IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.01.2019

CORAM:

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

Original Petition No.127 of 2010

M/s.Alam Construction,
Rep. By its Managing Partner,
Mr.Venkata Narayana,
D.No.6-1-710 Kovur Nagar,
Beside CVR School,
Anantapur Post & District 515 004,
Andhra Pradesh. ...Petitioner

Vs.

1.The General Manager,
Southern Railway,
Office of the Southern Railways,
Park Town, Chennai – 600 003.

2.The Chief Engineer (Construction),
Southern Railway, Park Town,
Chennai – 600 003.

3.The Deputy Chief Engineer (Construction),
Southern Railways,
Park Town,
Chennai – 600 003.

4.Mr.K.Alagirisamy,
Senior Advocate & Sole Arbitrator,
No.273, Addl. Law Chambers,
High Court, Chennai – 600 104. ...Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 31.08.2009 passed in Agreement No.381/CN 02.

For Petitioner : Mr.M.K.Kabir,
Senior Counsel
for Mr.A.Dhiravianathan

For Respondents : Mr.P.T.Ramkumar

<u>ORDER</u>

This Petition has been filed seeking to set aside the Award dated 31.08.2009 passed in Agreement No.381/CN 02.

2. The sum and substance of the issue in this Original Petition is with regard to the vitiation clause, namely, clause 25.1.0 of the Agreement entered into between the parties, which is extracted as below:

> "**25.1.0 VITIATION CLAUSE**
> In the event of Vitiation occurring due to increase or decrease in quantities among the first, second and third lowest valid tenderer, the vitiation shall be to contractor's account. The total value of the work done shall be calculated at the rate offered by those tenderers and the amount payable shall be limited to the lowest aggregate value as worked out.
> Vitiation as above shall be worked out as a whole for Agreement including all variations in quantities."

3. The case of the petitioner is that he was the successful bidder in the tender called for by the respondent/Southern Railways, for the work "KPD – PAK – TPTY GC Works, Yard remodelling at KPD Junction and MG Terminal facilities at Vellore cantonment – Phase I etc". The parties entered into an Agreement on 18.11.2002 for executing the above said work. The total value of the contract was Rs.1,49,63,362/- (Rupees One Crore Forty Nine Lakhs Sixty Three Thousand Three Hundred and Sixty Two Only) and the work had to be completed within a period of five months from the date of the contract being signed between the parties. It is the further case of the petitioner that he had to execute works over and above 25% of the actual quantity specified in the Agreement due to the variation that was effected by the respondent/Southern Railways in the Agreement. The variations were executed at the tender rate itself.

4. The respondent/Southern Railways, by communication dated 21.03.2006, informed the petitioner that a sum of Rs.8,10,130/- was liable to be deducted from the final bill payable to the petitioner, towards the vitiation that has occurred. Accordingly, a sum of Rs.6,80,939/- was adjusted from the final bill and thereafter a sum of Rs.1,29,991/- was recovered from the

Petitioner vide Agreement bearing No.624/CN/04.

5. According to the learned counsel for the petitioner, the Vitiation clause contemplates execution of quantities, where extras are involved due to variation in the work and correspondingly, there is an increase or decrease in quantities, and it presupposes three factors. Firstly, there must be vitiation from the original contract contemplated. Secondly, the quantities for such variation must be open to tender and finally, there must be difference (vitiation) in price between the first three lowest tenderers. In the event of variation in the tender for the varied quantities then, vitiation is calculated.

6. It is also represented by the learned counsel for the petitioner that the works were entrusted on overall rates and the same implies that the rate quoted is not subject to modification. According to the learned counsel, the tender submitted by the petitioner is a package and once the Railways has admitted the package, there cannot be any variation. In support of his case, learned counsel for the petitioner has relied on a decision of the Supreme Court in the case of **National Fertilizers vs. Puran Chand Nangia, (2000 (8) SCC 343)**, relevant portion of which, is extracted below:

> "**28.** We are of the view that the abovesaid clause "*±25%*" was understood by the arbitrator in a reasonable manner as being applicable to a case where the value of the

sum total of the additions and deletions exceeded 25% of the contract price. That construction, in our view, cannot be said to be vitiated by any serious error of law. The following are our reasons:

> When a contractor bids in a contract, he has to offer reasonable rates for the works which are both difficult to perform and other works which are not that difficult to perform. Every contractor tries to balance his rates in such a manner that the employer may consider his offer reasonable. In that process the contractor tries to get a reasonable margin of profit by balancing the more difficult (and less profitable items) and the less difficult (and more profitable items). His bid is, normally, a package. If the employer is permitted in law to make variations upwards and downwards — even if it be up to a limit beyond which market rates become payable — then the interpretation of the clause must be one which balances the rights of both parties. For example, if the plus and minus variations go beyond 25% and are made in a manner increasing the less profitable items and decreasing the more profitable items, and if the net result of the contract is to be the basis, as contended by the appellant, then it may work out that the contractor could be made to perform a substantially new contract on the same contracted rates. In fact, if the said reasoning of the appellant is accepted and if, in a given case, the value of the increases in unprofitable items is 50% of the contract value and the value of the reductions of the remaining more profitable items is 50% of the contract value, it could still be contended for the appellant that the net variation was nil, even though that was a situation where the contract had been substantially modified and was almost a different contract from the one stipulated. Such an unreasonable construction is to be avoided and was rightly avoided by the arbitrator.

29. The additions and decreases in work are, in our

> opinion, therefore both independent for the purpose of finding out the ± 25% variation and have to be pooled together. The arbitrator was right in thinking that the case fell within the exception. Obviously, he must have felt that the plus and minus variations are more than 25% and that the contract rates are no longer binding. His construction of the clause appears to be rational and just and cannot be said to be unreasonable.
>
> **30.** In the result, the interpretation put on the clause by the arbitrator appears to us to be quite reasonable and very plausible and it cannot therefore be said that the award is vitiated by any error of law affecting his jurisdiction. In fact, the learned District Judge found that the total variation — both upwards and downwards was more than 100% of the contract price. For the aforesaid reasons, we are of the view that Points 1 and 2 should be answered in favour of the respondent contractor."

7. Learned counsel for the petitioner has also relied upon a Division Bench decision of this Court in the case of Union of India, owning **Southern Railway vs. Best Cast Construction (Private) Limited, 2010 (2) MWN (Civil) 349,** wherein, it is held that in the absence of rules and guidelines pertaining to the constitution and avoidance of vitiation and its occurrence during execution, the same is not enforceable. It is his further contention that the Arbitrator has wrongly applied the vitiation clause against the petitioner and thereby a sum of Rs.8,10,130/- was deducted from the amount due to the petitioner. Having admitted the original rates, which are constant, the same cannot be reduced after the completion of the contract. The Arbitrator ought to have noticed that even though the petitioner has given a letter of consent on 07.04.2006, it does not amount to agreeing for application of Vitiation

Clause mentioned supra. The petitioner had to sign the contract, following which, the work would not be altered and hence, it has to be considered that the Agreement had been signed under duress and compulsion.

8. Learned Standing Counsel appearing for the respondents/Southern Railways submitted that the decisions relied on by the learned counsel for the petitioner/contractor are not relevant to the facts of the present case, as it deals with price variation and not price vitiation. He further submitted that when the Contract was signed on 18.11.2002, the petitioner had raised bills and at the time of raising the bills, he raised contentions with regard to vitiation clause. The petitioner, being a contractor of the Southern Railways, is well aware of the vitiation clause mentioned in the Agreement and the procedure being upheld by the Southern Railways with regard to variation and consequent vitiation thereof.

9. Learned counsel appearing for the respondent further submitted that the Respondent/Southern Railways is a Government organization dealing with money and in an attempt to safeguard the interest of the public Exchequer, it has incorporated the vitiation clause in the Agreement entered into with the Petitioner/Contractor. According to the learned counsel, after the completion of work, the overall quantities executed are compared with the rates quoted

by the first three valid lowest tenderers and once the original tender position is vitiated, the difference amount has to be borne by the Contractor to whom the work is awarded. Clauses under the Agreement are common to all the tenderers, who have participated. Clause 25.1.0 was available even at the time of tender and it was not included as a new clause at the time of executing the main Agreement.

10. It is further stated by the learned counsel appearing for the Respondent/Southern Railways that the Petitioner has sent a communication dated 07.04.2006 to the Respondent/Southern Railways and as per the said request and based on his assurance for recovery of the balance money, the claim was duly adjusted at that point of time. The petitioner has never objected at the time of participating in the tender and signed the documents without protest. Thus, according to the learned counsel, it is clear that the petitioner was aware of the vitiation clause at the time of signing the Agreement itself. However, the Petitioner made the claim only after the completion of work, which cannot be accepted.

11. In reply, learned counsel for the petitioner reiterated his contention that under the Building and Engineering Contract, any tender submitted by the Contractor is a package. The rates for each item in the

Contract is quoted by the contractor taking into consideration the availability of modern equipments and the expertise. Between contractors, the rates become variable for a particular item depending upon the aforesaid factor. Hence, no two tenders can be identical in nature in relation to a particular item of work, as according to tenderers, those which are difficult will be quoted higher and those which are easy will be quoted lower and thus, the question of comparing two tenders does not arise.

12. Learned counsel for the Petitioner went on to state that amount has been illegally and unlawfully withheld under the final bill dated 01.12.2003. In order to suit the convenience of the Respondent/Southern Railways, they have taken into consideration the lowest rate quoted by the second lowest tenderer in respect of a particular item of work, wherein the rate quoted by the petitioner is higher and have unilaterally deducted the differential amount which has been arrived at. When the Petitioner has executed the work and the Respondent/Southern Railways being benefited by the same, the Petitioner is entitled to payment for the entire work done. Any deduction made from the final bill would tantamount to obtaining the execution of the work free of charges. Hence, the petitioner is entitled to refund of a sum of Rs.8,10,130/- which was deducted from the final fill and the respondent/Southern Railways

cannot adjust the amount from various other contracts that have been allotted to the petitioner.

13. Heard the learned counsel for the parties and perused the material documents available on record.

14. It is not in dispute that the petitioner is a successful tenderer and that the petitioner has signed the contract, which contains clause No.25.1.0, namely, the vitiation clause, which is extracted supra. The petitioner has made a claim on 03.05.2006 after executing the contract and has sent a letter to the Respondent/Southern Railways to deduct the amount due to the Railways in terms of the said clause. The petitioner is aware that in view of the vitiation clause, certain items would have to be taken into account and that the lowest tender amount will be ascertained from the other tenderers. The petitioner having accepted the same and signed the contract with eyes wide open, cannot come forward as an afterthought and try to blame the Respondent/Southern Railways. It is not as if the vitiation clause was introduced after the contract was signed. If the petitioner was not willing to participate in the tender, he could have avoided the same. Having participated in the tender, he is bound by the terms of the Agreement and the Arbitrator has rightly taken note of the Petitioner's consent letter dated 07.04.2006 with

regard to the amount due to the Railways in terms of the vitiation clause extracted supra. Section 28 of the Arbitration and Conciliation Act, 1996 existed prior to substitution with effect from 23.01.2006.

15. For the sake of convenience, Section 28 of the Arbitration and Conciliation Act, 1996 (after amendment) is extracted below:

28. Rules applicable to substance of dispute.—

(1) Where the place of arbitration is situate in India,

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
(b) in international commercial arbitration,—

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) In all cases, the Arbitral tribunal shall decide in accordance with the terms of the contract and shall take

> into account the usages of the trade applicable to the transaction.

16. Prior to amendment, sub-Section (3) of Section 28 of the Arbitration and Conciliation Act, 1996, read as under:

> "28(3). While deciding and making an award, the Arbitral Tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

17. In terms of the provisions that existed at the time of signing the contract, it is made very clear that the Tribunal shall decide the issue in terms of the contract and take into account the usage of the trade applicable to the transaction. In view of the same, the petitioner is bound by clause No.25.1.0 of the Agreement. At the risk of repetition, this Court observes that taking note of the petitioner's consent letter for deduction dated 07.04.2006 and that the claim has been made after deduction, only on 06.05.2006, the parties are bound by the contract in terms of Section 28(3) that existed on the date of signing of the Agreement.

18. Thus, this Court is of the view that the petitioner is not entitled to any relief and therefore, the Award dated 31.08.2009 passed by the Sole Arbitrator is upheld.

In the result, the Original Petition is dismissed. No costs.

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Speaking Order : Yes

(tsg)

S.VAIDYANATHAN,J.

(tsg)

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