

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.07.2019

CORAM

THE HONOURABLE MR. **JUSTICE N.SATHISH KUMAR**

**Original Petition No.516 of 2011
and O.P.No.284 of 2013**

S.K.Ramkumar

.. Petitioner in O.P.No.No.516 of
2011 and respondent in
O.P.No.284 of 2013

Vs.

1. Union of India
rep. by its
General Manager, Southern Railway,
Park Town,
Chennai - 3.

2. The Chief Engineer,
Construction,
Southern Railway,
Egmore,
Chennai - 8.

3. The Dy.C.E., Gauge Conversion,
Southern Railway,
Manamadurai - Madurai Division,
Arasaradi, Madurai.

.....Respondents
in O.P.No.No.516 of 2011 and
Petitioners in O.P.No.284 of 2013

4. Shri. S.Venkatesan,
Chief General Engineer, Southern Railway,
Park Town, Chennai - 3 & Presiding Arbitrator

5. Smt.K.Hema Suneetha, Dy.FA&CAO
Headquarters, Southern Railway,
Park Town, Chennai - 3 & Arbitrator

6. Shri. R.B.Udayakumar,
 Chief Project Manager, Railway Electrification,
 Southern Railway, Egmore, Chennai - 8. Respondents
 in O.P.No.No.516 of 2011 and
 O.P.No.284 of 2013

Prayer in O.P.No.516 of 2011: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award of the arbitrators dated 23.11.2009 arising out of the agreement No.423/CN/04 dated 15.09.2004 entered into between the petitioner and the respondent in respect of Claim No.1 - Final bill for the earth work executed by own earth and also railway earth to the extent of the quantity prayed for to be settled as per this petition and to grant relief of other claims awarded but not paid by the respondent viz., Claim No.3, 4 and 5 with interest compensation.

Prayer in O.P.No.284 of 2013: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award of respondents 2 to 4 dated 23.11.2009 made in relation to the disputes between the petitioners and the 1st respondent pertaining to agreement dated 15.09.2004 bearing No.423/CN/2004 in so far as Claim No.3, 4 and 5 are concerned.

For Petitioner in
 O.P.No.No.516 of 2011
 and for respondents in
 O.P.No.284 of 2013 : Mr.V.Sivakumar for
 R1 in O.P.No.284 of 2013

For Respondents in
 O.P.No.No.516 of 2011
 and for petitioners in
 O.P.No.284 of 2013 : Mr.P.T.Ramkumar
 for R1 to R3 in O.P.No.516 of
 2011 and for petitioners in
 O.P.No.284 of 2013

COMMON ORDER

O.P.No.284 of 2013 has been filed to to set aside the award of respondents 2 to 4 dated 23.11.2009 made in relation to the disputes between the petitioners and the 1st respondent pertaining to agreement dated 15.09.2004 bearing No.423/CN/2004 in so far as Claim No.3, 4 and 5 are concerned.

2. The learned counsel for the petitioner factually submitted that the claim No.1(b) awarded by the learned Arbitrator to the tune of Rs.30,91,500/- has been paid by the Railways. Similarly, Claim No.2 to a sum of Rs.1,93,086/- has been paid and they are not challenging the above claim. It is his contention that the challenge under Claim No.3 with regard to ideal higher Charges of 3 poclains etc and pendente lite interest.

3. The learned counsel for the petitioner submitted that they are confined only to the Claim.Nos.3,4,5. It is his contention that the pendente lite interest cannot be ordered. Similarly, Ideal charges is also excess.

4. Since the claim No.1 and 2, there is no challenge that has been paid. As far as claim No.3, the ideal charges is concerned having the counter statement, the defence extracted in the arbitration award dated 23.11.2009 is as follows:

" From the 7 days notice issued, the Arbitration Tribunal observed that within a period of 4 months from the date of award of the contract, the respondent was issued with 7 days notice forcing the Claimant to complete the entire agreement quantity including the widening of the bank to meet the requirement of the respondent though the Letter of Acceptance issued in favour of the Claimant despite it being valid for a period of 12 months and expiring only by 1.8.2005"

"The Arbitration Tribunal observed that the Claimant had shown adequate progress than what was anticipated within a period of 3 months and completed more than 13000 cu.m of own earth on various locations within a short period from the date of award of the Letter of Acceptance.

"The urgency imposed by the Respondent for completing the widening of the bank in a shorter period than the original stipulated period upto 1st August, 2005 was also considered by the Arbitration Tribunal. The Claimant is not at fault because as per agreed terms of contract, the work including the bank was to be

completed before 1.8.2005. Advancing the schedule of completion by 7 months ahead of the original period of contract itself proved that the Claimant was compelled to do the urgent nature of work to meet the requirement of the respondent."

The Claimant had also stated that instructions were given by the respondent to excavate the earth from the railway land to meet their urgency to complete the work before CRS's inspection scheduled during middle of April, 2005. The Claimant had protested that the work was not covered under the agreement. The Respondent viz., the Dy.C.E./GC, Manamadurai had specifically forced the Claimant for completion of the work by April, 2005 using the railway earth and also promised that the loss incurred by way of installing more machineries and workmen will be compensated properly. The letter No.W/148/GC/MDU-MNM dated 21.09.2005 by Dy.CE/MNM clearly confirms that the work undertaken by the Claimant for taking earth from the railway land is only on their instruction. The Claimant further submitted to the court that in view of the pressure put forth by the respondent for completing the work, the Claimant incurred extra expenditure and the loss by engaging more heavy machineries such as 3 poclains and more labourers for 24 hours in a day shift basis and also drawn capital resources from outside borrowers in addition to the bank and thereby sustained a huge loss of

Rs.80 lakhs on this account which is required to be compensated by the Respondent."

5. The above facts makes it very clear that infact, the claimant was asked to complete the work prior to the contract period. Taking note of the above facts, the learned Arbitrator in Claim No.3 ideal charges, he has considered the entire evidence and considered their admission on the side of the Railways as to the share of the 3 poclains and payment of share charges and finally awarded a sum of Rs.2,00,000/-. When the learned Arbitrator factually found that such amount is payable, I am of the view that the same cannot be interfered. There is no possibility to re-appreciate the above evidence. Hence, claim No.3 is confirmed.

6. 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."*

7. 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.

8. 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 hereinbefore 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** reported 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.

9. Having regard to the aforesaid judgments and also there is specific clauses in the contract, I am of the view that the Arbitration award awarding pendente lite interest alone is set aside.

10. Accordingly, the original petition No.284 of 2013 is partly

allowed. The award passed by the learned Arbitrator, dated 23.11.2009 in respect of the *interest portion alone is set aside*. In all other aspects, the award is confirmed. No costs.

11. As far as O.P.No.516 of 2011 is concerned, the learned counsel for the petitioner submitted that in view of the order passed in other O.P.No.284 of 2013, no further order is required in this petition and requests the same may be closed.

12. Accordingly, O.P.No.516 of 2011 is closed. No costs.

09.07.2019

msv

Index:Yes/No

Internet:Yes/No

Speaking order: Non-speaking order

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Park Town,
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WEB COPY

N.SATHISH KUMAR,J.

msv

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