IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :02.04.2019

Coram

**THE HONOURABLE MR. JUSTICE M.SUNDAR**

**O.P.No.80 of 2013**

1. The Union of India,
   rep. by the General Manager,
   Southern Railway,
   Chennai – 600 003.

2. The Divisional Railway Manager (Works)
   Southern Railway,
   Park Town,
   Chennai – 600 003. .. Petitioners

vs.

1. M/s. Raasi Bricks and Jelly,
   rep. By its Proprietor Mrs.R.Kamala,
   No.62-D/1, Kamaraj Street,
   Kancheepuram – 631 501.

2. Mr.Hon'ble Justice K.M.Natarajan (Retd),
   No.136, L.B.Road, Kamaraj Nagar,
   Thiruvanmiyur, Chennai – 600 041. .. Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 24.06.2008 passed by the 2nd respondent herein and pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and render justice.

For Petitioners : Mr.P.T.Ram Kumar
For Respondents : Mr.Amalaraj S. Penikilapatti
R2-Arbitrator

**ORDER**

Instant 'Original Petition' ('OP' for brevity) has been filed *inter alia* under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) assailing an 'arbitral award dated 24.06.2008' (hereinafter 'impugned award' for brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole arbitrator, who was a former judge of this Court.

2. To be noted, instant OP has been filed under Section 34 of A & C Act. Section 34 in the scheme of A & C Act finds its slot under Chapter VII of A & C Act, which is captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A perusal of Section 34 of A & C Act also reveals that recourse to Court against an arbitral award may be made by an 'application'. Also to be noted, the very caption to Section 34 of A & C Act reads 'APPLICATION FOR SETTING ASIDE AN ARBITRAL AWARD'. Be that as it may, such recourse against an arbitral award is being assigned the nomenclature 'Original Petition' in this Registry. Therefore, I shall refer to the instant proceedings as 'OP' for the sake of convenience and clarity.



3. First respondent in the instant OP is one Mrs.R.Kamala, who is carrying on business in the name and style 'M/s.Raasi Bricks and Jelly' as its sole proprietor. To be noted, cause title in instant OP as far as first respondent

is concerned reads as follows:

> *'M/s.Raasi Bricks and Jelly,*
> *rep. by its Proprietor, Mr.R.Kamala,*
> *No.62-D/1, Kamaraj Street,*
> *Kancheepuram – 631 501.'*

4. This Court is informed by both sides that there is a typographical error and the correct factual position is that first respondent is Mrs.R.Kamala, who is carrying on business in the name and style 'Raasi Bricks and Jelly' as sole Proprietrix.

5. First respondent in instant OP is the sole claimant before AT. Petitioners 1 and 2 in the instant OP are respondents 1 and 2 respectively before AT and 'petitioners 1 and 2' shall hereinafter be collectively referred to as 'Southern Railways' for the sake of convenience and clarity.

6. This Court is informed that Mrs.R.Kamala, is now 95 years old and is in the evening of her life. Therefore, without going through the procedural formality of taking out an amendment application, as both learned counsel before this Court accept that there is a typographical error and that 'Mr.R.Kamala' in the short cause title of instant OP should read as 'Mrs.R.Kamala', Registry shall carry out necessary changes/amendments while

drafting the decree. To be noted, in the long cause title the description is correct i.e., the description reads 'Mrs.R.Kamala'.

7. As much as petitioners 1 and 2 are being collectively referred to as 'Southern Railways', 'first respondent' shall be referred to as 'contractor' for the sake of convenience and clarity. The minimum facts that are imperative for appreciating this order are as follows:

7.1. Admittedly, there was a contract between the Southern Railways and contractor. This contract is dated 09.11.2000. Value of contract is Rs.88 lakhs. This contract was for collection, stacking and dumping of ballast in specified locations of Railway tracks. For the sake of convenience, the work, as can be culled out in the claim statement is extracted/reproduced and the same reads as follows:

*'[a]. **Ballast Collection Works:-***

*“Collection and supply of 20,000 CUM of **[at the contract rate of Rs.4,224/- per 10 Cum and totally valued at Rs.84,48,000/-]** 50 mm size machine crushed stone ballast along side the Track and stacking at various locations in AEN/KPD Section as per Railway specifications”*

***[b]. Ballast Collection Works:-***

*“Dumping the 20,000 CUM of **[at the contract rate of Rs.220/- per 10 Cum and totally valued at Rs.4,40,000/-]** 50*

*mm size machine crushed stone ballast in to the Track at various locations including boxing the ballast and sectioning to profile and dressing etc"*

To be noted, there is no dispute or disagreement before this Court that the aforesaid description is the work qua the contract dated 09.11.2000 and therefore, the aforesaid work shall be referred to as 'said work' and 09.11.2000 contract shall be referred to as 'said contract'.

7.2. Besides said contract dated 09.11.2000 both parties agreed that there is also what is known as 'General Condition of Contract' ('GCC' for brevity) and that GCC will also govern the said contract between the Southern Railways and contractor.

7.3. Said work, according to said contract and Letter of Acceptance dated 07.08.2000 (which preceded said contract), ought to have been completed on or before 06.05.2001. It was not completed within that period and it was ultimately completed only on 29.01.2002 after three extensions. The three extensions are on 07.05.2001, 22.11.2001 and 30.11.2001. It is submitted that first extension is under Clause 17(2) of GCC and it is for the period from 07.05.2001 to 31.08.2001. The second extension is for the period from 01.09.2001 to 30.11.2001. In this second extension, one part of the second extension i.e., the period from 01.09.2001 to 30.09.2001 is under clause 17(2) of GCC and the second part viz., dated 01.10.2001 to 30.11.2001 is under clause 17(4) of GCC. The third extension dated 30.11.2001 is for the period from 01.12.2001 to 29.01.2002 and this entire extension is under clause 17(4) of GCC.

7.4. There is no dispute or disagreement that said work was completed. However, Southern Railways, imposed penalties and some pending bills also remained unpaid. This is the trigger between the parties. Contractor sought refund of the penalties levied and payment of unpaid bills, which was declined by Southern Railways. There is no dispute or disagreement that there is an arbitration clause between the parties and that no special period of limitation i.e., a period of limitation less than one prescribed under Limitation Act has been covenanted in the arbitration clause.

7.5. In the aforesaid backdrop, AT was constituted and the Contractor, as claimant, has made seven claims, which has been captured in tabular form and the same reads as follows:

| ***Sl. No.*** | ***DESCRIPTION OF CLAIMS*** | ***AMOUNT*** |
|---|---|---|
| *1.* | *Declaration that the penal extension granted by the Railway is illegal and void* | - |
| *2.* | *Refund of the illegal Penalties and the payment of the pending bill amount* | *Rs.7,00,000/-* |
| *3.* | *Refund of the Security Deposit and EMD* | *Rs.3,00,000/-* |
| *4.* | *Damages for the idling and the under-utilisation of the labour due to the defaults of the Railways.* | *Rs.3,59,150/-* |
| *5.* | *Damages for the losses due to 'Additional Establishment' and Overhead Costs suffered in the extended contract period @ 10% of contract value for the extended period [as per Hudson's Formula].* | *Rs.6,76,000/-* |
| *6.* | *Damages towards unlawful retention & non-payment of the above claims [pendente-lite interest from 1/12/02 to date of Award] and for post award period.* | *Not quantified* |
| *7.* | *Costs for securing appointment of Arbitrator and for Legal & Technical counsel and Cost of Arbitration* | *Not quantified* |
| | ***[EXCLUDING CLAIM NO: 6 and 7]*** | ***Rs.20,35,150/-*** |

7.6. Southern Railways entered appearance, filed statement of defence and opposed the claim of the contractor before AT. There was full contest. After full contest, impugned award came to be passed by AT. Vide impugned award, with regard to serial Nos.2 and 3 of the claims supra in the tabulation, AT awarded Rs.7,48,425/-. AT also awarded pendente-lite interest, at the rate of interest 9% per annum from the date of filing of arbitration i.e., 28.04.2006 till the date of the impugned award i.e., 24.06.2008. Thereafter, future interest has been awarded at the rate of 18% per annum from the date of the impugned award i.e., 24.06.2008 to the date of actual realization. With regard to costs of proceedings, the same was also granted. Operative portion of the impugned award, reads as follows:

*'In view of the findings under various issues, the following amounts are awarded to the claimant:*

*1]. The claimant is awarded a sum of Rs.7,48,425/- which represents the sum payable to the work done by the claimant and the Security Deposit.*

*2]. The claimant is entitled to the interest for the above amount at the rate 9% per annum from the date of filing for arbitration i.e. 28.4.2006 till date of award and from the date of award till the realization at the rate of 18% per annum and the Respondent is directed to pay the above amount to the claimant.*

*3]. As regards the cost of proceedings the counsel for* *the Respondent and counsel for the claimant had file memo of costs. Both the parties have paid a sum of Rs.55,000/- towards Arbitrators fees and secretarial expenses. In view of the various findings both in favour of the claimant as well as the Respondents and the facts and circumstances of the case, I feel the ends of justice will be met if both parties are directed to bear their respective costs in the arbitration proceedings.'*

7.7. Southern Railways, stating that the impugned award is liable to be set aside under Section 34 of A & C Act, have filed instant petition.

8. Having set out the bare minimum facts, which are necessary for appreciating this order, this Court now proceeds to examine the grounds of challenge to impugned award by Southern Railways and examination of the same.

9. **<u>Discussions and Dispositive Reasoning:</u>**

Mr.P.T.Ram Kumar, learned standing counsel for Southern Railways and Mr.Amalaraj S.Penikilapatti, learned counsel for contractor are before this Court. In other words, learned standing counsel for Southern Railways is before this Court on behalf of petitioners and Mr.Amalaraj S.Penikilapatti is before this Court on behalf of contesting first respondent. To be noted, the sole arbitrator, who constituted the AT has been arrayed as respondent No.2, though this is completely unnecessary. Considering the nature of grounds on which the instant OP is predicated, this Court is of the view that it is not necessary to array the sole arbitrator who constituted the AT as one of the respondents. However, this Court is now not embarking upon the exercise of passing orders of deleting respondent No.2 as it will cause procedural delay. To be noted, instant OP is already more than half decade old. Moreover, main OP itself is now being heard out and disposed of. Be that as it may, this aspect is set out to make the position clear for filling of petitions under Section 34 of A and C Act in the days to come.

10. Be that as it may, learned standing counsel for Southern Railways, raised three issues. The three issues are as follows:

a) Claim of the contractor is barred by limitation.

b) pendente-lite interest at the rate of 9% p.a alone is assailed (future interest is not assailed)

c) The impugned award was incorrect in holding that the extensions are illegal.

11. As limitation goes to the root of the mater, it is to be examined first.

12. To be noted, issues framed by AT read as follows:

*'1. What are the various quantities of works and their respective values that were completed by the claimant before 1st October, 2001?*

*2. Whether any 'Ballast Dumping' work whatsoever was permissible between 01.10.2001 to 30.11.2001, for the length of 14 Kms. (i.e. between Kms. 94 to Kms.105 and between Kms. 126 to Kms.129)?*

*3. When did the Railway Department complete the 'Deep Screening' work for the length of 14 Kms. to enable the claimant to commence and progress with the 'ballast dumping work' as per the IRP way manual?*

*4. Whether the Railway is proper in making the retrospective extension of the contract? Whether the facts and circumstances of this case warrant the extension of contract beyond 01.10.2001 under clause 17(3) of the General Condition of Contract or under clause 17(4) of General Condition of Contract?*

*5. Whether the claimant is entitled for the refund of the penalties levied by the Railway and if so, what amount?*

*6. Whether the claimant is entitled for the refund of SECURITY DEPOSIT and EMD?*

*7. Whether the claimant is entitled for compensation for the additional establishment and overheads, as claimed by her?*

*8. Whether the claimant is entitled for interest on her various claims?*

*9. Whether the claim is maintainable as the same is barred by limitation?*

*10. Whether the claimant has performed her duty as required under Agreement No.122/MAS?*

*11. Whether the claimant is entitled to make a claim which is 'not quantified'?*

*12. What other reliefs. the parties are entitled to?'*

13. A perusal of 12 issues will reveal that limitation issue is issue No.9. AT has also dealt with issue No.9 first.

14. Issue No.9, turns on a very narrow compass. While learned standing counsel for Southern Railways submitted that the claim ought to have been made within three years from the date of cause of action taking the last date of transaction i.e., 30.11.2001 as date of cause of action, it was contended by learned counsel for contractor that the date of cause of action is 23.01.2003, when Southern Railways ultimately passed an order rejecting the claim of the contractor for refund of penalty and payment of unpaid bills and therefore claim is not time barred.



15. In support of his contention, with regard to limitation, learned standing counsel for Southern Railways pressed into service a judgment of Hon'ble Supreme Court in ***State of Orissa and Anr. Vs. Damodar Das*** reported

in ***(1996) 2 SCC 216***.

16. This Damodar Das case, is for the principle that limitation for commencing an arbitration runs from the date on which the cause of action accrued. There is no dispute with regard to this principle.

17. In the instant case, dispute is what is the date on which the cause of action accrued. Learned counsel for Southern Railways contended that the date on which the cause of action accrued is on the last date of transaction, which is 30.11.2001. However, AT relying on Ex.C51, which is a communication from Southern Railway bearing reference No.M/W/148/122/MAS/West/2002, held that 23.01.2003 is the date, on which the cause of action accrued as that is the date on which Southern Railways conclusively rejected contractor's claim and held that the claim of the contractor not to be time barred.



18. In the instant case, the facts i.e., on the facts and the circumstances of the case, this is a mixed question of fact and law, AT after elaborate discussions on issue No.9, has appreciated evidence before it, particularly Ex.C51 and has come to the conclusion that the date of accrual of cause of action is not 30.11.2001, being the date of last transaction as contended and

that it is 23.01.2003 (Ex.C 51, when Railways rejected the claim of the contractor). This Court is of the considered view that no compelling ground has been made for judicial intervention with regard to the finding of AT on limitation which in the instant case is a mixed question of fact and law. This puts an end to the campaign of Southern Railways qua limitation which is a challenge which is predicated on the ground that the impugned award is in conflict with public policy of India.

19. This takes us to the second aspect of extensions being illegal.

20. With regard to extensions, in response to grounds raised by Southern Railways contractor contended that having granted extension, Southern Railways cannot impose penalty and much less can it withhold payment for work which has been done. With regard to Clauses 17(2) and 17(4) of GCC, there has been elaborate discussion by AT on these aspects of the matter and AT has come to the conclusion that Southern Railways was responsible for the delay and therefore imposition of penalty was improper.



21. Moreover, this is more in the nature of a generic ground of appeal, which fits into an appeal memorandum under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) but this being a challenge to an arbitral

award under Section 34 of A & C Act (not an appeal), it may not be necessary to delve further into this aspect of the matter as it does not fit much less fit snugly into any of the slots under Section 34. Also to be noted, in the light of the fact that there were as many as 53 exhibits on the side of the contractor namely Ex.C1 to Ex.C53 and one exhibit on the side of Southern Railways namely Ex.R1, oral evidence was let-in and one witness namely CW1 was examined on behalf of the contractor, all these are in the realm of appreciation of evidence.

22. Be that as it may, as alluded to supra, the grounds raised by Southern Railways with regard extension, which are in the nature of grounds under Section 96 of CPC, cannot be examined. Nevertheless, a perusal of the impugned award reveals that there is elaborate discussion on these aspects of the matter and therefore no judicial intervention is warranted.

23. This takes us to the pendente-lite interest aspect. As already alluded to supra, learned counsel for Southern Railways very fairly submitted that the challenge is only to pendente-lite interest of 9% per annum (hereinafter 'p.a.' for brevity) from the date of filing of arbitration i.e., 28.04.2006 to the date of impugned award being 24.06.2008. In other words, future interest awarded at the rate of 18% p.a. vide clause 2 of the operative

portion of the award is not under challenge.

24. Both the learned counsel submitted that there is a Clause in the GCC namely Clause 16(2) which prohibits interest being award pendente-lite. Both learned counsel submitted that Clause 16 in its entirety as applicable to said contract reads as follows:

*16. (1) The earnest money deposited by the Contractor with his tender will be retained by the railways as part of Security for the due and faithful fulfilment of the contract by the Contracotr. The balance to make up the security deposit which will be calculated as under, unless otherwise, specified in the special conditions, if any, may be deposited by the Contractor in cash or in the form of Government securities or may be recovered by percentage deductions from the Contractor's on account bills_*

| | | |
|---|---|---|
| *For works costing upto Rupees one lakh* | .. | *10 per cent of the value of the contract* |
| *For works costing more than Rupees one lakh and upto Rupees two lakhs* | .. | *10 per cent of the first Rupees one lakh and 7-1/2 per cent of the balance.* |
| *For works costing more than Rupees two lakhs* | .. | *10 per cent of the first one lakh, 7-1/2 per cent of the next one lakh and 5 per cent of the balance subject to a maximum of Rs.1.50 lakhs.* |

*Provided also that in case of a defaulting Contractor the Railways* *may retain any amount due for payment to the Contractor on the pending "on account bills" so that the amount or amounts so retained may not exceed 10 per cent of the total value of the contract.*

*(2) No interest will be payable upon the earnest money or the 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 repayable with interest accrued thereon.'*

25. With regard to pendente-lite interest, Mr.Amalaraj S.Penikilapatti, learned counsel for contractor pressed into service two judgments and both are Ambica Construction. Therefore, the earlier in point of time shall be referred to as Ambica-I and later shall be referred to as Ambica- II. Ambica-I is reported in ***(2016) 6 SCC 36 [Union of India vs. Ambica Construction]*** and Ambica-II is reported in ***2017 SCC Online SC 678 [M/s.Ambica Construction vs. Union of India]***.

26. It was pointed out that Ambica-I arose under the Old Arbitration Act i.e., Arbitration Act, 1940 under which there is no equivalent of Section 31(7) of new Arbitration Act, i.e., 1996 Act and therefore the same cannot be pressed into service. There is no difficulty in accepting this submission.

27. This takes us to Ambica-II. Ambica-II has been rendered by Hon'ble Supreme Court by a bench of three Hon'ble Judges of Supreme Court. In Ambica-II, relying on ***Irrigation Department, State of Orissa vs. G.C. Roy*** *reported in* ***(1992) 1 SCC 508***, the Hon'ble Supreme Court held that bar to award of interest on delayed payment when covenanted in the contract itself will not be readily inferred as express bar to award interest pendente-lite and it does not tantamount to ouster of power of the arbitrator, as various other relevant aspects have to be taken into account.

28. In response to this, learned counsel for Southern Railways pressed into service two judgments namely ***Sri Chittaranjan Maity vs. Union of India*** *reported in* ***(2017) 9SCC 611*** and ***Jaiprakash Associates Ltd. (JAL) vs. Tehri Hydro Development Corporation India Ltd.*** (unreported judgment) rendered in Civil Appeal Nos. 1539 of 2019 on 07.02.2019.

29. In Jaiprakash Associates, which has also been rendered by a bench of three Hon'ble Judges of Hon'ble Supreme Court, there is a clear reference to ***Sri Chittaranjan case*** and two earlier judgments being ***Sree Kamatchi Amman Constructions vs. Divisional Railway Manager (Works), Palghat & ors.*** reported in ***(2010) 8 SCC 767*** *and* ***Union of India Vs. Bright Power Projects (India) Private Limited*** reported in ***(2015) 9 SCC 695.*** Reference to

all these citations are captured in paragraph 13 of Jaiprakash Associates, which reads as follows:

*'13. The aforesaid position is reiterated in Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat & Ors. and Union of India v. Bright Power Projects (India) Private Limited. Later judgment is by a bench of three Judges. This legal position is reiterated in Sri Chittaranjan Maity v. Union of India which is authored by one of us (Nazeer, J.). In that case, the Court considered the same very question which falls for determination by us, namely, whether the arbitral tribunal was justified in awarding interest on delayed payments in favour of the appellant? After nothing that clause 16(2) of GCC in that case bars the payment of interest, it was held that under the 1996 Act, the position wherein is different from 1940 Act, the interest could not be awarded. Following observations from this judgment may be noted:*

*"16. Relying on a decision of this Court in Ambica Construction v. Union of India [Ambica Construction v. Union of India, (2017) 14 SCC 323], the learned Senior Counsel for the appellant submits that mere bar to award interest on the amounts payable under the contract would not be sufficient to deny payment on pendente lite interest. Therefore, the arbitrator was justified in awarding the pendente lite interest. However, it is not clear from Ambica Construction [Ambica construction v. Union of India, (2017) 14 SCC 323] as to whether it was decided under the Arbitration Act, 1940 ( for short "the 1940 Act") or under the 1996 Act. It has relied on a*

*judgment of Constitution Bench in State of Orissa v. G.C. Roy [State of Orissa v. G.C. Roy, (1992) 1 SCC 508]. This judgment was with reference to the 1940 Act. In the 1940 Act, there was no provision which prohibited the arbitrator from awarding interest for the pre-reference, pendente lite or post-award period, whereas the 1996 Act contains a specific provision which says that if the agreement prohibits award of interest for the pre-award period, the arbitrator cannot award interest for the said period. Therefore, the decision in Ambica Construction [Ambica Construction v. Union of India, (2017) 14 SCC 323] cannot be made applicable to the instant case."*

30. To put it in a nutshell, what has been articulated in Jaiprakash Associates on the limitation is that it is not clear as to whether Ambica-II arose under the old Act i.e., Arbitration Act, 1940 where there is no equivalent to Section 31(7) of new Act i.e., Arbitration and Conciliation Act, 1996 and therefore, there is difficulty in relying on Ambica II case.

31. This Court, therefore, deems it appropriate to follow Jaiprakash Associates Limited case and on that basis in the light of Clause 16(2) in GCC, the impugned award is partly modified by setting aside the award of pendente-lite interest alone i.e., award of interest at the rate of 9% p.a from the date of filing of arbitration namely 28.04.2006 till the date of the impugned award

making i.e., 24.06.2008. For the purpose of abundant clarity, it is made clear that future interest awarded by AT vide the impugned award being interest at the rate of 18% p.a from 25.06.2008 to the date of actual realisation is not disturbed and the same remains.

32. In all other aspects, the impugned award is confirmed.

33. Impugned award is partly set aside/ modified and instant OP is partly allowed, setting aside the pendente-lite interest at the rate of 9% p.a. alone and confirming the impugned award in all other aspects.

34. Considering the nature of the matter and the trajectory of the hearing, this Court deems it appropriate to leave the parties to bear their respective costs.

**02.04.2019**

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

**M.SUNDAR.J.,**

vsm/mp

**O.P.No.80 of 2013**

**02.04.2019**