

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.08.2019

CORAM :

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

O.P. No.144 of 2017

and

A. No.2393 of 2017

- 1.The Union of India,
Represented by the General Manager,
Southern Railway,
Park Town,
Chennai – 600 003.
- 2.The Chief Engineer (Construction),
Office of the Chief Administrative Officer (Construction),
Southern Railway,
Egmore,
Chennai – 600 008.
- 3.The Deputy Chief Engineer (Construction),
Southern Railway,
First Floor, Railway Station Building,
Kannur – 670 001.

... Petitioners

Vs.

Best Cast Constructions (P) Ltd.,
Represented by its President, Sri. N. Venugopal,
No.9, 6th Street, T.N. Nagar,
Palanipet,
Arakkonam – 631 002,
Vellore District,
Tamil Nadu.

... Respondent

Act, 1996, to set aside the award dated 05.03.2016 made in relation to disputes arising out of Agreement No.250/CN/99 in so far as it directs payment of interest @ 12% per annum from 01.08.2005 till 05.03.2016 and the cost of the arbitration for a the sum of Rs.2,00,000/- by the petitioners to the respondent is concerned.

For Petitioners : Mr.P.T.Ramkumar

Standing Counsel for Railways

ORDER

An Arbitral award dated 05.03.2016, passed by sole Arbitrator is under challenge in the present Original Petition.

2.The petitioners invited tender for execution of Railway works, viz., "Doubling of track between Shornur and Mangalore – Cannanore – Mangalore Section : Construction of Major Bridges with Pile Foundation and Earthwork for approaches" by their public tender, dated 15.07.1998. The respondent participated in the tender and became successful bidder. Contract was awarded with a condition that the work has to be completed within a period of 24 months from the date of issue of Letter of Acceptance, i.e., 22.05.1999, followed by agreement executed on 28.06.1999. The work of the respondent was affected by monsoon, yet, the respondent completed a considerable portion of the work. However, the petitioners issued notices of termination of the contract. On respondent's representation, time was extended, but still, taking up the position that the respondent had not achieved the revised target, the petitioners terminated the contract at the risk and cost of the respondent. The respondent claimed various amounts under different heads totalling to Rs.1,66,71,020/- and sought an

arbitration of the claims before a sole independent Arbitrator.

3. Upon hearing both sides and on perusal of materials on record, ultimately, the learned Arbitrator, vide impugned award dated 05.03.2016, awarded a sum of Rs.15,91,020/- with interest thereon at 12% p.a. from 01.08.2005 till date of the award and interest on the consolidated amount at 18% p.a. from 16.05.2016, if the awarded amount is not paid or tendered by the petitioners on or before 15.05.2016 and also awarded costs of Rs.2,00,000/- payable by the petitioners.

4. This Original Petition has been filed challenging the award passed by the Arbitrator only in respect of *pendente lite* interest awarded at the rate of 12% p.a.

5. Learned Standing Counsel appearing for the petitioners would submit that the interest awarded by the learned Arbitrator is contrary to terms of contract and beyond the scope of very contract itself. Hence, the award has to be set aside in that aspect. In support of his submission, he also placed reliance on the judgment of this Court reported in **2018(3) CTC 285 [Deputy Chief Engineer (Construction), Southern Railway, Podanur v. Vishal Constructions and another]**. Therefore, according to the learned Standing Counsel, the award has to be set aside insofar as the *pendente lite* interest portion is concerned.

6. Heard the learned Standing Counsel for the petitioners and perused the materials available on record. Despite notice being served, none appeared for the respondent.

7. Since this petition pertains to a short question as to whether interest could be awarded contrary to the terms of the contract, it is imperative to look into the contract entered into between the parties. Clauses 16(3) and 64(5) of the General Conditions of Contract of Indian Railways read 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 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."

8. When the parties have chosen to waive interest by lawful agreement, the contract has to be given more importance rather than general principles of law. The agreement having entered lawfully and voluntarily, the same has to be given effect to. Unless parties specifically agree, it is well settled that *pendente lite* interest cannot be awarded, when the claim itself is made for money. Such being the position, I am of the view that the award passed by the learned Arbitrator, awarding *pendente lite* interest at the rate of 12% p.a. is against very terms of the contract. Admittedly, the parties have agreed to waive interest by lawful contract. Such contract is not prohibited under the law. Therefore, I am of the view that when the parties have agreed under certain terms

to waive interest, *pendente lite* interest cannot be awarded. In this regard, it is useful to refer the 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."

9. Similarly, in an unreported judgment of this Court in the case of **The Chief Engineer/CN/South/Ms, Southern Railway and Another v. M/s.M.R.K.R. Rail One (J.V.), Hyderabad [O.P.No.1067 of 2018, dated 08.04.2019]**, this Court has held that, when the contract is specific and the parties have agreed to waive their right to claim interest, terms of the contract have to be given effect to and this Court, considering the terms of the agreement, set aside the award in respect of *pendente lite* interest alone, in that case.

10. Similarly, in yet another unreported judgment of this Court in the case of **The Deputy General Manager/General, Southern Railway, Chennai-3 and Another v. Strong Engineering Contractors, Tiruchirapalli [O.P. No.397 of 2018, dated 29.06.2018]**, this Court held as under:

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.

8. Following the Supreme Court decisions and our High Court decision, the learned Single Judge, in the judgment cited supra, allowed the section 34 application. The case on hand is similar to the decisions cited supra reported in 2018 (3) CTC 285. Since the Arbitrator has gone beyond the scope of the contract by awarding pendente lite interest, the Award will have to be set aside. Learned counsel for the petitioner submits that subsequent to passing of the Arbitral Award which is under challenge before this Court, the petitioner has already paid a sum of Rs.20,57,829/- to the respondent as directed by the Arbitrator and the petitioner is aggrieved only with award of the Arbitrator in respect of pendente lite interest at the rate of 10% per annum."

N. SATHISH KUMAR, J.

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11. In the light of the aforesaid judgments and the specific clauses in the contract, wherein, the parties have agreed to waive their right to claim interest, I am of the view that the award passed by the Arbitrator qua *pendente lite* interest at the rate of 12% p.a. from 01.08.2005 till 05.03.2016 is liable to be set aside.

award dated 05.03.2016, passed by the learned Arbitrator in respect of *pendente lite* interest @ 12% p.a. alone is set aside. In all other aspects, the award is confirmed. No costs. Consequently, connected application is closed.

29.08.2019
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Index : Yes / No
Internet : Yes / No
Speaking Order / Nonspeaking Order

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N.SATHISH KUMAR, J.

This Original petition has been listed today under the caption 'for being mentioned' at the instance of the learned counsel for the petitioner.

2. The learned counsel appearing for the respondent submitted that on the date of the Order he was present in the Court and hence, his presence may be directed to be mentioned in the appearance paragraph and para 6 of the Order.

3. In view of the above submissions, the name of the learned counsel for the respondent to be noted in the appearance paragraph in the Order of the Original Petition and also in 6th paragraph of the Order, after heard the learned Standing Counsel for the petitioner, 'heard the learned counsel appearing for the respondent' to be incorporated in the Order in O.P.No.144 of 2017 dated 29.08.2019.

4. The registry is directed to incorporate the above corrections and issue fresh Order copy to the parties concerned.

13.09.2019

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