

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 29.07.2019

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR**O.P.No.498 of 2011**

1. Government of India
Represented by the General Manager,
Administrative Office,
I.C.F., Perambur,
Chennai – 600 038.

2. I.C.F. Represented by
its Chief Engineer (Civil)
Administrative Office,
I.C.F., Perambur,
Chennai – 600 038.

3.I.C.F. Represented by
its Executive Engineer (Civil)
Administrative Office,
I.C.F., Perambur,
Chennai – 600 038.

...Petitioners

Vs

1. A.N.Kumar

2. Hon'ble Mr.Justice A.S.Venkatachalamoorthy
(Former Chief Justice, High Court of Chhattisgarh)
(Sole Arbitrator)
No. V- 87, 5th Avenue,
Anna Nagar,
Chennai – 600 040.

... Respondents

Prayer:- Original petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the portion of the

Award of the Learned 2nd Respondent dated 23.05.2010 made in relation to the disputes arising out of Agreement No.ICF/842 in so far as the Award of pre-reference and pendente lite interest under claim 20, in the sum of Rs.5,58,582/- is concerned.

For Petitioners : Mrs. T.P.Savitha
For Respondents : Mr.T.Sivaprahasam for R1.

ORDER

This original petition has been filed to set aside the portion of the Award of the Learned 2nd Respondent dated 23.05.2010 made in relation to the disputes arising out of Agreement No.ICF/842 in so far as the Award of pre-reference and pendente lite interest under claim 20, in the sum of Rs.5,58,582/- is concerned.

2. Heard both sides.

3. This petition has been filed to challenge the award passed by the Arbitrator in respect of *pendente lite interest awarded* at the rate of 9% p.a. from 1.1.2000 till the date of the award and thereafter at the rate of 12% per annum till the date of realization. As far as, pendente lite interest is concerned, when the contract prohibits the

claim of any interest, such interest cannot be awarded under Clause 16(2) and Clause 64 of General Conditions of Contract also makes it very clear that interest cannot be ordered.

4. With regard to the pendente lite interest, it is useful to refer judgment of this Court reported in **2018 (3) CTC 285 (supra)** which reads as follows:

*"14. The Interest Act, 1978, was introduced to consolidate the allowance of interest in certain cases. The provisions of the Act do apply to Arbitral Tribunal, subject to other laws and covenants in the agreement. Section 3 speaks about the power of the Court to allow interest. Under Section 4, interest shall be payable by virtue of an Act, Rule or usage having the force of law. As per sub-clause (2), the Court can award interest, but without prejudice to the provisions of sub-section (1). Therefore, when there is a Rule or an Act or usage having force of law, Section 4 does not have any application. The Interest Act, 1978, cannot be construed to be one in conflict with the GCC. The conditions are binding in nature having force of law. Similarly, the Interest Act also will have to be taken as the one in operation without violating the provisions of the Arbitration Act. **It is well settled that even a right created under the statute can be waived by agreement.** Thus, the payment of interest having been*

waived by accepting the terms and conditions cannot be agitated for the first time before the Tribunal. **After all, the role of the Tribunal is to adjudicate the right of the parties under the contract** and in order to set at naught its provisions, the other decisions viz., CWHEC-HCIL (JV) v. CHPRCL (CDJ 2017 DHC 640); S.K. SHARMA v. CHANDER PRAKASH ARORA (CDJ 2012 DHC 2017); VENTURE GLOBAL ENGINEERING v. SATYAM COMPUTER SERVICES LTD. (CDJ 2010 Supreme Court 693); P. GOPIRATHNAM v. FERRODOUS ESTATE (PVT) LTD., REP., BY ITS POWER OF ATTORNEY HOLDER SRI G. JOHN ARTHUR (CDJ 1999 MHC 502); NHAI v. HINDUSTAN CONSTRUCTION CO., LTD., (CDJ 2017 DHC 540); NORTH DELHI MUNICIPAL CORPORATION v. PREMCHAND GUPTA (AIR 2017 DELHI 171) and KAUSHAL KISHORE MISHRA v. STATE OF U.P., (CDJ 2018 ALL HC 020) relied upon by the learned counsel appearing for the first respondent also are of no help.

22. We are concerned with the power of the Tribunal to pass an award for interest prior to the pronouncement when it involves payment of money. When once the role of the Tribunal is defined and thus, prohibited from going into certain claims, the same cannot be allowed in a different form. Otherwise, it will amount to setting aside the very clauses themselves. When it is found that the clauses are not unlawful and entered into voluntarily by the parties, then the Tribunal will have to give effect to it rather than go against. The same logic applies to this

Court as well. When the Tribunal exceeded its jurisdiction and undertakes such an exercise, then the power under Section 34 of the Arbitration Act has to be exercised with certainty."

5. Similarly, in an unreported judgment of this Court in **THE CHIEF ENGINEER/CN/ SOUTH/Ms, SOUTHERN RAILWAY AND ANOTHER VS. M/S.M.R.K.R. RAIL ONE (J.V.), HYDERABAD (O.P.No.1067 of 2018, dated 8.4.2019**, this Court held that when the contract is specific and the parties have agreed to waive their right to claim interest, terms of the contract has to be given effect to and this Court considering the terms of the agreement, set aside the award in respect of the *pendente lite interest* alone.

6. Similarly, yet another unreported judgment of this Court in the case of **THE DEPUTY GENERAL MANAGER/GENERAL, SOUTHERN RAILWAY, CHENNAI-3 AND ANOTHER VS. STRONG ENGINEERING CONTRACTORS, TIRUCHIRAPALLI (O.P.No.397 of 2018, dated 29.6.2018**, this Court held as under:

"5. Learned counsel for the petitioner drew the attention of this Court to clauses 16(3) and 64(5) of the General Conditions of Contract which reads as follows;

' 16).....

.....

(3) 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.'

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 herein before and in the presence of prohibition contained Clause 16(2)(old) & 16(3) (modified) of GCC which are similar and identical."

6. Under the respective clauses, it is clear that the contract does not stipulate payment of pendente lite interest for the sums due and payable under the Contract.

*7. Mr.P.T.Ramkumar , the learned counsel for the petitioner drew the attention of this court to a decision of this Court dated 2.2.2018 in the case of **Deputy Chief Engineer (Construction), Southern Railway, Podanur Vs. Vishal Constructions, represented by its Proprietor B.Vijayakumar and another reproted in***

2018(3) CTC 285 following various decisions of Supreme Court as well as our High Court held that when the Contract specifically bars payment of interest, no interest is payable for any sum of money due and payable under the Contract.

8. Following the Supreme Court decisions and our High Court decision, the learned Single Judge, in the judgment cited supra, allowed the section 34 application. The case on hand is similar to the decisions cited supra reported in 2018 (3) CTC 285. Since the Arbitrator has gone beyond the scope of the contract by awarding pendente lite interest, the Award will have to be set aside. Learned counsel for the petitioner submits that subsequent to passing of the Arbitral Award which is under challenge before this Court, the petitioner has already paid a sum of Rs.20,57,829/- to the respondent as directed by the Arbitrator and the petitioner is aggrieved only with award of the Arbitrator in respect of pendente lite interest at the rate of 10% per annum."

7. Having regard to the aforesaid judgments and also there is specific clauses in the contract wherein, the parties have agreed to waive their right to claim interest, I am of the view that the award passed by the Arbitrator in respect of the *pendente lite interest* awarded at the rate of 9% p.a. from 1.1.2000 till the date of the

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award and thereafter at the rate of 12% per annum till the date of realization alone is set aside.

8. Accordingly, the original petition is partly allowed. The award passed by the learned Arbitrator, dated 23.05.2010 in respect of the *interest portion alone is set set aside*. In all other aspects, the award is confirmed. No costs.

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

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