by an award made on 24-11-2004 in Award No.450 of 2000, all claims but one were allowed. In other words claims 1 to 6 and 8 to 10 were allowed and claim No.7 was disallowed.

9. Likewise, an award was passed on 10-10-2005 in Award No.43 of 2001 rejecting all the 9 heads of claims and refusing to grant any relief to the contractor.

10. As against the claims allowed by the Arbitrator (claims 1 to 9, 12 to 14 and A to E), arising out of contract N.1, the Railways filed O.P.No.563 of 2006 under Section 34 of the Act. Aggrieved by the disallowance of claim Nos.10 and 11, in respect of this contract, the contractor filed O.P.No.565 of 2006.

11. As against the 9 heads of claims allowed by the Arbitrator in respect contract No.2, the Railways filed O.P.No.564 of 2006. Aggrieved by the disallowance of the claim under heading No.7, the contractor filed O.P.No.562 of 2006.

12. Since all the 9 heads of claims in respect of contract No.3 were disallowed by the Arbitrator, the contractor alone filed O.P.No.424 of 2007.

13. Thus, there were five Original Petitions before the court below under Section 34 of the Arbitration and Conciliation Act, 1996. Out of them, two related to contract No.1, two related to contract No.2 and one related to contract No.3.

14. By two judgments dated 05-06-2009, the court below dismissed O.P.Nos.563 and 565 of 2006, filed respectively by the Railways and the contractor, thereby confirming the award dated 24-11-2004 passed in Award No.439 of 2000. Aggrieved by the said order, the Railways have come up with C.M.A.No.1253 of 2009 and the contractor has come up with C.M.A.No.1106 of 2011.

15. By two separate judgments passed on 05-06-2009, the court below dismissed O.P.Nos.564 and 562 of 2006 filed respectively by the Railways and the contractor, thereby confirming

the award passed on 24-11-2004 in Award No.450 of 2000. Therefore, the Railways have come up with C.M.A.No.28 of 2010 and the contractor has come up with C.M.A.No.552 of 2010.

16. As pointed out earlier, the arbitration arising out of contract No.3 resulted in a NIL award dated 10-10-2005 in Award No.43 of 2001 and hence, the contractor alone filed an Application in O.P. No.424 of 2007. This O.P.No.424 of 2007 was allowed by the court below by a judgment dated 24-02-2001. By this judgment, the award of the Arbitrator was set aside. Though the judgment of the trial Court does not say anything more than setting aside the award of the Arbitrator, the Railways have come up with an appeal in C.M.A.No.1219 of 2011 thinking that all heads of claims made by the contractor automatically stood allowed. Interestingly, the contractor, who succeeded in O.P.No.424 of 2007, has also come up with an appeal in C.M.A.No.634 of 2011, on the ground that his prayer for a direction to the Arbitrator to refund his fee, was not addressed in the judgment of the court below.

17. Resultantly, we have six appeals on hand arising out the judgments in five applications under Section 34, which sprung out the three arbitration awards.

C.M.A.Nos.1219 of 2011 and 634 of 2011:

18. These two appeals, which relate to Contract No.3, are capable of being disposed of without much ado. Therefore, we shall take them up first. As pointed out earlier, these two appeals arise out of the judgment in O.P.No.424 of 2007. The application in

O.P.No.424 of 2007 was filed by the contractor, challenging Award No.43 of 2011 made on 10-10-2005. The contractor made claims under nine different heads, but the Arbitrator rejected all heads of claims and passed a NIL award.

19. The question as to what the court can do under Section 34 of the Act in cases where an Arbitral Tribunal dismisses all the heads of claims and passes a NIL award, is yet to be settled by an authoritative pronouncement of the Supreme Court. It is true that in paragraph 52 of its decision in ***Mcdermott International Incorporation v. Burn Standard Co. Limited***¹, the Supreme Court indicated that the Court can only quash the award leaving the parties free to begin the arbitration again if it is so desired. Paragraph 52 of the decision in ***Mcdermott International Incorporation v. Burn Standard Co. Limited*** reads as follows:

“The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

20. But in ***M/s. X v. Y Limited***², to which one of us (VRSJ) was a party, the Court had an occasion to point out that the power to

¹ 2006 (11) SCC 181

² 2015 (1) ArbLR 354 (Madras)

set aside available under Section 34 may include a power to modify or revise or vary the award.

21. Fortunately, this question may not arise in this case for adjudication for the simple reason that in its judgment dated 24-02-2011, the Court below merely set aside the award, but did not grant any award or decree in favour of the contractor. Paragraphs 67 and 68 of the judgment dated 24-02-2011 in Arbitration O.P.No.424 of 2007 read as follows:

“67. In view of the finding given above and as per the guidelines given in the above said decisions, I am of the opinion that the award in question is liable to be set aside because same proceedings on wrong interpretation of various provisions which are referred above all making award illegal and error apparent on the record and actual facts. The learned Sole Arbitrator without applying actual legal aspects referred above applicable to the case.

68. In the result, with the aforesaid observation, the objection petition is allowed and the impugned Award dated 10-10-2005 is set aside. The petition is disposed of as allowed, leaving the parties to bear their own costs.”

22. Even the decree accompanying the judgment in O.P.No.424 of 2007 does not give any relief to the contractor. The decree reads as follows:

“1) that the objection petition be and the same is allowed with the observations mentioned in the order;

2) that the impugned order dated 10-10-2005 be and the same is set aside and that the petition be and the same is disposed of as allowed leaving the parties to bear their own costs.

23. Therefore, the Railways cannot be said to be aggrieved by the judgment of the Court below, in as much as no decree or award is passed against the Railways for payment of any particular sum of

money to the contractor. Hence, C.M.A.No.1219 of 2011 filed by the Railways is liable to be dismissed.

24. However, Mr. Krishna Prasad, the contractor appearing in person drew our attention to the findings of the court below in paragraphs 57 to 65 and contended that the court below has categorically found his entitlement to each one of the heads of the claims and that therefore, the court below should be taken to have allowed the claim petition.

25. We do not think so. Apart from the question of the power of the court under Section 34, it is also clear from the decretal portion of the judgment of the Court below that no decree was granted in favour of the contractor. This question cannot even be gone into by this court in the appeal filed by the contractor, since the contractor's appeal in C.M.A.No.634 of 2011 is confined only to the claim of the contractor for a direction to the Arbitrator to refund the amount of fee paid to him. Therefore, in the absence of any decree/ award made by the court below directing the Railways to pay a specified sum of money, the South Central Railways cannot be taken to be aggrieved by the judgment of the court below. Hence, C.M.A.No.1219 of 2011 is dismissed.

26. In so far as C.M.A.No.634 of 2011 is concerned, the grievance of the contractor, as projected at the time of oral hearing, was that under Section 13 (6) of the Act, the fee paid to the Arbitrator is liable to be refunded along with interest. According to the Contractor, the Arbitrator committed serious errors in his award

and that the award was set aside by the court below, pointing out the errors. Therefore, the contractor claims that the fee of Rs.22,500/- paid to the Arbitrator should be refunded with interest at 18% p.a.

27. But the above contention of the contractor is wholly misconceived. Section 13 of the Arbitration Act contains a procedure for challenging an Arbitrator. The challenge is to the very appointment of the Arbitrator. Under sub-section (2) of Section 13, the appointment of an Arbitrator can be challenged within 15 days of becoming aware of the constitution of the Arbitral Tribunal. If the Arbitrator does not withdraw, the Arbitral Tribunal itself is entitled to decide on the challenge. If the challenge to the appointment of the Arbitrator is not successful, then the Arbitral Tribunal may continue the proceedings and pass an award. If an award so made under sub-section (4) of Section 13 is challenged in terms of sub-section (5) of Section 13 and the award is set aside, then the court is given power under sub-section (6) of Section 13 to decide whether the Arbitrator whose appointment is challenged, is entitled to any fees.

28. This is not a case arising out of a challenge to the very appointment of the Arbitrator. Merely because an Arbitrator committed errors and his award came to be set aside, the fee paid to the Arbitrator cannot be ordered to be refunded. If this theory is accepted, the same should apply even to the other appeals. Therefore, the only ground advanced by the contractor at the time of oral hearing in C.M.A.No.634 of 2011, is wholly unsustainable and this appeal also is liable to be dismissed.

29. Accordingly, C.M.A.No.1219 of 2011 and 634 of 2011 are dismissed.

C.M.A.Nos.1253 of 2009 and 1106 of 2011:

30. These two appeals, one by the Railways and the other by the Contractor arose respectively out of the dismissal of O.P.No.563 of 2006 filed by the Railways and O.P.No.565 of 2006 filed by the contractor. They arose out of a single award bearing No.439/2000.

31. We have already pointed out that Award No.439/2000 was in respect of about 19 claims made by the contractor under claim heads 1 to 14 and A to E. The claims under claim heads 10 and 11 were dismissed and all other claims were allowed. This is why the Railways filed one application under Section 34 as against the claims allowed and the contractor filed one application as against the disallowed claims.

32. The heads of claim made by the contractor that formed the subject of the Award bearing No.439 of 2000 are as follows:

- (1) The security deposit amount of Rs.24,400/- that was withheld by the Railways;
- (2) Compensation for the withholding of security deposit, calculated at Rs.24,400/-;
- (3) Payment for the extra/new items of work done in good faith as per oral instructions amounting to Rs.15,640/-;
- (4) Payment for another item of work viz., laying of wooden crossing sleepers amounting to Rs.6,800/-;

(5) Payment for the work of packing for a length of 500 linear metres, amounting to Rs.20,000/-;

(6) Payment for another extra item viz., packing for 5 sets – Rs.5,750/-;

(7) Compensation for the loss due to non-payment of the amount under the heads of claim 3, 4, 5 and 6 = Rs.48,190/-;

(8) Loss of profit of Rs.40,500/- calculated at the rate of 15% on the value of the work viz., Rs.2,70,000/-;

(9) Compensation for non-payment of the loss of profit of Rs.40,500/-;

(10) Miscellaneous charges of Rs.1,000/-;

(11) Turnover loss at 5% on the work value of Rs.3,37,572/-, amounting to Rs.16,878/-;

(12) Expenses incurred in obtaining decreetal order from the Court with regard to appointment of Arbitrator, estimated at Rs.1,000/-;

(13) Interest at 12% per annum on the total of the heads of claims 1 to 12;

(14) The cost of the arbitration proceedings;

(15) A sum of Rs.8,955/- claimed under heading A for the removal of the damaged PSC sleepers;

(16) A sum of Rs.20,370/- towards handling of wooden sleepers from the place where they are unloaded up to the required location, put under claim head B;

(17) A sum of Rs.30,465/- claimed under Head No.C, for laying wooden work sleepers with all fittings;

(18) Compensation in an amount equivalent to the sum total of claim headings A, B and C, working out to Rs.59,730/-, under claim head D, and

(19) Interest at 24% per annum on the total amount of claim heads A to D.

33. As we have indicated earlier, the Arbitrator rejected the claims under claim head Nos.10 and 11. The contractor filed O.P. No.565 of 2006 in respect of these disallowed claims. But, the Court below dismissed O.P.No.565 of 2006 forcing the contractor to come up with C.M.A.No.1106 of 2011.

34. But as seen from the above table, the claim under head No.10 was for a sum of Rs.1,000/- towards miscellaneous charges such as the cost of tender schedule etc. The claim under head No.11 is for a turnover loss at 5% on the work value. The Arbitrator rightly dismissed the claim under head No.10 on the ground that these charges were incurred by the contractor for participation in the tender and hence the question of reimbursing him, especially after bagging the contract and executing the work would not arise. The reasoning of the Arbitrator is perfectly valid and hence the Court below was right in not interfering with the finding on claim head No.10.

35. Claim Head No.11 was rejected by the Arbitrator on the ground that it is nothing but a duplication of the claim under claim

head No.8. The Arbitrator was right. The contractor is not entitled to come up with different heads of claim which overlap. Therefore, the Court below was right in dismissing his petition in O.P.No.565 of 2006, which arose out of the rejection of the claims under claim head Nos.10 and 11. Hence, the appeal filed by the contractor in C.M.A.No.1106 of 2011 is liable to be dismissed and accordingly it is dismissed.

36. Coming to the appeal in C.M.A.No.1259 of 2009 filed by the Railways as against the dismissal of their application O.P. No.563 of 2006, it is seen that there are 13 heads of claims viz., 1 to 9 and 12 to 15 and 5 sub-heads of claims viz., A to E. The nature of each of these heads of claim, the amount claimed under each head, the reasoning given by the Arbitrator and the amount awarded under each head are provided in a tabulation as follows:

Head of Claim	Nature	Amount claimed Rs.	Reasons of Arbitrator	Amount awarded Rs.
1	Security deposit amount withheld by the Railways	24,400/-	There stands a fundamental breach of contract in non availability of PSC sleepers upto middle of December 97 for Gudur works (about 170 PSC sleepers yet to be available even in Feb 98). There has also been a fundamental breach of contract in non availability of PSC sleepers for Bitragunta works as requisite materials were available only in Feb 99 i.e., 4 months after the last extension on 30.06.98. It is seen that certain items of works, complementary in nature to the scheduled works have to be executed as non-schedule works and processing requisite deviation statement initiated and	24,400

			requisite sanction was not communicated. This non-sanction of requisite NS rates, timely is another state of breach of contract, denial of natural justice attracting Sections 53, 67, 73, 75 of the Indian Contract Act, 1872. Therefore the claimant is entitled for due compensation by way of damages. In short, since this is a case of fundamental breach of the contract by the Railways by non production of requisite material to the contractor to get the works done, withholding of the security deposit is not warranted.	
2	Compensation for withholding of security deposit amount	24,400	The amount is lying idle with the respondents from 01.07.1998 i.e., after the expiry of the validity period. As already indicated in the award against claim 1 that withholding of security deposit is not warranted, the claimant is entitled to compensation.	27,999
3	Payment for the extra/new items of work done in good faith as per oral instructions	15,640	It stands established that 170 wooden crossing sleepers were laid for Gudur Yard works and payment for the same is due taking light of Ex.A-20 of the claimant which provided the true record of the work accomplished by him at Gudur. Perusal of Ex.A-9 with the deviation statement filed on 08.09.2003 reveal that item at Serial Nos. 2, 3, 5 of Ex.A-9 is corresponding to NS item 1, 2 and 4 at page 4 of the deviation statement, which reveal a total of Rs.50/- per wooden crossing sleeper is the rate for the total non scheduled works of handling new wooden crossing sleeper to site of work from place where it is unloaded (NS item 1), removing existing wooden crossing sleepers from tracks, transport the released crossing sleepers to the PW1 store yard (NS items 2 and 4). Hence payment due to work done i.e., 170 crossing sleepers is Rs. 8,500/-.	8,500
4	Payment for another item of work viz., laying of	6,800	Keeping in view that payment is due for the work done, as brought out in claim No.3 the claimant is entitled for the	6,800

	wooden crossing sleepers		payment.	
5	Payment for the work of packing for a length of 500 linear metres	20,000	Keeping in view that payment is due for the work done, as brought out in claim No.3, the claimant is entitled for the payment.	20,000
6	Payment for another extra item viz., packing for five sets	5,750	Keeping in view that payment is due for the work done, as brought out in claim No.3, the claimant is entitled for the payment.	5,750
7	Compensation for the loss due to non-payment of the amounts under the heads of claim 3, 4, 5 and 6	48,190	The amount awarded against claim nos. 3,4,5 and 6 aggregates to an amount of Rs. 41,050/- and this could have been available for commercial use of claimant by 01.07.1998. The case is of breach of contract in non-fulfilling the assurance of completing work within 4 months, denial of site as well as materials to be supplied for the execution of the contracted work even within 8 months of the date of acceptance letter and work at Gudur commenced only on 06.12.97 and non fixing of rates for non-non-scheduled works that were required and executed by the claimant contractor on oral assurances etc which all lead to further breach of natural justice and fair play which in turn made the claimant a victim of uncalled for harassment and hence entitled for compensation as damages claimed and damages worked in the form of interest at 18% p.a on the amount of Rs.41,050/- for the period from 01.07.1998 upto the date of award say 6 years and 4 1/2 months, is expected to meet the ends of justice.	47,105
8	Loss of profit of Rs.40,500/- calculated @ 15% on the value of the work	2,70,000	Time is the essence of the contract and in the instant case completion of works envisaged within 4 months from the date of acceptance letter implying/promise to ensure availability of materials to be supplied for work. This has not been complied by the respondents even up to 30.06.1998, the extended date	40,500

			of contract and even a 4 month period thereafter (being the assured period for completion of works). Hence the loss of profit on the remaining work value at 15% as claimed is to be allowed in the interest of natural justice and fair play and this amount would have been available for the claimant contractor by 31.10.1998 latest for commercial investments.	
9	Compensation for non-payment of the loss of profit	40,500	Compensation as damages for the loss due to blocking of claimants legitimate earnings in claim 8 for commercial deployment in the form of interest on Rs.40,500/- at 18% per annum for the period from 31.10.1998 up to the date of award say 6 years is expected to meet ends of justice.	43,740
10	Miscellaneous charges	1,000	Miscellaneous charges as indicated are incidental to participation against a tender call.	Nil award
11	Turnover loss at 5% on the work value of Rs.3,37,572/-	16,878	Normal profit of 15% on the value of work executed as well as 15% of remaining work allowed as reliance damages claimed in Claim No.8 is expected to cover the element of turnover loss.	Nil award
12	Expenses incurred in obtaining decretal order from the Court with regard to appointment of Arbitrator estimated at	1,000	Rs. 1000/- as claimed is considered reasonable.	1,000
13 & E	Interest at 12% p.a., on the total of the heads of claim Nos.1 to 12	Interest @ 24% p.a. on summed up total damages i.e. Rs.2,45,058/- beyond 30.9.2002 till date of payment or date of decree whichever is earlier	Further interest @ 18% p.a. on Rs.2,44,237/- being summed up damages against Claims 1, 3 to 6, 8, 12, 14, A, B & C beyond the date of award to till date of payment or date of decree whichever is earlier.	Further interest @ 18% p.a. on Rs.2,44,237/-
14	Costs of arbitration proceedings	As per actuals	The arbitration expenses apportioned to the claimant as far as the instant matter is concerned is as under: (1) 50% of the Arbitration	18,552

			Fees, Special Fees, Clerkage and Stenographer expenses as indicated at para 1/para 3 of the Sole Arbitrators earlier letter dated 14.09.2004 to the Hon'ble Court (copy endorsed to both parties) = $1/2 \times \text{Rs. } 6000 = \text{Rs. } 3000/-$ (2) Other expenses apportioned to the instant matter as brought out at para 17 of this report = Rs. 15, 552/-. (3) Totalling to Rs. 18, 552/-. In view of the fact that there has been a fundamental breach of contract on part of the railways in not providing the requisite materials resulting into the non completion of the work by the arbitrator, which could have been avoided, the claimant is entitled to the amount claimed.	
A	For the removal of the damaged PSC sleepers	8,955	In view of the fact that the contractor had completed some of the works like handling of damaged PSC sleepers replaced, handling of wooden sleepers from place of unloading to the location where the work is executed, laying of wooden sleepers etc based on work executed/covered by the NS rates/ deviation statement processed etc and the above claim had not been contested by the respondent, the claimant is entitled for an amount at Rs.15/- for 597 sleepers.	8,955
B	Handling of wooden sleepers from the place where they are unloaded up to the required location	20,370	In view of the fact that the contractor had completed some of the works like handling of damaged PSC sleepers replaced, handling of wooden sleepers from place of unloading to the location where the work is executed, laying of wooden sleepers etc based on work executed/ covered by the NS rates/ deviation statement processed etc and the above claim had not been contested by the respondent, the claimant is entitled for an amount at	13,540

			Rs.30/- for 677 sleepers.	
C	For laying wooden work sleepers with all fittings	30,465	In view of the fact that the contractor had completed some of the works like handling of damaged PSC sleepers replaced, handling of wooden sleepers from place of unloading to the location where the work is executed, laying of wooden sleepers etc based on work executed/ covered by the NS rates/ deviation statement processed etc and the above claim had not been contested by the respondent, the claimant is entitled for an amount at Rs.45/- for 677 sleepers.	13,540
D	Compensation in an amount equivalent to the sum total of claim headings A, B & C	59,730	Awarded compensation as damages against claim nos. A, B and C total to Rs. 36, 035/-. On par with what is stated in the award against similar Claim No. 7, compensation as damages is entitled and is worked in the form of interest on the amount of Rs. 36, 035/- @18% p.a for the period from 01.07.1998 up to date of award say 6 years 4 1/2 months to meet ends of justice.	36,035

37. It may be seen from the above table that all the heads of claims allowed by the Arbitrator, could be grouped under 6 different categories viz., (i) security deposit withheld by the Railways, (ii) payment for certain extra items of work, (iii) compensation for withholding of security deposit and compensation for non-payment in respect of certain extra items of work, (iv) loss of profit calculated at 15% on the value of the work, (v) interest on all the other categories of claims and (vi) costs of the arbitration proceedings.

38. The primary grievance of the Railways is that after awarding compensation – (i) either for non-refund of security

deposit, (ii) or for non-payment of the value of certain items of additional work, the Arbitrator has awarded an additional amount which is either equivalent to or more than the amount claimed. This itself is contrary to law and the Arbitrator awarded interest on these amounts also, in addition to the award of such compensation. Though the learned Standing Counsel for the Railways did not project the objection of the Railways, in the manner we have narrated herein, her argument was that the Arbitrator had awarded interest on interest, contrary to Clause No.16.3 of the General Conditions of Contract. The learned Standing Counsel also cited lot of decisions for the proposition that the General Conditions of Contract are binding on the contractor and that it is settled law that such interest cannot be awarded.

39. But from the table extracted above, we do not find that the Arbitrator awarded interest on interest, contrary to the General Conditions of Contract. The only mistake committed by the Arbitrator was to award compensation for the retention of the security deposit or for the non-payment of certain items. After awarding compensation, the Arbitrator also awarded interest on both the amounts.

40. For instance, the first head of claim relates to the retention of the security deposit to the extent of Rs.24,000/-. For non-payment of the said amount, if the contractor is entitled to interest at a particular rate, from the date on which the security deposit became repayable, then he may not be entitled to compensation. But the

Arbitrator awarded compensation to the extent of Rs.24,400/-, under head of claim No.2, for the non-refund of the security deposit to the tune of Rs.24,400/-, which formed the head of claim No.1.

41. After awarding an equivalent amount as compensation, the Arbitrator also awarded interest on both the amounts. This is impermissible in law. Therefore the Railways is fairly justified in their grievance.

42. But, unfortunately for the Railways, this cannot be one of the grounds on which an award can be set aside under Section 34. Under Clause (a) of sub-section (2) of Section 34, an arbitration award can be set aside only under 5 contingencies viz., (i) when a party was under some incapacity, (ii) when the arbitration agreement was not valid, (iii) when the aggrieved party was not given proper notice of the appointment of the Arbitrator or of the arbitral proceedings, (iv) when the arbitral award deals with a dispute not contemplated by or not falling within the terms of submission to arbitration and (v) when the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

43. Similarly, an arbitration award can be set aside under Clause (b) of sub-section (2) of Section 34 only under two contingencies viz., (i) when the subject matter of the dispute is not capable of settlement by arbitration or (ii) when the arbitral award is in conflict with the public policy of India. The scope of the definition of the expression "public policy of India", has now been narrowed

down by the insertion of a new Explanation under sub-section (2) of Section 34. Therefore, a mere error of law is no ground to interfere with the arbitral award. Hence, the Court below was right in rejecting the challenge.

44. Therefore, the award bearing No.439 of 2000, despite granting reliefs to the Contractor, which could not have been granted in law, is not liable to be set aside in view of the very narrow scope of the court's jurisdiction under Section 34. The Court below was, therefore, right in dismissing the challenge to the same in O.P.Nos. 563 and 565 of 2006. Hence, C.M.A.Nos.1253 of 2009 and 1106 of 2011 are liable to be dismissed and accordingly they are dismissed.

C.M.A.Nos.28 and 552 of 2010:

45. These appeals arise out of a challenge made by the Railways as well as by the contractor to the award bearing No.450/2000. The claim of the contractor was under 10 heads. The Arbitrator disallowed the head of claim No.7 and allowed all other claims. Therefore, the Railways filed O.P.No.564 of 2006 challenging the award in respect of the claims allowed. The contractor filed O.P.No.562 of 2006 in respect of the head of claim No.7 that was disallowed.

46. For easy appreciation, we give below in a tabular form the head of claim, the nature of the claim, the amount claimed by the contractor, reasoning given by the Arbitrator and the amount awarded under each head of claim.

Head of Claim	Nature	Amount claimed Rs.	Reasons of Arbitrator	Amount awarded Rs.
1	Refund of deposit amount withheld	74,000	Release of security deposit to the contractor as he was not at fault.	74,000
2	Compensation as damages for blocking of security deposit amount at an interest of 24% p.a. from 16.12.1999 to 15.12.2002	51,800	Maintenance period of 10 months reckoned from 01.6.2009 to 31.3.2000	20,600
3	Payment for deviation items executed	12,000	Timely processing of deviation items could have resulted in earlier payment by 01.6.1999 itself.	12,000
4	Compensation as damages for the loss due to delay in payment of amount towards deviation items executed at 24% p.a. from 01.10.1999 to 05.11.2002 on Rs.1,02,000/-	75,480	Compensation as damages for the loss awarded at Rs.12,000/- as on 22.11.1999. This is the sum denied for commercial exploitation over the period from 22.11.1999 up to date.	10,800
5.	Compensation as reliance damages for the loss of amount incurred by claimant by way of payment as wages to Watchmen deployed. Wages per day Rs.250/- Total No. of days Watchmen deployed 853.	2,13,250	The un-remunerated guarding expenses can be deemed to have been incurred by the claimant contractor over the period from April, 2000 to March, 2002 i.e. 24 months.	1,84,000/-
6	(a) compensation as damages for the loss due to blocking of claimant's investments in a non productive venture (b) Compensation as damages in form of interest @ 24% p.a. on the amount paid as wages Rs.2,13,250/- from 16.4.2002 to 15.11.2002. Further interest at 24% p.a. on summed up damages to till date of payment or date of decree.	60,900 29,855	The claimant's son productive expenditure towards wages to watchmen for guarding the assets could be taken as Rs.1,80,000/- on 01.4.2001	1,09,836

8	Expenses incurred for obtaining decretal order in the appointment of Arbitrator	10,000	Reasonable claim	10,000
9	Further interest at 24% p.a. on the summed up damages to till date of payment or date of decree	5,82,285	Interest up to date of award had already been included in the award indicated against claims 3 & 5. Further interest at 18% p.a. is allowed from the date of award on the summed up damages.	2,12,280
10	Cost of arbitration proceedings	19,279.50	The arbitration proceedings revealed that there had been breaches of contract and that the contractor need not have been driven to arbitration if at all the contract was dealt dispassionately and ensuring natural justice and fair play. In such scenario, the cost of arbitral proceedings, earlier indicated to be the charge on to the claimant contractor should borne by the respondents.	19,280

47. It may be seen from the above tabular column that the 9 heads of claims allowed by the Arbitrator can be grouped together under five categories namely: (i) non-refund of the security deposit; (ii) payment for certain deviation items; (iii) damages either for retention of security deposit or for the delay in payment towards

deviation items; (iv) compensation for the opportunity cost of blocking the investments and (v) interest on all the items put together. On the question of refund of the security deposit and on the question of payment for certain items of work in deviation of the original contract, the Arbitrator has given some reasons. Therefore, the Court below was right in refusing to interfere with the arbitral award, as the objections to the award in respect of these items, do not fall under any of the parameters of clauses (a) or (b) of sub-section (2) of Section 34 of the Act.

48. The compensation for wrongful retention of the security deposit, as awarded by the Arbitrator, also did not call for any interference, as the same is based upon the principle of unjust enrichment. Similarly, the compensation for the delay in payment for deviation items cannot also be interfered for the very same reason. The opportunity cost under the head of claim No.5, is perhaps on the fringe. But a court exercising jurisdiction under Section 34 is not a court of appeal. We may not agree with the Arbitrator in awarding a sum of Rs.1,84,000/- towards head of claim No.5. But, it does not give us the power under Section 34 to interfere with the same. The same is the case with the head of claim No.6.

49. The amount of award towards the interest under the head of claim No.9 is unsustainable. Once the Arbitrator has chosen to award compensation for non-payment of the value of the work in respect of deviation items and once the Arbitrator has awarded compensation for non-payment of the security deposit, the question

of awarding interest on both the amounts, is completely contrary to law.

50. But unfortunately, the judicial trend with regard to the arbitral awards is to permit no interference. As we have pointed out earlier, even an award, which is wrong in law or on fact, cannot be interfered with. Therefore, the court below was right in dismissing the application of the Railways in O.P.No.564 of 2006.

51. In so far as the head of claim No.7 disallowed by the Arbitrator is concerned, it pertains to turn over loss @ 5% on the total value of the work. The Arbitrator rejected the same and we think rightly on the ground that the element of profit @ 15% on the work value is already in-built. Therefore, there was no scope for interference under Section 34 of the Act. Hence, O.P.No.562 of 2006 was also rightly dismissed by the court below and we see no reason to interfere with the same. Hence, C.M.A.Nos.28 of 2010 and 552 of 2010 are also liable to be dismissed.

52. In view of the above, all the six appeals are dismissed. There shall be no order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

V. RAMASUBRAMANIAN, J

J. UMA DEVI, J

Date: 24-10-2018

Ak/Ksn

**HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE MS. JUSTICE J. UMA DEVI**



**C.M.A.Nos.1253 of 2009, 28 of 2010, 552 of 2010, 634 of 2011,
1106 of 2011 and 1219 of 2011**

(per V. Ramasubramanian, J)

24th October, 2018.
(Ksn)