Reserved on :26.06.2019

Pronounced on :01.07 .2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Original Petition No.305 of 2010

Union of India represented by
The Chief Engineer,
Metropolitan Transport Project/Railways,
Chennai – 600 008. ... Petitioner

Vs

1. M/s.S.K.Swamy and Co.,
No.30/9, Rajmahal Vilas Extension,
Bangalore – 560 080.

2. Mr.D.P.Dash,
Deputy Chief Electrical Engineer/C&D,
Integral Coach Factory/Fur.,
Chennai – 600 038.
(Presiding Arbitrator)

3. Mr.N.Nandakumar,
Deputy Chief Electrical Engineer,
Head Quarters, Southern Railway,
Chennai – 600 003.
(Co-Arbitrator)

4. Mr.V.Murali Mohan,
Deputy Financial Adviser & Chief
Accounts Officer/Shell,
Integral Coach Factory,
Chennai – 600 038.
(Co-Arbitrator) ... Respondents

Prayer :- This Original Petition has been filed under section 34 of the Arbitration and Conciliation Act to set aside the Award of Respondents 2 to 4 dated 06.11.2009 made in relation to the disputes arising out of the Agreement dated 12.09.2003 bearing No.310/CN/2003 between the petitioner and the first respondent.

For Petitioner : Mr.P.T.Ramkumar

For Respondents : Mr.K.Harishankar – R1

ORDER

Challenging the Award passed by the Arbitral Tribunal dated 06.11.2009, particularly in respect of the claim Nos.1, 3, 6(b) and 8.

2. The respondent was awarded a contract for design and construction of Road Under Bridge of inside dimensions as 12.00 m x 4.075 and about 39.10m. Long. The above Award was awarded on 09.03.2003 and the date of completion of work is on 18.02.2004. The contracts were submitted belatedly to the contractor. Hence, the respondent could not discharge the contractual obligations due to the delay caused on the side of the Department. Subsequently, additional time was granted for a further period of 13 months to complete the contract. Accordingly, the following claims have been claimed by the Claimant :

1) Compensation for increased cost of working due to un-workability, beyond the original time of 11 months, which expired

on 18.02.2004 (excluding steel increase claim) for a sum of Rs.53,99,344/-.

2) Compensation for idling of establishment non-utilization under utilization etc. on staff, workers, plant, machinery, equipments etc. deployed on the work including watch and ward a sum of Rs.13,55,350/-.

3) Compensation for payment of difference in market price and tendered price for steel and M.S. Plates used in the work, a sum of Rs.22,71,818/-.

4) Compensation of Proprietor's regular expenditure incurred but not recouped (Rs.15,000.00x13 months), a sum of Rs.1,95,000/-.

5) Compensation for loss of profit of 15% of the contract value of Rs.1,83,60,601/-, a sum of Rs.27,54,000/-.

6) Compensation for any other losses that will be suffered till completion/determination of the work and up to receipt of final payments etc. a sum of Rs.39,28,500/-.

7) Compensation for loss of earning on Block of working capital vide claim 1 to 6 above, 30% P.A. from 01.03.2004 to realization.

8) Interest on all the above claims at the rate of 24% p.a. from 01.03.2004 to realisation.

9) Payment of equivalent amount blocked vide above claims for an equivalent period (starting from 01.01.2004 to the actual date of final settlement)

10) Cost of legal charges and other connected expenditure a sum of Rs.50,000/-.

3. Though the contract was originally executed with a specific time for completion, physical hand over of the work site was done on 05.03.2004. This fact is not in dispute. The Arbitral Tribunal has awarded Rs.17,89,780/- by increasing 10% of the value of the work in Claim No.1. Similarly, the Arbitrators also awarded compensation for payment of difference in market price and tender price, a sum of Rs.20,70,000/- in Claim No.3. In claim No.6(b), the Arbitrators have also awarded a sum of Rs.10,35,000/- towards admitted work done by the contractor. Besides, towards claim No.8, they have awarded interest at the rate of 9% from 26.09.2005 payable till the date of Award on all the claims.

4. The main contention of the learned counsel appearing for the petitioner is that originally, time for completion of the contract was extended without any penalty vide clause 17(2) of General Conditions of the Contract and necessary rider agreement was also executed by the Contractor wherein it has been agreed to execute the work during the extended currency period on the same terms and conditions of the agreement. Therefore, when the Contractor has agreed to

complete the work on the same terms and conditions of the contract, the Arbitrator awarding compensation towards additional work is beyond the terms of the contract. It is his further contention that though the contract could have been terminated and woundup the work at the inception itself, when the work was not done or could not be completed before the stipulated time as per the agreement, the very fact that the contract was extended at the same terms of the original contract and executing the rider agreement makes it clear that the Contractor is bound by the contract, therefore, the Contractor entitlement of additional cost is certainly beyond the terms of the contract.

5. The next contention of the learned counsel with regard to claim No.3 is that the contract does not contain the price variation clause. Therefore, the Arbitrators ought not have awarded for the said claim. Similarly, compensation awarded under the Head 6(b) for additional work is also beyond the terms of the contract. The tender conditions did not include such work. Therefore, it is his contention that the above amount is also beyond the contract. As far as interest awarded in Claim No.8, it is the contention of the learned counsel that the General Contract Conditions bars awarding any pendentilite interest. When the parties are bound by the contract, the Arbitrator awarding interest is not accordingly to law.

6. Whereas, it is the contention of the learned counsel for the respondent that the Arbitrators have considered the entire issue and factually found that the entire delayed work was due to the employer and they have reasonably interpreted clause 17(2) of the Contract. The delay, in fact, lead the claimant to execute the work and during the period the cost of construction materials has increased. When the Arbitrators have reasonably interpreted the contract on the basis of the factual matrix, this Court cannot re-appreciate the evidence and interfere the Award. As far as compensation awarded under PVC, it is his contention that the learned Arbitrators have considered the fact that the steel price have been shoot up and analysed the evidence and awarded just compensation and the same cannot be interfered. Similarly, the work is also carried out, which has not been denied. Therefore, the Arbitrators have rightly awarded compensation under claim 6(b) which cannot be interfered. As far as interest is concerned, it is his contention that unless there is a specific agreement between the parties to waive interest or if there is a bar for awarding interest, the Award of interest, particularly, pendentilite interest cannot be faulted.

7. It is not in dispute that originally the Letter of Acceptance was given on 19.03.2003 for completion of the work within a period of 11 months, i.e., on or before 18.02.2004. The work pertains to the construction of Road Under Bridge. The total cost of the contract is Rs.1,83,63,601/-. The extension of performance was extended upto 18.03.2005, for a period of 13 months against the original

contract of 11 months, in one go, without penalty. The Arbitrators have rightly recorded that the physical hand over of the work site was done on 05.03.2004 and the delay was not attributable to the Contractor and the delay was mainly due to prolonged discussions with the Ministry of Defence. The above facts makes it clear that original contract period is already over. However, the Contractor has agreed to complete the work in the same terms and conditions of the original contract. In fact, he has specifically signed and executed the rider agreement on the same terms and conditions of the original contract. The Claimant, in fact, admitted signing of the Rider Agreement. However, submitted that it has been signed only to fulfill the contractual formalities and same would not tantamount to free consent.

8. Admittedly, the Rider Agreement has been signed by the Contractor on 03.03.2004, much after the period originally agreed in the Letter of Acceptance dated 19.03.2003. When the Contractor has consciously agreed to complete the work with the same conditions set out in clause 17(2) of the General Conditions of the Contract, Clause 17(ii) of General Conditions of the Contract makes it clear that no other compensation shall be payable for works so carried forward to the extended period of time, the same rates, terms and conditions recommended in the original contract itself. When the Contractor consciously entered into a contract on the same terms and conditions of the earlier contract to complete the work even after the period of the original contract had expired, now he cannot

contend that he is entitled for compensation, when he is bound himself by the contract that no compensation is payable for the works so carried forwarded for the extended period of time, he is bound by the original contract. The claim made by the Contractor for the additional work on the ground that the original contract could not be completed and the delay was attributed to the employer. Having understood the delay and the reasons for such delay and consciously entering into the contract on the same conditions, now awarding compensation for the additional work for the extended period is certainly beyond the scope of the contract. The parties are bound by the terms of the contract and taken conscious decision to bound by the contract, the Arbitrators awarding compensation, in my view, is beyond the scope of the contract. Therefore, the compensation awarded under Claim No.1 is certainly liable to be interfered. Accordingly, the same is interfered.

9. With regard to the price variation, the learned Arbitrators have in fact factually found that there was variation in steel price, particularly, there was escalation in steel price and it is also not disputed by the respondent the nature of the steel used and hence, such excess amount has to be reimbursed. When the Arbitrators have reasonably arrived at such a conclusion, merely because, there is no price variation clause in the contract, when the actual contract is not disputed and escalation in price is also not disputed and escalation in price has also been established by documentary evidence, merely on the ground that there

is no PVC in the contract, the claim of the Contractor cannot be non-suited. The Arbitrators, infact has factually found that there is escalation of price in steel, therefore, the claim No.3 in the petition has to be necessarily dismissed. As far as the claim No.6(b), it is the contention of the learned counsel that the work done not included in the tender condition and periodical report also not sent by them. Therefore, the above claim is also beyond the scope of the contract. The Arbitrators have found that the works executed is not in dispute. The nature of the work completed by the Contractor is not disputed by the parties. In fact, the Arbitrators have compared the original rate calculated in the tender agreement as to the real work and nature of work done by the Contractor and awarded the amount as per the original rates calculated in the tender. Since the work completed is not in dispute, the Award of the Arbitrators is well reasoned and does not require any interference. Accordingly, the petition on this ground is also dismissed.

10. As far as claiming pendentilite interest, it is the contention of the learned counsel that the Arbitrators have specifically Awarded pendentilite interest. Clause 16(3) of the General Conditions of the Contract reads as follows :

> "No interest will be payable upon the Earnest Money and Security Deposit or amounts payable to the Contractor under the Contract, but Government Securities deposited in terms of Sub-

Clause (1) of this clause will be payable with interest accrued thereon.

Similarly, clause 64(5) of General Conditions of the Contract reads as follows :

> "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."

Appreciating the above two clauses, it is the contention of the learned counsel for the petitioner that awarding pendentilite interest by the Arbitrators cannot be sustained in the eye of law.

11. Whereas, it is the contention of the learned counsel for the respondent in this regard is that the Apex Court in the judgment in **Reliance Cellulose Products Limited Vs. Oil and Natural Gas Corporation Limited** reported in **2018 (9) Supreme Court Cases 266** enumerating clause 16 of the General Conditions of the Contract has held that grant of pendentilite interest depends upon the phraseology used in the agreement, clauses conferring power relating to the arbitration, the nature of the claim and dispute referred to the arbitrator and on what items the power to award interest has been taken away and for which period. According to the learned counsel, unless when there is a

specific agreement between the parties, which debars the parties from claiming any interest, there is no bar for the Arbitrator for awarding pendentilite interest. Hence, it is his contention that in the above judgment similar condition set out in Clause 16 of the General Conditions of the Contract and as such the said clause will not bar Arbitrator from awarding interest.

12. Whereas, the learned counsel appearing for the respondent would contend that the judgment in **Reliance Cellulose Products Limited Vs. Oil and Natural Gas Corporation Limited** reported in **2018 (9) Supreme Court Cases 266** has been referred in the subsequent judgment of the Apex Court in the judgment in **Jaiparakash Associates Ltd. (JAL) through its Director Vs. Tehri Hydro Development Corporation India Ltd. (THDC), through its Director** reported in **2019 (2) CTC 577**, the Larger Bench of the Apex Court considering Clause 50 and 51 General Conditions of the Contract which bars the Arbitral Tribunal to award interest and finally held that when there is express bar against awarding of pendentilite interest by the Arbitrator and the same is not according to the contract and held that the clause barring interest is very widely worded. It uses the words "any amount due to the Contractor by the Employer" and these words cannot be read as *ejusdem generis* along with the earlier words "Earnest Money" or "Security Deposit" by holding so, the Apex Court has held that when the contract stipulates bar of interest, pendentilite interest cannot be Ordered. Similar view was taken in the judgment of the Larger Bench of the Apex Court in

Bharat Heavy Electricals Limited Vs. Globe Hi-Fabs Limited reported in **2015 (5) Supreme Court Cases 718**. Similarly, in the judgment in **Reveechee and Company Vs. Union of India** reported in **2018 (7) Supreme Court Cases 664**, the Larger Bench of the Apex Court has held that in the absence specific bar to grant interest, there is no bar for the Arbitrator to Award interest.

13. This Court also occasioned to consider the pendentilite interest in Original Petition No.334 of 2019 wherein, this Court relying on the judgment in **DEPUTY CHIEF ENGINEER (CONSTRUCTION), SOUTHERN RAILWAY, PODANUR VS. VISHAL CONSTRUCTIONS AND ANOTHER** reported in **2018(3) CTC 285** and unreported judgment of this Court in a case in **THE DEPUTY GENERAL MANAGER/GENERAL, SOUTHERN RAILWAY, CHENNAI-3 AND ANOTHER VS. STRONG ENGINEERING CONTRACTORS, TIRUCHIRAPALLI in O.P.No.397 of 2018, dated 29.6.2018,** has held that when there is specific clauses in the contract wherein the parties have agreed to waive their right to claim interest and has set aside the pendentile interest awarded by the arbitrator.

14. Hence, in the present case, the General Conditions of the Contract makes it very clear from the clauses referred that no interest shall be payable for any money payable during the arbitration proceedings. In view of the specific covenant binding on the parties, the Arbitrators awarding pendentilite interest at

the rate of 9% from 26.09.2005, i.e., from the date of Arbitration up to the date of Award, is set aside.

15. Accordingly, this Original Petition is partly allowed by setting aside the Award in respect of claim No.1 and 8. As far as the other claims are concerned, the Award is confirmed. No cost.

01.07.2019

Index : Yes/ No
Internet : Yes
Speaking/Non-speaking Order

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To

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N.SATHISH KUMAR, J.

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