

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.07.2019

CORAM

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

Original Petition No.1019 of 2015

M/s.Subalakshman Unique Builders(JV)
Arakkonam.

.... Petitioner

Vs.

1.Union of India,
Rep by the Deputy Chief Engineer,
Construction, Southern Railway,
Podanur, Coimbatore.

2. Mr.A.Selvaraj
General Manager (Finance)
Delhi Metro Rail Corporation,
GCDA Tower (Second Floor),
kochin-682 016
Kerala State.

3.Smt.Manjula Rangarajan
Financial Advisor and Chief Accounts officer,
Head Quarters Office, Southern Railway,
Park Town, Chennai-600 003.

4.Mr.A.K.Khandelwal
Executive Director/L & A-II,
R.No.162, Rail Bhovan, New Delhi-110 001.
(Amendment as per order dated 17.2.2016 in A.No.7680 of 2016)

... Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 the original award of the learned Tribunal/the respondents 2 to 4 dated 07.02.2015 and corrections dated 26.03.2015 to the original award in the arbitration proceeding between the petitioner and the 1st respondent to the extent it dis-allowed the claims of the petitioner and allows the counter claims of the 1st respondent may be set aside.

For Petitioner : M/s.K.K.Muralitharan

For Respondents : Mr.P.T.Ramkumar

ORDER

Challenge has been made to the award of the Arbitrator dated 27.02.2015 and 26.03.2015. The Petitioner herein is the claimant before the Arbitrator.

2. The brief facts of the case is that the tender was invited for "Coimbatore and Podanur-Dismantling of existing track, linking of BG track, Assembling and linking of BG points and Crossings, collection of ballast including transportation of P.way materials, Reconstruction of minor bridges and major bridges, Earthwork excavation in formation of bank using contractor's own earth etc., between Coimbatore and

Podanur". The petitioner had been awarded the said tender and successfully entered into an agreement dated 15.03.2008 which was executed between the claimant and the respondents. The date of completion of the above work(i.e. Original currency period) was upto 16.07.2008 i.e 9(Nine) months from the date of issue of LOA dated 17.10.2007. However, the work could not be completed and therefore, periodical extension was granted under Clause 17A(II) of General Conditions of Contract. The period was finally extended upto 31.12.2009 with the period over-run by 17 months over the original currency period and thereby the actual completion period was prolonged to 26 (Twenty Six) months.

3. Disputes arose between the Petitioner/claimant and the respondent-Railways. Due to certain unresolved disputes and for other disputes arose during execution of the work between the parties, Arbitration in terms of Clause 64 of the General Conditions of Contract has been invoked.

4. The petitioner had made a total claim of a sum of Rs.7,90,20,886/-under various heads. The above said claim is comprised under 50 description of claims. However, during Arbitral proceedings, 17 claims namely Nos.2, 4, 5, 9, 11, 13, 23, 25, 27, 31, 33, 35, 37, 44, 45, 46,and 47 along with five other claims have been either withdrawn or not presented. Then, remaining claims 15 claims made by the petitioner were rejected. The main challenge in this original Petition is only with regard to claim No.10, 12,42 and 43 which reads as follows:-

"(i)The Claim No.10 relates to the compensation for the loss incurred in execution of each work in filing in cutting portion 28,000/- cum 65,80,000/-.

(ii)The Claim No.12 relates to the compensation for loss incurred in widening the formation with existing cut spoils from cuttings, by spreading, dozing, watering and rolling with vibratory roller-28,000/- cum-Rs.42,51,415.

(iii)The Claim No.42 relates damages for Office Overheads and Profits due to prolongation of the contract @ 10% of contract-Rs.56,47,137.

(iv)The Claim No.43 relates compensation for loss in escalation of rated for abnormal prolongation of contract @ 15% of contract-Rs.92,49,197."

5. The petitioner has also challenged the award in respect of counter claim Nos.1 and 2 raised by the Respondents. The main contention of the learned counsel for the petitioner is that the learned arbitrator has not considered the relevant materials available on record, despite having factually found that the work is being executed under the peculiar situations, but rendered a perverse finding that the work has not been done properly. The Arbitrator rejected the claims raised by the petitioner and awarded counter claim Nos. 1 and 2 raised by the respondents without any reasons. It is further contended that extension was granted to execute the work mainly on the ground of delay on the part of the railways.

6. The main objection raised by the Petitioner/claimant is with regard to rejection of Claim No.17. The Claim reads that "compensation

for the loss incurred in salvaging and scooping out the existing old ballast, transporting and stacking-3500 cum-Rs.3,85,000/- and the amount revised as Rs.4,22,805/-". It is the contention of the petitioner that the respondent after accepting and enjoying the benefits cannot refuse to pay for the expenditure incurred and the loss sustained by the claimant for the transportation to faraway places in the lands belonged to Private Owners by getting permission from the Private Owners near Nanjundapuram LC gate. It is vehemently contended that the above aspects have not been considered by the Arbitrator and the findings in this regard is contrary to Clause 17-A (i) and (ii) of the Agreement, so too, the rejection of Claim Nos.10, 12, 42 and 43. The findings of the Arbitrator in rejecting the above claims clearly indicate that the award is suffered by patent illegality. Hence, the same has to be set aside.

7. The learned counsel for the respondents would contend that the Arbitrator has considered the entire aspects and the merits and demerits of the tender work and passed the Award. The entire claim raised by the Petitioner/claimant is fictitious one and the claim amount raised is more than 120% of the contract amount. The claim nos.10,12,

42 and 43 raised on behalf of the petitioner and the counter claim raised on behalf of the respondents/railways had been contested before the Arbitrator and after going through the elaborate terms and conditions of the schedule of the agreement, the award is passed by the Arbitrator. The claims raised by the Petitioner/claimant has been well considered and after hearing both sides and on perusal of the documents available before them, the Arbitrator given the finding that the Petitioner/claimant is not entitled for any compensation, even as per the contract. Hence, the learned counsel for the respondents prays that the findings of the Arbitrator need not be interfered with and cannot be set aside.

8. The learned counsel for the respondents, in support of his contentions, relied upon the decision reported in **(2015) 5 SCC 739 [Swan Gold Mining Limited Vs. Hindustan Copper Limited]** and submitted that the power of the court to set aside the award would be exercised only in cases where the court finds that the arbitral award is one the fact of it erroneous or patently illegal or in contravention of the provisions of the Act.

9. Heard both sides and perused the materials available on record.

10. It is not in dispute that the contract has been extended on many occasions with the original conditions of the contract. In fact, it is submitted by the both parties that clause 17-A (ii) of the contract existed even after extension. Since, the challenge is only with regard to the specific claims, more particularly, claim No.10 viz., for compensation for the loss incurred in the execution of Earth work, it is relevant to refer clause 17-A(ii) of the contract which reads as follows:

“17-A (ii) Extension for delay not due to Railway/Contractor: If in the opinion of the engineer the progress of work has any time been delayed by an act or neglect of Railway's employees or by other contractor employed by the Railway under sub-clause(4) of clause 20 of these conditions or in executing the work not forming part of the contract but on which contractor's performance necessarily depends or by reason of proceedings taken or threatened by or dispute with adjoining or to neighboring owners or public authority arising otherwise through the contractor's own default etc. or by the delay authorized by the engineer pending arbitration or in consequences of the contractor not having received in due time necessary instructions from the railway for which he shall have specially applied in writing to the engineer or his authorized representative then upon happening of any such event causing delay, the contractor shall immediately give notice thereof in

writing to the engineer within 15 days of such happening but shall nevertheless make constantly his best endeavors to bring down or make good the delay and shall do all that may be reasonably required of him to the satisfaction of the engineer to proceed with the works. The contractor may also indicate the period for which the work is likely to be delayed and shall be bound to ask for necessary extension of time. The engineer on receipt of such request from the Contractor shall consider the same and shall grant such extension of time as in his opinion is reasonable having regard to the nature and period of delay and the typed and quantum of work affected thereby. No other compensation shall be payable for works so carried forward to the extended period of time, the same rates, terms and conditions of contract being applicable as if such extended period of time was originally provided in the original contract itself."

The above clause makes it very clear that in the event of extension of work period, no other compensation shall be payable for the works so carried out, to the extended period of time; the same rates, terms and conditions of contract being applicable as if, to such extended period of time as originally provided in the original contract itself.

11. When the compensation payable is prohibited in the terms of the contract and the contract being concluded one, certainly, the parties are not entitled to any of the claims, on the said aspect. As rightly contended by the learned counsel for the respondents that when the

parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract, then substituting new terms in the contract by the arbitrator or by the Court would be erroneous or illegal, also relied upon the decision in ***Swan Gold Mining Limited Vs. Hindustan Copper Limited*** reported in (2015) 5 SCC 739. The said decision would squarely apply to the facts of the case. For better appreciation, the relevant portion reads as follows:

“11. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the court finds that the arbitral award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well-settled proposition that the Court shall not ordinarily substitute its interpretation for that of the arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the arbitrator or by the Court would be erroneous or illegal.”

12. The learned Arbitrator had also found that the alleged loss incurred during the execution of the work was never complained by the contractor nor substantiated with any documents. The learned Arbitrator also rightly considered the merits and demerits of the parties' claim and arrived at a conclusion. This Court cannot re-appreciate the evidence as far as claim No.12 is concerned. There is a specific finding of the learned arbitrator that no materials or documents prior to claim No.10 for the loss incurred in widening the formation. As far as claim nos.42 and 43 are concerned, the learned Arbitrator, took note of clause 17-A (ii) of the General Conditions of Contract and held that the compensation is prohibited for the work carried out during the extended period. Therefore, when the contract prohibits any compensation in respect of the extra work claims in the original terms and conditions of the contract, the claimant is not entitled for any such claim for the extra work as it is not permitted in the contract. At the time of extension of time, the claimant has not made any objection to such terms. When the Petitioner/claimant has not raised any objection at the time of extension of contract with regard to such conditions, it is not open to them thereafter to make a claim for compensation. Therefore, any claim is

bound by the contract. Similarly, there is no price variation in the contract. When the parties are bound by clause 17-A (ii) and so too, the petitioner, hence, the Petitioner/contractor cannot be compensated for any of the said claims.

13. In the light of the above reasonings, this Court do not find any merits in any of the grounds in the original petition made under section 34 of the Arbitration and Conciliation Act, 1996, to interfere with the award. Accordingly, the Original Petition is dismissed.

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Index:Yes/No
Internet:Yes/No
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N.SATHISH KUMAR, J.

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