

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.06.2019

PRONOUNCED ON : 17.06.2019
CORAM

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

Original Petition No.1072 of 2018

The Chief Engineer/CN/South/Ms,
Southern Railway,
Egmore, Chennai 600 008

... Petitioner

Vs.

M/s.M.R.K.R.Rail One (J.V)
No.339, Arora Colony - II,
Road No.2, Banjara Hills,
Hyderabad 500 034.

... Respondent

Petition filed under Section 34 of the Arbitration and Conciliation Act,
1996 to set aside the Award dated 06.04.2018.

For Petitioner

:

Mr.P.T.Ram Kumar

Standing Counsel for Railways

For Respondent

:

M/s.V.Sivakumar

ORDER

Challenging the award passed under Claim Nos.5, 8 & 10 the present
original petition has been filed.

2. The claimant entered into an agreement for the work of Gauge Conversion between KMs 674 to 692 Shenkottai - Punalur Section termed as Reach III being the successful bidder in the tender was invited by CAO/CN/MS/SR on 15.06.2009. The claimant being the successful bidder was awarded the work vide LOA No.W.496/CN/ERS/OTT/03/2009/3 dated 22.06.2010 for a total value of Rs.29,53,04,604.26p. The original completion period was 20 months from date of LOA upto 21.02.2012. Though the time was originally fixed in the contract to complete the work, the contract was subject to six time extension by the respondent/petitioner herein.

3. It is the case of the claimant that they had made all arrangements to take up the work in right earnest. Claimant has requested the respondent/petitioner herein for the stoppage of train movements and to hand over the section to enable him to start the field works uninterruptedly and safely, as the section was a ghat section and having entry from one side only. The respondent/petitioner closed the section for train movement from 23.09.2010, 91 days from issue of LOA. Thus there was a delay in handing over the site by 91 days. Besides, drawings were not issued in time. Further, though the drawings for pre-cast boxes were issued in January 2011, the respondent/petitioner herein had not finalised the working section, station

yards, catch siding and major bridge drawings, till the end of original completion date as per the agreement. Drawings were modified by the respondent many a times, that caused rework besides causing total confusion regarding finality of the works and the respondent had arranged only 7 girders out of 10 steel girders that too only after 48 months of LOA. Besides the respondent had not assessed correctly the quantum of work provided under various schedules of the Tender, due to which abnormal increase in quantities of certain items and reduction in quantities of many items and many items were not operated due to non-requirement of such items. Time extensions sought on six occasions by the claimant/respondent. The last extension was granted till 20.07.2016. Due to the delay in completion of the contracted work, which was originally planned for completion in 20 months, the claimant/suffered overstay due to extensions for an additional 50 months till termination of contract. The respondent terminated the contract on 17.05.2016, two months before the expiry of the extended completion period which gave the claimant a heavy blow financially. At the time of termination of contract the value of executed works amounted to about Rs.2673 lakhs against which Rs.2457 lakhs were paid and Rs.216 lakhs was due to be paid. 95% of physical work had been completed and the claimant pleaded that the balance executable work could be completed before the existing currency of the agreement i.e., extended completion period. Hence preferred a claim.

4. It is the contention of the petitioner herein/respondent-Railway that there was no delay on their part though there was a delay in issuing of drawings of major bridges, station yards and working section. The claimant was compensated by payment of adjusted rates on account of PVC and granting extension of currency of agreement without imposing any penalty or liquidated damages. As per the contract conditions the claimant should have inspected the site for assessing the expected hurdles in the field, before quoting rates. It is the duty of the claimant to obtain necessary approvals from the statutory authorities for use of explosives for carrying out blasting work and cutting of trees. Though the controlled blasting locations were to be identified jointly by the departmental staff and claimant's site engineer and the work could be carried out on the instructions of the Departmental supervisor, it was the claimant who had delayed the activity. Similarly, Forest clearance for cutting of the trees was requested by the claimant only in February 2013. During the currency of the contract, respondent/petitioner herein was entitled to modify the drawings and quantities as per the site requirement and no claim could be made by the contractor on this account. Supply of Steel Girders was the last activity to be undertaken after completion of all sub-structure works. During the currency of contract, considering the genuine reasons submitted by the claimant, time extensions were granted by the respondent. The respondent

had followed all lawful measures to get the work carried out on mutually agreeable conditions and made due payments. However, the respondent was disappointed with the performance of the claimant's execution and stated that after giving sufficient opportunity the respondent terminated the contract on 17.05.2016. The respondent had suffered huge loss due to non-performance of the claimant. Based on the above claim and defence the arbitrator has passed an award under various heads. The award has been challenged only with regard to the claim Nos.5, 8 and 10 and hence the present original petition has been filed.

5. The learned counsel for the petitioner/Railways would contend that though the contract was originally executed for a period of 20 months, the contract was extended for many times due to various reasons at the request of the claimant. The letter submitted by the claimant for extension of contract clearly indicates that they are willing to carry out the work at same rate as agreed. Contracts were extended under clause 17 A (ii) of the General Conditions of Contract, hence it is the contention of the learned counsel that clause 17 A (ii) makes it very clear that extension of time for delay not due to Railways or Contractor, no compensation shall be payable for work so carried out to the extended period of time at the same rate and terms and conditions of contract being applicable as if such extended period of time was originally

in the original contract itself. Therefore, when extension is given under specific GCC, the arbitrator has passed an award beyond the contract and beyond the scope of Section 28(2) of Arbitration Act. It is further contended that the arbitrator passed the award under various heads towards payment of bank commission charges for extension of performance Bank Guarantee and also awarded the amount for overhead charges beyond the period of contract, the cost of machinery idle charges. Hence it is submitted that such award is against the contract itself, as the payment of bank commission cannot be fastened on the Railways and it is the duty of the contractor to keep alive the Bank Guarantee during the period of contract. Similarly, as per the GCC when the delay is neither on the part of the Railway nor on the contractor no compensation whatsoever can be claimed for such delay. Admittedly, 95% of the work has been completed and the payment has been made. Therefore it cannot be said that the contractor has overstayed and hence he is entitled to overhead charges beyond the period of contract. Similarly, the cost of machinery idle charges also could not have been awarded for the simple reason that contract has been extended mutually and such being the position, the question of overstaying and paying the idle charges for machinery does not arise at all. Hence it is the contention that there is a patent illegality in the award which goes into root of the matter and beyond the contract and therefore the learned counsel for the petitioner prays to set aside the award.

6. To buttress his submission, learned counsel has made reliance upon the following decisions:

(i) **Bharat coking Coal Ltd., Vs. L.K.Ahuja** reported in (2004) 5 SCC 109

(ii) **Ramnath International Construction (P) Ltd., Vs. Union of India (P) Ltd.**, reported in (2007) 2 SCC 453

(iii) **Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager works, Palghat Division, Southern Railway, Palghat, Kerala and others** reported in 2007 (5) CTC 17 (Mad)

7. It is the contention of the learned counsel for the respondent herein/M/s.M.R.K.R.Rail One (J.V) that the contract was terminated two months prior to the contract period originally extended, though there were extensions for many times made out due to delay on the part of the Railways. The Arbitrator has considered the said aspect factually and found that the delay was not attributable to the contractor and the Railways was responsible for such delay. Therefore, it is the contention of the learned counsel that once the arbitrator analysed the matter factually and arrived at a conclusion, the same cannot be challenged merely because some other view is possible. In support of his submission, learned counsel has made reliance upon the

following decisions:

(i) *Fiza Developers and Inter Trade Private Limited Vs AMCI (India) Private Limited and another* reported in (2009) 17 SCC 796.

(ii) *Wishwa Mittar Bajaj and Sons Vs. Shipra Estate Ltd and Jaikishan Estates Developers Private Limited* reported in 2018(6) ArbiLR 478 : 2019 (256) DLT 42 : 2019(1) R.A.J.66

(iii) *Sutlej Construction Limited Vs Union Territory of Chandigarh* reported in (2018) 1 SCC 718

(iv) *Emkay Global Financial Services Ltd., Vs Girdhar Sondhi* reported in (2018) 9 SCC 49

8. The claimant has preferred the claim as against the termination of contract and for various amounts and it is not in dispute that 95% of the work has been completed and the subject matter of the issue under Section 34 is with regard to the award passed by the Arbitrator in claim Nos.5, 8 and 10. The claim No.5 pertains to Payment of Bank commission charges for extension of Performance Bank Guarantee. Claim No.8 is with respect to the site overhead charges beyond the period of contract. Claim No.10 pertains to cost of machinery idle charges.

9. It is not in dispute that originally contract was entered on 22.06.2010

for total value of Rs.29,53,04,604.26 and original completion period for 20 months from the date of LOA upto 21.02.2012. It is also not in dispute that within 20 months agreed as per agreement the work could not been completed which resulted in extension of time on six occasions. In all six occasions extension of agreement was granted under clause 17 A (ii) of the GCC of Indian Railways. Such extension was granted on 20.07.2016. The extension was granted as per the request made by the contractor. In one of such requests while seeking extension, the contractor has specifically made a request that due to certain reasons sought for extension of time and agreed to carry out the work at the same rates and as per conditions originally agreed. This reason has been acceded by the respondent/petitioner herein on several occasions. As indicated above, the application for grant of extension of time has considered under clause 17 A (ii) of the GCC. Clause 17 A (ii) of GCC is extracted below:-

"(ii) Extension For Delay Not Due To Railway or Contractor:

If in the opinion of the Engineer, the progress of work has any time been delayed by any 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 proceeding taken or threatened by or dispute with adjoining or to neighbouring 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 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 endeavours 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 type 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 made it clear that when there was no delay on either part in the event of extension, no other compensation shall be payable for works so carried forward to the extended period of time, the same rates terms and conditions of the contract being applicable as if such extended period was

originally provided in the original contract itself. Therefore, the above clause, makes it clear that when there is no delay on either side and the contract is extended, original conditions agreed upon between the parties would prevail and bind the parties to the contract. In this regard the judgment relied on by the petitioner herein in the case of **Ramnath International Construction (P) Ltd., Vs. Union of India (P) Ltd.**, reported in (2007) 2 SCC 453 reads as follows:-

"12. Clause (C) provides that where extensions have been granted by reason of the delays enumerated in clause (A) which were beyond the control of the contractor, or on account of the delays on the part of the employer specified in clause (B), the contractor is not entitled to make any claim either specified in clause (B), the contractor is not entitled to make any claim either for compensation or otherwise, arising in whatsoever manner, as a result of such extensions. After enumerating certain delays, sub-clause (viii) of clause (A) specifically mentions delay on account of any other clause beyond the control of contractor. The causes for delays specified in clause (A), thus, encompass all delays over which the contractor has no control. This will necessarily include any delays attributable to the employer or any delay for which both the employer and contractor are responsible. The contract thus provides that if there is any delay, attributable either to the contractor or the employer or to both, and the contractor seeks and obtains extension of time for execution on that account, he will not be

entitled to claim compensation of any nature, on the ground of such delay, in addition to the extension of time obtained by him. Therefore, the claims for compensation as a consequence of delays, that is Claim 24 of the Hangar Contract and Claims 13 to 16 of the Road Contract are barred by clause 11(C).

20. In the view that we have taken the arbitrator clearly misconducted himself in awarding compensation under Claim 24 under the Hangar Contract and Claims 13 to 16 under the Road Contract which was rightly set aside by the High Court in the order impugned herein, on the ground that the arbitrator had acted in excess of his jurisdiction”.

(i) In *Bharat coking Coal Ltd., Vs. L.K.Ahuja* reported in (2004) 5 SCC 109, the Apex Court held as follows:-

24. Here when claim for escalation of wage bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading “Loss or Profit”. It is not unusual for the contractors to claim loss or profit arising out of diminution in turnover on account of delay in the matter of completion of work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a

plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in Sunley (B) & Co. Ltd., v. Cunard White Stad Ltd. By the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs.6,00,000 awarded to the claimant.

(iii) In the case of *Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager works, Palghat Division, Southern Railway, Palghat, Kerala and others* reported in 2007 (5) CTC 17 (Mad), this Court, observed as follows:-

33. Claim No.5: LOSSES SUFFERED OWING TO OVERSTAYAL OF WORK

This claim is almost similar to Claim No.3: Though the Tribunal was of the view that Claim No.5 is different from Claim No.3, as it is exclusively for Supervisory Staff and other establishment. Case of Contractor/Claimant is that work was awarded on 25.10.1995 with anticipated date of completion of 25.01.1996 but there were delays on the part of the Railway Administration which hampered the progress of work. The Contractor/Claimant contended that due to delays on the part of Railway, work got prolonged and the Contractor had to keep the Supervisory Staff at site, duly paying their wages

and due to idling and under utilization of the mobilised infrastructure the contractor suffered losses for a value of Rs.1,26,350/-.

34. Railways denied that there was any delay on their part and contended that sufficient sleepers were arranged and the Contractors have not taken any effort for trucking out of sleepers despite the availability of enough sleepers at Bommidi Sleeper Factory. The Railway mainly contended that necessary rider Agreements have been executed and the claimant has not raised any objection at that point of time. Referring to pleadings and documents, Tribunal arrived at the conclusion that work prolonged beyond the original currency of contract and such time overrun has resulted in maintaining the Supervisory Staff and non-utilization of infrastructure, the Tribunal computed Rs.1,04,250/- payable to the claimant.

35. Assailing the award under Claim No.5, the learned Counsel for the Railway submitted that there is no explanation as to how the amount has been computed as Rs.1,04,250/-. It was submitted that when rider Agreement had been executed which provides that the same rate clause and condition, as found in the original Agreement, shall apply to the extended period also, under such circumstances, the award under Claim No.5 is patently illegal, warranting interference by the Court.

36. Supporting the award for losses owing to overstayal of work, the learned counsel for the claimant contended that the works could not be completed within ninety days period only due to railway's failure and defaults and the contract was extended from time to time, finally upto 31.03.1997, which resulted in enormous loss to the claimant due to idling of under utilization of the mobilized infrastructure and establishment. The learned counsel further urged that such losses to the claimant is to be compensated on the universally accepted principle of computing damages, which is termed as 'The Hudson's Law of Damages' and adopting that formula in his Written Submissions, the learned counsel for the claimant has calculated damages payable under this head as Rs.7,50,537/- as per the following calculation,

$$\begin{array}{rcl}
 \text{H.O. Percentage} & & \text{Contract sum x Delay period} \\
 \text{-----} & & \text{-----} \\
 100 & & \text{Contract period} \\
 = 10 \times \text{Rs. } 17,32,010 \times 13 \text{ months} \\
 \text{-----} & & \text{-----} \\
 100 & & 3 \text{ months}
 \end{array}$$

Though the aforesaid formula adopted and the arguments advanced on behalf of the claimant appear to be attractive, on a close scrutiny, in our view, this submission lacks substance.

37. Though the work was time bound programme, it was extended and necessary rider Agreements have been executed by the Railway with the claimant, vide rider Agreements dated 05.01.1996, 06.05.1996, 12.07.1996 and 12.03.1997. As per the rider Agreements, the contractor and the Railway Administration have mutually agreed that the Agreement shall be varied or added in minor manner i.e., to say 'the currency of the Agreement is extended up to 31.03.1996' [and other dates respectively] under Clause 17(3) of GCC. It was further mutually agreed that 'the Agreement and every rate clause and conditions in the Agreement shall continue of full effect and be binding on the respective parties'. As per the rider Agreement, the Contractor and Railway administration have thus mutually agreed with every rate clause and condition shall continue of full effect and binding on respective parties. It was also stated that the extension of time will not result in any financial loss to the administration.

38. There are mutual agreement between the parties that the same terms and conditions would apply and extension of time will not result in any financial loss to the administration. When there was such express terms, Arbitrators erred in ignoring such clauses in rider Agreements. Holding that Arbitrator being creatures of the Agreement between the parties and that he has to operate within the four corners of the Agreement and if he ignores the specific terms of the contract, it would be a question of jurisdiction error on the

face of the award, in Food Corporation of India Vs. Chandu Construction and another 2007 (4) MLJ 73, the Supreme Court had held thus:

11. It is trite to say that the Arbitrator being a creature of the agreement between the parties, he has to act within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be correct by the Court. We may however, hasten to add that if the Arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. (Associated Engg. Co. Vs State of Andhra Pradesh, AIR 1992 SC 232: 1991 (4) SCC 93 and Rajasthan State Mines and Minerals Ltd., Vs Eastern Engineering Enterprises and another, AIR 1999 SC 3627: 1999 (9) SCC 283].

In this context, a reference can usefully be made to the observations of this Court in Alopi Parshad and sons Ltd Vs. Union of India, AIR 1960 SC 588, wherein it was observed that the Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contracts at rates different from the stipulated rates, on some vague plea of equity. The Court went on to say that in India, in the codified

law of contracts, there is nothing which justifies the view that a change of circumstances, 'completely outside the contemplation of parties' at the time when the contract was entered into will justify a Court, while holding the parties bound by the contract, in departing from the express terms thereof. Similarly in The Naihati Jute Mills Ltd. Vs Khyaliram Jagannath, AIR 1968 SC 522, the Supreme Court had observed that where there is an express terms, the Court cannot find, on construction of the contract, an implied term inconsistent with such express term.

13. In Continental Construction Co. Ltd., Vs. State of Madhya Pradesh, AIR 1988 SC 1166: 1988 (3) SCC 82 it was emphasized that not being a conciliator, an Arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a Tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the Court provided his error appears on the face of the award.

14. In Bharat Coking Coal Ltd., v. Annapurna Construction AIR 2003 SC 3660; 2003 (8) SCC 154, while inter alia, observing that the Arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract, it was observed, thus:

'There lies a clear distinction between an error within the

jurisdiction and error in excess of jurisdiction. Thus, the role of the Arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parametres of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record.'

15. Therefore, it needs little emphasis that an Arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action.

39. As per rider Agreements, Contractor and Railway have mutually agreed that every rate clause and the conditions in the Agreement shall continue of full effect and binding on the respective parties. No provision was made for payment of extra to Technical supervisor. While so, ignoring the terms of Agreement and the rider Contractual Agreement, Tribunal has exceeded its jurisdiction in awarding Rs.1,04,250/- towards overstay of work. In our considered view, the award of compensation of Claim No.5 is liable to be set aside.

10. Admittedly, the extension in this case was also given as per the GCC wherein, it is specifically agreed by the parties that no compensation was payable. Further, at the time of seeking extension it is not the case of the claimant to the effect that the entire delay was because of the Railways. Without establishing delay on the part of the Railways merely on the basis of the termination of the contract after extension for more than 5 times, it cannot be raised by the contractor for the first time that he suffered a huge loss. Admittedly 95% of the work has been completed that itself indicate the fact to the effect that machineries were all along used by the contractor. Therefore, it cannot be construed to say that he has suffered loss due to overstay and idle charges of machinery.

11. Similarly, when the contractor himself has agreed for certain conditions particularly, clause 17 A (ii) of the GCC of the Railways, there is an obligation on the contractor to keep the Bank Guarantee alive, for that reason, the Railways cannot be fastened with the liability to pay the bank charges namely the commission etc., When the parties are bound to act as per contract, the learned Arbitrator ought not to have gone beyond the scope of the contract which is certainly in violation and contrary to Section 28 of the Arbitration and Conciliation Act.

12. No doubt, in the judgments cited by the learned counsel for the respondent in *Wishwa Mittar Bajaj and Sons Vs. Shipra Estate Ltd and Jaikishan Estates Developers Private Limited* reported in 2018(6) ArbILR 478 : 2019 (256)_DLT 42 : 2019(1) R.A.J.66 . wherein, it has been held that the award cannot be interfered with unless it is patently illegal or opposed to the policy of India. Absolutely, there is no dispute with regard to the proposition of law emerged in the above judgment.

13. However, facts and circumstances of the case on hand clearly indicate that the arbitrator has passed the award beyond the scope of the contract which has been specifically agreed between the parties, which is certainly contrary and violative of Section 28 of the Arbitration Act. This Court finds the arguments raised by the learned counsel for the petitioner seeking to set aside the claim Nos.5, 8 & 10 are acceptable.

14. In view of the above discussion, I am of the view, the award passed by the arbitrator in so far as Claim Nos. 5, 8 and 10 is liable to be interfered. Accordingly, the original petition is allowed and the award is set aside as far as the claim Nos.5, 8 and 10 are concerned. No costs.

17.06.2019

Index:Yes/No
Internet:Yes/No
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N. SATHISH KUMAR, J.
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Pre-delivery order made in
Original Petition No.1072 of 2018

17.06.2019

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