

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.07.2019

C O R A M

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.P.Nos.319 of 2014
and 977 of 2015

The Deputy Chief Engineer/Construction,
Southern Railway,
Salem -1.

... Petitioner
in O.P.No.319 of 2014

1.Union of India,
Represented by the General Manager,
Southern Railway,
Chennai.

2.The Chief Administrative Officer/Construction,
Southern Railway,
Chennai.

3.The Chief Engineer/West/Construction,
Southern Railway,
Chennai.

4.The Deputy Chief Engineer/Construction,
Southern Railway,
Salem.

... Petitioners
in O.P.No.977 of 2015

Vs.

1.Y.Bhaskara Raju
2.K.K.Sharma
3.S.Balachandran

... Respondents
in O.P.No.319 of 2014

(The 3rd Arbitrator passed away on 8.1.2011 and hence
he is not made a party to the present proceedings)

1.Y.Bhaskara Raju
2.S.Balachandran
3.Dany Thomas

... Respondents
in O.P.No.977 of 2015

Prayer in O.P.No.319 of 2014 : The Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the arbitral award dated 13.09.2011 pertaining to disputes arising out of Agreement No.294/CN/1996 insofar as it relates to award in respect of Claim Nos.4 and 10 are concerned.

Prayer in O.P.No.977 of 2015 : The Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the arbitral award of respondents 2 and 3 dated 20.5.2011 made in relation to disputes arisen out of agreement No.293/CN/1996 insofar as the award of interest under Claim No.4 in the sum of Rs.1,79,150/- is concerned.

For Petitioners : Mr.P.T.Ramkumar
for M/s.V.G.Suresh Kumar
(in O.P.No.319 of 2014)
Mr.Ramachandramoorthy
(in O.P.No.977 of 2015)

For Respondents : Mr.Amalraj S.Penikilapatti
for R1
(in both O.Ps)
R2 & R3 - Arbitrators
(in both O.Ps)

COMMON ORDER

Since the issues raised in both petitions being the same, these petitions are taken up together and disposed of by way of a common order.

2. O.P.No.319 of 2014 has been filed challenging the award dated 13.09.2011 passed by the Arbitral Tribunal under Section 34 of the Arbitration and Conciliation Act, 1996 (*'the Act' for brevity*) particularly in respect of the claim Nos.4 and 10.

3. O.P.No.977 of 2015 has been filed challenging the award dated 20.5.2011 passed by the Arbitral Tribunal under Section 34 of the Arbitration and Conciliation Act, 1996 (*'the Act' for brevity*) particularly in respect of the claim No.4, towards interest quantified at Rs.1,79,150/-

4. Though the award of the arbitrators was challenged by the learned counsel for the petitioners it is fairly submitted that the claim petitions have been considered by the arbitrators only based on the materials filed before the arbitrators. Therefore, the only challenge is with regard to the rate of interest.

5. The main contention of the learned counsel appearing for the railways is that there is a clear clause in the agreement under Clause 16(2) of General Conditions of Contract ('GCC' for brevity) which prohibits the claimant from claiming payment of interest. Hence, his contention is that there is an agreement between the parties relating to payment of interest

as per clause 16(2) of the GCC. The arbitrators while awarding interest, went beyond the terms of the contract. Hence the award passed is liable to be set aside insofar as it relates to direction for payment of interest.

6. The learned counsel for the 1st respondent submitted that Section 31(7)(a) of the Act cannot be made applicable to these cases and there is no separate contract appeared in awarding the interest. According to the learned counsel Clause 16(2) of GCC is applicable only to the mother agreement not to the agreement which is subject matter of arbitration.

7. In support of his contention, the learned counsel relied upon the judgments of the Apex Court in Union of India Vs. Ambica Construction (2016) 6 SCC 35 and ***M/s.Ambica Construction Vs. Union of India (2017 SCC Online SC 678)*** submitted that the Apex Court has held that Clause 16(2) of GCC there is no bar for the arbitrator to award the interest. Hence, his contention that as long as there is no bar in the contract for the Arbitrators to Award the interest in this regard.

8. The issue is narrow only with regard to the payment of interest. The Division Bench of this Court in O.S.A.Nos.119 and 303 of 2018 at paragraph No.10 held as follows :

“ 10.As rightly submitted by the learned counsel for respondents 1 to 3, Clause 16(2) of GCC has already been considered by the Apex Court on more than one occasion. While doing so, it has been held categorically that the aforesaid clause prohibits payment of interest. If that position is taken into consideration, in the light of Section 31(7) of the new Act, then, we do not find any error in the order passed by the learned single Judge.”

9. Similarly the single Judge of this Court in O.P.No.80 of 2013 at paragraph No.31 has held as follows :

“ 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 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.”

10. In this regard 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 *pendente lite* interest depends upon the phraseology used in the agreement, clauses conferring power relating to the arbitrator, 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 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 *pendente lite* interest. Hence, it is his contention that in the above judgment, similar condition is set out in Clause 16 of the General Conditions of the Contract and as such the said clause will not a bar for the Arbitrators from awarding interest.

11. Whereas, the learned counsel appearing for the petitioners 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, wherein 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, finally held that when there is express bar against awarding of pendente lite interest by the Arbitrator, 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, pendente lite 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.

12. This Court also had an occasion to consider the pendente lite 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 has set aside the pendente lite interest awarded by the arbitrator.

13. In view of the same the arbitrators awarding the pendente lite interest is liable to be interfered. Accordingly, the interest awarded by the arbitrators is set aside and the other aspects of the arbitrators award is confirmed.

14. Accordingly, these Original Petitions are partly allowed by setting aside the Award in respect of pendente lite interest and confirming the impugned award in all other aspects. No cost.

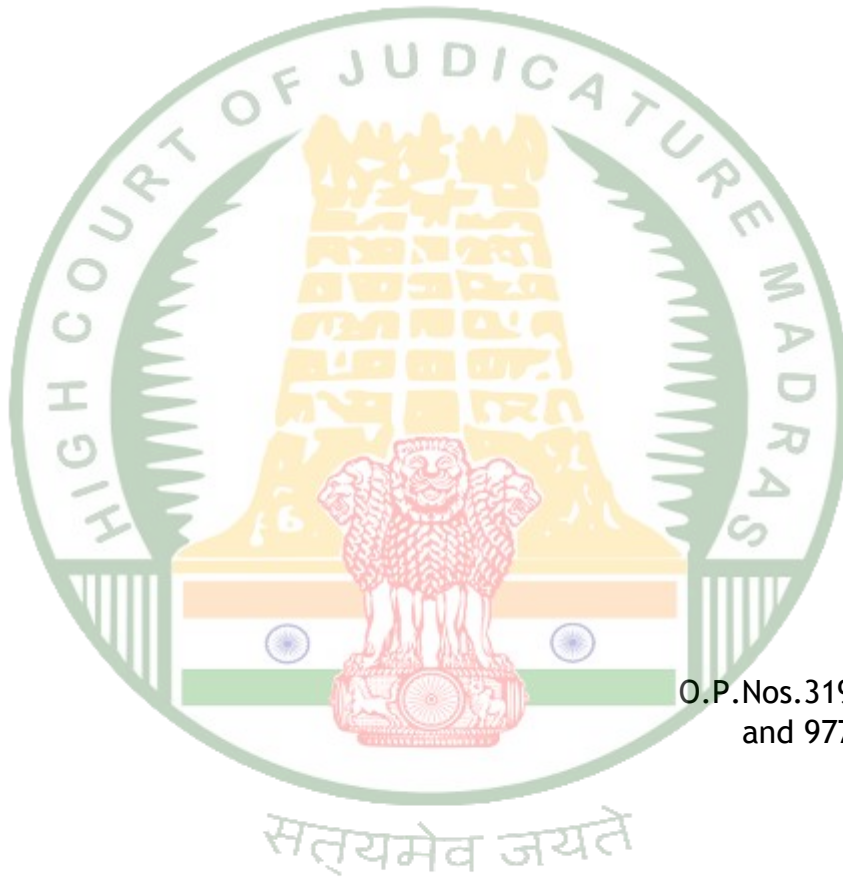
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Index:Yes/No
Internet:Yes/No
Speaking Order / Non Speaking Order
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N.SATHISH KUMAR, J.,

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