

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	21.11.2019
Judgment pronounced on	10.12.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

**O.P. Nos. 87 and 88 of 2014 &
O.P. No.168 of 2015 &
O.P. No. 446 of 2016**

1. The Chief Engineer (Construction)
Gauge Conversion,
Southern Railway,
Chennai.
2. The Deputy Chief Engineer (Construction)
Gauge Conversion,
Southern Railway,
Calicut.

.. Petitioners in all OPs

vs.

1. Sri Swarna and Co.,
Represented by its Managing Partner,
Mr. B. Venugopal Reddy,
No.10/329, Thambu Chetty Street,
II Floor,
Chennai-600 001.

2. Hon'ble Mr. Justice K.P. Sivasubramaniam (Retired)
Sole Arbitrator,

Pulla Reddy Avenue,
Shenoy Nagar,
Chennai-600 030.

.. Respondents in all Ops

Prayer in O.P.No.87 of 2014:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award of the second respondent dated 07.03.2013 as amended by further Award dated 25.04.2013 made in relation to disputes arising out of Agreement No.359/CN/1998, dated 08.09.1998 insofar as claims 4 to 7 and pre-reference and pendente lite interest for claim Nos.2, 4 to 7 are concerned.

Prayer in O.P.No.88 of 2014:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award of the second respondent dated 07.03.2013 as amended by further Award dated 25.04.2013 made in relation to disputes arising out of Agreement No.83/CN/2001, dated 14.03.2001 insofar as claims 3 to 7 and pre-reference and pendente lite interest for claim Nos.2 to 7 are concerned.

Prayer in O.P.No.168 of 2015:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award of the second respondent dated 07.03.2013 made in relation to disputes arising out of Agreement No.414/CN/1998, dated 16.10.1998 insofar as claims 3 to 7 and pre-reference and pendente lite interest for claim Nos.2 to 7 are concerned.

Prayer in O.P.No.446 of 2016:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award of

the second respondent dated 07.03.2013 made in relation to disputes arising out of Agreement No.106/CN/2001, dated 03.04.2001 insofar as claims 3 to 7 and pre-reference and pendente lite interest for claim Nos.2 to 7 are concerned.

For Petitioners : Mr.P.T.Ramkumar (SC), Railways
(in all OPs)
For Respondents: Mr.S.Raghavan & M.Balakrishna
(in all OPs)

COMMON ORDER

The respondent in all four arbitrations, which were initiated by the first Respondent herein, is the Petitioner herein. For the sake of convenience, the Petitioner herein is referred to as the Railways and the first Respondent as the Contractor in this order. The Railways accepted the bid of the Contractor and issued the respective Letter of Acceptance to the Contractor in respect of 4 related works in connection with the doubling of track between Shoranur and Mangalore and Cannanore-Uppala sections and the scope of work, as between these 4 work orders, was similar but not identical. Disputes arose between the Contractor and the Railways in relation to the execution of these works, which were the subject matter of separate arbitrations before a common Arbitrator, namely, the second Respondent. In each of the arbitrations, the Contractor made claims in respect of the following:

- (i) final bill
- (ii) refund of security deposit with interest
- (iii) loss of profit with interest
- (iv) idle labour
- (v) idle machinery and equipment
- (vi) overheads
- (vii) 20% increase in rates for the work that was completed during the extended period
- (viii) labour amenities
- (ix) costs

2. The Railways made counter claims in O.P. No.87 of 2014 but not in the other arbitrations. Each arbitration was disposed of by a separate Arbitral Award (the Award/s), which is challenged herein. The award of the final bill dues and refund of security deposit (except as regards interest thereon) by the learned Arbitrator is not challenged in any of these Petitions and the challenge is limited to the Award in respect of idling of men and machinery, overheads, 20% increase in rates for work done during the extended period, loss of profits and pre-reference and pendente lite interest. All these petitions were presented in the year 2013, i.e., before the entry into force of the Arbitration and Conciliation

(Amendment) Act, 2015. In view of the fact that common issues arise in all these Petitions, they are disposed of by a common order.

3. I heard the learned counsel for the Railways, Mr P.T. Ramkumar, and the learned counsel for the Contractor, Mr. Suryanarayanan. The learned counsel for the Railways commenced his submissions by providing an overview of the nature and scope of the Contracts, which are substantially similar. He pointed out that these Contracts were originally intended to be executed in three months, whereas they were subsequently extended by exercising powers under clause 17 (2) of the General Conditions of Contract (the GCC). His first contention was that all the claims under challenge are prohibited under clause 43 of the GCC, which stipulates that the Contractor shall prepare and furnish to the Engineer, once in every month, an account giving full and detailed particulars of all claims for any additional expense to which the Contractor may consider himself entitled. Moreover, he pointed out that the said clause stipulates that no claim for payment for any such work will be considered unless it is included in the aforesaid account. Consequently, he submitted that none of the claims that were awarded by the learned Arbitrator and are under challenge herein are maintainable as per the respective Contract. By way of illustration, he referred to the operative portion of the Award in O.P. No.87 of 2014, internal page 29 of the Award, and pointed out as to which aspects of the Award were under challenge.

4. The second contention of the learned counsel was that the Contractor had issued a "no claims certificate", in each of these Contracts, whereby the Contractor agreed that no claims would be made against the Railways in respect of the relevant Contract. In light of the said "no claims certificate", the learned counsel contended that the claims before the Arbitral Tribunal were liable to be rejected.

5. The learned counsel, next, turned to the topic of extension of time and raised the third contention that each time an extension of time was requested, the Contractor agreed that work would be carried out at the agreed contractual rates and not at enhanced rates. On this issue, he referred to paragraph 22 of the Awards, which are identical in all the cases, so as to point out as to how the learned Arbitrator concluded that the Railways was responsible for the delay merely because extension of time was granted under clause 17 (2) of the GCC. In this connection, he also referred to paragraph 28 of the Awards wherein the learned Arbitrator recorded speculative and completely unsubstantiated findings that the Contractor, in the letters requesting for extension, did not specify the real reason for seeking extension.

6. By adverting to the findings with regard to the claim for overheads, he pointed out that the learned Arbitrator awarded a sum of

Rs.3 lakhs in O.P. No.87 of 2014, Rs.1,75,000 in O.P. No.88 of 2014 and Rs.1,00,000 in O.P. No.446 of 2013 on a completely arbitrary basis without examining the evidence, in that regard, and recording reasoned conclusions on that basis. He also pointed out that the learned Arbitrator had shifted the burden of proof on the Railways with regard to the claim for overheads.

7. He concluded his submissions by referring to the interest claims and pointing out that the GCC contains two clauses, namely, clause 16 (2) and 64(5) whereby interest claims are prohibited both during the pre-reference period and pending arbitration.

8. In response, the learned counsel for the Contractor contended that the main reason for the delay was due to non-supply of PSC sleepers by the Railways. In this connection, he referred to paragraph 22 of the Award wherein the learned Arbitrator recorded the finding that the Railways was responsible for the delay.

9. With regard to the "no claim certificate", he referred to paragraph 33 of the Award wherein the learned Arbitrator referred to a judgment of the Division Bench of the Bombay High Court and held that a no claim certificate, which is submitted as a precondition for the submission of the

final bill, cannot be construed as a voluntary and unconditional acceptance of payments in full and final settlement under the contract. In this regard, he also referred to paragraphs 34 to 36 of the Award and pointed out as to how it was concluded therein that the issuance of a "no claim certificate" by the Contractor, as a precondition for the processing of the final bill, does not preclude the making of claims subsequently.

10. He, thereafter, referred to paragraphs 18 to 22 of the Award so as to establish that the learned Arbitrator considered the evidence and concluded that the Railways is fully responsible for the delay and the consequential extension of the respective Contract. He also pointed out as to how a specific finding was recorded in paragraph 24 that clause 17 (2) of the GCC does not prohibit the grant of compensation during the extended stay period. He next referred to the findings in paragraphs 27 and 28 of the Award that there are no excepted matters in this Contract and that the Contractor was constrained to issue letters seeking extension of time without specifying the real reason for such extension so as to secure payments due to the Contractor for work already carried out.

11. The learned counsel next contended that evidence was produced with regard to the idle claim by way of filing ledgers with particulars of the deployment of men and equipment. In this regard, he

referred to internal pages 22 and 23 of the Awards wherein the Arbitral Tribunal appraised the evidence in the form of the labour agreement, three volumes of ledger's, the auditor's certificate, the 56 vouchers in respect of hiring cranes, et cetera. He pointed out that the limited rebuttal of the Railways was that the monthly statement, as required by clause 43 of the GCC, was not provided. He also referred to the judgment in the **K.N. Sathyapalan v. State of Kerala (2007) 13 SCC 43** on the grant of escalation in spite of the contractual stipulation that no compensation would be paid during the extended period of the contract. On this issue, he also relied upon the judgment of the Supreme Court in the **Assam State Electricity Board v. Buildworth Private Limited (2017) 8 SCC 146**, wherein the award of overheads was not interfered with on the basis that the award was based on an appreciation of evidence and contained reasons.

12. With regard to the award of enhanced rates during the extended period, he pointed out as to how the Arbitral Tribunal examined the evidence on the increase in cost of diesel and the fact that the Railways had not cross-examined the witness with regard to the said increase. He referred to and relied upon the judgment of the Hon'ble Supreme Court in the **Maharashtra State Electricity Distribution Company Ltd. v. Datar Switchgear Ltd. (2018) 3 SCC 133** to contend that factual

findings of the arbitral tribunal are not liable to be interfered with under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

13. With regard to the claim for interest, the learned counsel for the Contractor submitted that the GCC does not contain a clause prohibiting the payment of interest. According to the learned counsel, clause 16 (2) of the GCC deals with security deposit and EMD and that clause 64(5) is not contained in these contracts. Consequently, the said clause cannot be relied upon to contend that payment of interest on claims is prohibited either during the pre-reference period or pendente lite. In support of this submission, he referred to a judgment of the Supreme Court in **Raveechee and Co. v. Union of India 2018 SCC Online SC654** (the **Raveechee case**) and, in particular, paragraphs 10 to 15 thereof so as to contend that clause 16 (2) of the GCC is restricted to claims relating to security deposit and earnest money.

14. By way of rejoinder submissions, the learned counsel for the Railways referred to several judgments, including that in **Union of India v. Bright Power Products (India) Pvt. Ltd. (2015) 9 SCC 695** for the principle that an arbitral tribunal should not award interest in the pre-reference and pendente lite periods if the contract prohibits the same. He

also relied upon the judgment in **BHEL Ltd. v. Globe Hi-Fabs Ltd. (2015) 5 SCC 718** so as to contend that the words "amounts payable to the contractor under the contract" in Clause 16(2) should not be construed *ejusdem generis* with the preceding words "earnest money or the security deposit". In addition, he relied upon judgments such as **Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat (2010) 8 SCC 767** (the **Sree Kamatchi Amman case**) , **Sri Chittaranjan Maity v. Union of India (2017) 9 SCC 611** (the **Chittaranjan Maity case**) and many judgments of this Court wherein clause 16 (2) of the GCC were interpreted as prohibiting all interest claims in the pre-reference and pendente lite periods.

15. The records were examined and the oral and written submissions of both sides were considered carefully. The question to be decided is whether the grounds of challenge of the Railways are wholly or partly sustainable. In order to decide this question, the Award in respect of the claims that were awarded and are under challenge should be examined. The overarching grounds of challenge are on the basis of the "no claim certificate" and on the basis of clause 43 of the GCC.

16. Clause 43 of the GCC provides as under:

"43 (1). The Contractor shall prepare and

furnish to the Engineer once in every month an account giving full and detailed particulars of all claims for any additional expense to which the Contractor may consider himself entitled and of all extra or additional works ordered by the Engineer which he has executed during the preceding month and no claim for payment for any such work will be considered which has not been included in such particulars.

(2). The Contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of or arising out of this contract, nor shall the Railway entertain or consider any such claim, if made by the Contractor, after he shall have signed a no claim certificate in favour of the Railway, in such form as shall be required by the Railway, after the works are finally measured up."

17. In this case, it is the admitted position that the Contractor issued a "no claims certificate" in respect of each of the four Contracts. In addition, clause 43 (1) also provides that no claim would be considered unless the Contractor included such claim in the monthly statement that is provided to the Engineer. The claims that were made and allowed in part by the Arbitral Tribunal were admittedly not included in the monthly statement. The learned Arbitrator relied upon judgments of the Hon'ble Supreme Court such as **Chairman and MD, NTPC Ltd. v. Reshmi**

Constructions (2004) 2 SCC 663 and that of a Division Bench of the Bombay High Court in **R.A. Deshmukh v. City and Industrial Development Corporation of Maharashtra AIR 1997 Bom 284** so as to hold that the "no claim certificate" and clause 43 (1 and 2) do not preclude subsequent claims. Although there are decisions to the contrary, such as those in **Union of India v. Master Construction Company (2011) 12 SCC 349** and **ONGC Mangalore Petrochemicals Ltd. v. ANS Constructions Ltd. (2018) 3 SCC 373**, in a recent judgment in **Union of India v. Parmar Construction Company 2019 SCC Online SC 442**, the Supreme Court held, in the specific context of Clause 43(2) of the GCC of the Railways, that no hard and fast rule can be laid down and that the cases fall into two categories. In these circumstances, the conclusions of the Arbitral Tribunal, in this regard, cannot be said to be based on an unreasonable application of the law laid down by the Supreme Court and, therefore, do not warrant interference.

18. Nevertheless, it remains to be seen as to whether the Awards in respect of these claims are otherwise sustainable. For this purpose, each of the heads of claim should be separately analysed. The claim for idle labour and machinery is essentially a disruption claim, i.e. a claim for compensation for costs incurred when the labour and machinery/equipment could not be deployed. Therefore, the first

Respondent would be required to plead that there was disruption of work during a particular period on account of the Petitioner and, thereafter, adduce evidence on the cost incurred on the idle labour and machinery/equipment during such period. In this case, the idle claims are made for the entire extended period or the entire period of the contract and not for the disruption period, as would be evident from internal pages 21 to 23 of the Award in O.P. No.87 of 2014 (21.7.1999 to 30.06.2001 for labour and June 1998 to 30.06.2001 for machinery), internal pages 21 and 22 of the Award in O.P. No.88 of 2014 (03.04.2001 to 30.06.2002), internal pages 20 and 21 of the Award in O.P. No. 168 of 2015 (17.08.1999 to 12.05.2000) and internal page 22 of the Award in O.P.No.446 of 2013. The petitioner's stand was that payments were made for work executed during this period and, therefore, there was no idling of labour or machinery / equipment. A disruption claim for the entire extended period of the contract is fundamentally misconceived and flawed because such a claim should only be made for the period when work is disrupted or halted for reasons attributable to the Railways, thereby resulting in idling of labour and machinery. On the contrary, in the extended stay or prolongation period, unless there was disruption during the extended period, the Contractor can only claim overheads and profits, which are separately claimed herein. Consequently, the idle claim, on the one hand, and the overheads and profits claims, on the other, overlap and

this claim should have been rejected for that reason. Therefore, there is an error apparent or patent flaw in the Awards as regards the claim for idle labour and machinery. In addition, the Arbitral Tribunal completely disregarded the requirement of mitigation under section 73 of the Indian Contract Act, 1872. In specific, if the Contractor was unable to execute work due to reasons attributable to the Railways, if the disruption was for an extended period, the Contractor was required to mitigate loss by de-mobilising men and materials until required. This aspect was not taken into consideration by the Arbitral Tribunal.

19. As stated earlier, a claim for overheads is a prolongation or extended stay claim and, as regards site-office expenses and off-site project specific expenses, should be proved by adducing evidence of actual expenditure incurred during the extended period. In this case, in O.P. No.87 of 2014, the claim of Rs.4 lakhs was made in respect of the salary for one engineer, two supervisors and one watchman per month during the extended stay period. As against the claim of Rs.4 lakhs, the Arbitral Tribunal awarded Rs. 3 lakhs without analysing the evidence or providing any basis or justification for the amount awarded except stating that it is a fair estimate. In O.P. No.88 of 2014, a sum of Rs.2,85,000 was claimed towards overheads, whereas a sum of Rs.1,75,000 was awarded without any basis or justification. In O.P. No. 446 of 2013, as against a

claim of Rs.1,39,332, a sum of Rs.1 lakh was allowed by taking into account the possibility of leave/absence. While in O.P. No. 168 of 2015 the entire claim was awarded, the evidence is not appraised so as to conclude as to how the claim was proved. In each of the Awards in respect of this head of claim, the patent or fundamental flaw is that evidence that this expenditure was actually incurred is a pre-requisite to sustain a claim for site-office overheads and such evidence should have been appraised, whereas there is no such appraisal. Therefore, the Awards cannot be sustained as regards overheads.

20. In respect of the claim for enhanced rates during the extended stay period, in each letter requesting extension of time, the Contractor agreed to execute work during the extended period at the same rates. Therefore, this claim should have been rejected on that basis. However, the learned Arbitrator allowed the claim by relying on **P.M. Paul v. Union of India 1989 Supp.(1) SCC 368**, which is a case where the contract was silent and did not prohibit the grant of escalation, and the **Sathyapalan case**, where the contractor agreed to a "no escalation" clause in a supplementary agreement under protest. In cases where there is a contractual prohibition, the Hon'ble Supreme Court held that escalation should not be granted: **Continental Construction Co. Ltd. v. State of MP (1988) 3 SCC 82** and **New India Civil Erectors (P) Ltd.**

v. ONGC (1997) 11 SCC 75. In addition, with regard to escalation, as against the claim of 20% enhancement over the contractual rates, the Arbitral Tribunal arbitrarily awarded 15% without appraising the evidence. Given that this was a claim for escalation, the conclusions of the Arbitral Tribunal should have been based on an appraisal of evidence. In the absence of such appraisal of evidence, the award in respect of escalation is arbitrary and perverse.

21. As regards the claims for loss of profits, the claims have been made and awarded at 15% of the unexecuted value of work without adducing evidence. The learned Arbitrator allowed these claims by referring to the judgments of the Hon'ble Supreme Court in **A.T. Brij Paul Singh and Bros. v. State of Gujarat 1984 (4) SCC 59 (the Brij Paul case)** and **Dwarka Das v. State of MP 1999(3) SCC 500 (the Dwarka Das case)**. In the **Brij Paul case** and the **Dwarka Das case**, as would be evident from paragraph 10 and 8, respectively, of the judgments, evidence was adduced with regard to the basis for the loss of profits claims, unlike in this case. Consequently, the claim should have been rejected because there was no evidence as held in paragraphs 52 to 55 of **State of Rajasthan v. Ferro Concrete Construction (P) Ltd. (2009) 12 SCC 1**, in the specific context of a claim for loss of profits, and generically, in a "no evidence" scenario, in paragraph 31 of **Associate Builders v. DDA (2015) 3 SCC 49 (the Associate Builders case)**.

22. Consequently, the Awards in respect of the claims towards idling of men and material, overheads, enhanced rates and loss of profits cannot be sustained as per the law laid down in **ONGC v. Saw Pipes (2003) 5 SCC 705** and **the Associate Builders case** both on the ground of patent illegality and violation of public policy.

23. As regards interest, the learned counsel for the Railways adverted to several judgments of the Supreme Court and this Court wherein clauses 16 (2) and 64 of the GCC were interpreted as prohibiting the award of interest. Although the learned counsel for the first Respondent relied upon the judgment in the **Raveechee case**, in light of multiple judgments to the contrary such as the **Sree Kamatchi Amman case** and the **Chittaranjan Maity case**, which were followed by this Court in several judgments, including the order dated 02.04.2019 which follows a recent unreported judgment of the Hon'ble Supreme Court in **Jaiprakash Associates Ltd., (JAL) vs. Tehri Hydro Development Corporation India Ltd.**, in Civil Appeal No.1539 of 2019, order dated 07.02.2019, the award of interest by the Arbitral Tribunal during the pre-reference and pendente lite periods is liable to be set aside.

24. For the aforesaid reasons, these Petitions are allowed and the Arbitral Awards are hereby set aside partly as regards the amounts

awarded against the claims for idling of men and materials, overheads, enhanced rate of 20% during the extended period, loss of profits and pre-reference and pendente lite interest. No costs.

10.12.2019

Speaking order
Index : Yes
Internet : Yes
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SENTHILKUMAR RAMAMOORTHY.J.,

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Order in O.P. Nos. 87 & 88 of 2014
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