



IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 30TH DAY OF JUNE 2021

THE HON'BLE MR. JUSTICE N.SATHISH KUMAR

O.P. No. 856 of 2016

In the matter of Arbitration and
Conciliation Act 1996

and

In the matter of the work of
construction of Additional Students
Rooms (3rd Floor) over Tapti and
Brahmaputra Hostels at IITM,
chennai (Agreement No.492/2009-
2010 dt. 28.01.2010 and the Award
of Sole Arbitrator dt. 25.10.2014.

M/s. URC Construction Pvt. Ltd.,
Rep. By its Managing Director,
No.102, Periyar Nagar,
Erode – 638001.

.. Petitioner

.Vs.

Indian Institute of Technology Madras
Rep.by its Superintending Engineer,
Engineering Unit,
IIT Madras,
Chennai 600036.

.. Respondent

Original Petition praying that this Hon'ble Court be pleased to set
aside the Award dated 25.10.2014 and remand the matter for fresh
consideration to the Arbitrator.

<https://hcservices.ecourts.gov.in/hcservices/> This Original Petition having been heard on 23/06/2021 in the

presence of Mr.V.P.Sengottuvel, Advocate for the petitioner herein and



Mr.P.Neelakandan for M/s.Menon, Karthik Mukunthan and

Neelakantan, advocates for the respondent herein and upon reading the petition and the award dated 25/10/2014 filed herein and having stood over for consideration till this date and coming on this day before this court for orders in the presence of the said advocates for the parties hereto and this court having observed that from the very beginning the petitioner not only canvas his case as against the levy of liquidated damages but also additional expenses due to the delay of 499 days, however, the Director of the IITM referred only one claim for Arbitration, only on 24.12.2013 other claims were referred and therefore, when the respondent themselves admitted that 399 days delay is not attributable to the petitioner, only 100 days delay was attributable, the learned Arbitrator ought to have gone into the aspect of the additional expenditures incurred due to delay of 399 days on merits, only on the repeated letters sent to the Superintending Engineer, thereafter Chairman and Director appeal was filed, thereafter, the matter was referred to the Arbitrator on 24.12.2013, therefore, merely the claims have not been made with specific format, it cannot be said that no procedure has been followed, when the Petitioner/Claimant has made proper claim to the Arbitrator for additional expenses, learned Arbitrator ought to have seen

the merits of the case as to whether the additional expenditure was



actually incurred and whether or not delay of 399 days attributable to the petitioner/claimant, without deciding the above matter just non-suiting the claim on the ground of non-following the procedure is, in fact, not according to law, when the Arbitrator has ignored the vital documents and considered only irrelevant material in reaching conclusion, such Award cannot be sustained in the eye of law and, it is ordered as follows:-

That the award dated 25/10/2014 with regard to Claim No.1 be and is hereby upheld.

2. That with regard to the other Claims i.e, Item 2 to 4 (Additional Claims) of the Award dated 25/10/2014 be and is hereby set aside.

3. That the parties hereto, shall be at liberty to refer the above dispute viz., Additional Claims, to the same Arbitrator by consent and if no consensus, seek an appointment of fresh Arbitrator as per law.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE,
CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS
THE 30TH DAY OF JUNE 2021.

Sd/-

ASSISTANT REGISTRAR (O.S. II)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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07/09/2021

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O.P.No. 856 of 2016

ORDER

DATED : 30.06.2021

THE HON'BLE MR. JUSTICE
N.SATHISH KUMAR

FOR APPROVAL: 08/09/2021

APPROVED ON: 08/09/2021

**THE HIGH COURT OF JUDICATURE AT MADRAS**

Reserved on	Delivered on
23~06~2021	30-06~2021

CORAM

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

O.P.No.856 of 2016

M/s. URC Construction Pvt. Ltd.,
Rep. By its Managing Director,
No.102, Periyar Nagar,
Erode – 638001.

.. Petitioner

.Vs.

Indian Institute of Technology Madras
Rep.by its Superintending Engineer,
Engineering Unit,
IIT Madras,
Chennai 600036.

.. Respondent

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitration Award dated 25/10/2014 and remand the matter for fresh consideration to the Arbitrator.

For Petitioner : Mr. V.P. Sengottuvel

For Respondents : Mr. P. Neelakandan for
M/s.Menon, Karthik Mukunthan and
Neelakantan



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ORDER

Aggrieved over the Award of the Sole Arbitrator dated 25.10.2014 rejecting the claim for recovery of liquidated damages and direction to refund the withheld amount of Rs.17,25,875.00 under clause 2 of the contract together with interest at the rate of 18% p.a., and rejection of the additional claims made during the arbitral proceedings viz., Claiming compensation of Rs.46,91,544/- for additional expenditure incurred in terms of construction materials, labourers, fuel etc., during the extended period of contract 499 days; Compensation of Rs.13,89,529.61 for additional expenditure incurred in terms of additional lead for all works in the 3rd and 4th wing due to non-availability of access point and Compensation of Rs.86,24,571/- for extra cost over run for the extended period of contract from 19.05.2010 to 20.09.2011 the Petitioner filed this petition.

2. Though several grounds have been raised during submissions, main ground raised by the Petitioner is that the Award is vitiated on the ground of Patent Illegality and non consideration of documents and no proper reason stated by the Arbitrator for rejecting the Additional Claims.



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3. Brief facts leading to file this Original Petition is as follows:

3.(a) The Petitioner was awarded a contract for a value of Rs.3,45,17,496/- for construction of Additional Students room (third floor) over Tapti & Bramaputra Hostels at IITM Madras. Tender submitted by the Petitioner was accepted by letter dated 08.12.2009. Thereafter, agreement was executed on 28.01.2010. One of the main condition in the Contract is that the work will be completed within a period of 4 months. However, work was not completed within that period. The Respondent extended the time provisionally six times finally upto 13.09.2011. The work was completed on 20.09.2011. The Petitioner applied for final extension of time on 12.03.2012. The superintending Engineer issued notice on 25.04.2012 to the Petitioner to show as to why compensation should not be levied. After considering the reply the Superintending Engineer levied a compensation for a sum of Rs.17,25,875.00 as per Clause 2 of the Agreement. The decision of the Superintending Engineer was appealed, thereafter the Arbitration was invoked.

3(b) The main contention of the Petitioner is that the work was not



completed because of various practical hindrance not attributable to the Petitioner. The respondent granted extension of time for six times and each time the Respondent informed that the extension of time was “provisionally granted” and also mechanically repeated all the extension of time is “without prejudice to the right of the Institute to recover the liquidated damages” in accordance with the provisions of clauses of the Agreement. While doing so, the Respondent without any reference to Clause 5.2 of the Contract, arbitrarily overlooked the factors put forth by the claimant. The fundamental hindrance in this project was that (a) the work had to be completed without affecting the students already occupying the floors i.e., ground, 1st floor and 2nd floor (b) Only one access point was allowed for each building from by a temporary stair. (c) No labour shed was allowed inside the campus and (d) Night work should not be carried out. Shifting of the materials in the required height through the temporary stairs, non availability of work space at the third floor, abnormal increase in leads for dumping of the waste materials beyond 100 meters stipulated in the agreement have hampered the actual progress of works. Hence it is the contention that the additional time required to complete the total project was beyond the control of the contractor. The work was completed on 20.09.2011, the respondent did



long time. The Petitioner requested extension of time vide its letter dated 12.03.2012. However, the respondent has sent a reply seeking compensation.

3(c) Though the delay of 499 days was attributed to the petitioner, the Respondent has restricted the delay to 100 days. How 100 days delay occasioned has not been explained by the Respondent. Above details also furnished to the Petitioner in their reply seeking compensation.

4. Denying the allegations it is the contention of the Respondent that the agreement stipulates specific time for completion of work. After the stipulated date of completion the quantum of work carried out was only 3% of the total cost of work. Therefore, a notice was issued to the Petitioner asking to show cause why the contract should not be terminated. The Petitioner in his reply intimated some vague reasons for the delay and sought extension of 3 months for completion of work. The extension also not sought as per Clause 5.3 of the agreement. However, the Respondent took lenient view and granted extension of time and similarly extension was granted for 6 times despite the delay attributed to the Petitioner. In spite of extension of time, no serious efforts were



completed on 20.09.2011 and final EOP application submitted by the claimant on 12.03.2012. Extension was granted with reserved right for claiming compensation. The Petitioner/claimant having accepted the provisional extension with the conditions, now cannot agitate the same. In respect of the Additional Claims, the Petitioner/claimant has never followed the Clause 5 of the agreement. The learned Arbitrator after considering all the documents and also analysed the various provisions of contract governing the parties, rejected the claim of the Petitioner.

5. The learned counsel appearing for the Petitioner vehemently contended that though 499 days delay was attributed to the Petitioner, the Respondent restricted the delay of 100 days only. How the delay of 100 days arrived, there is no evidence adduced and the learned Arbitrator has not considered the explanation averred by the Petitioner for such delay. Various factors which contributed for the delay has not been taken note of the learned Arbitrator, besides, there is no evidence to show that because of the delay the respondent suffered damages. Hence, levy of liquidated damages is not correct and the amount levied has to be refunded. It is his further contention that the additional expenditure claimed by the Petitioner was not at all considered by the learned



been followed. Any agreement restricting the parties from establishing their right is void. This aspect has not considered by the learned Arbitrator. Hence submitted that the Award is vitiated by the Patent Illegality and against the Fundamental Policy of India.

6. In support of his contention he relied upon the following Judgments:

1. *Oil and Natural Gas Corporation Ltd., vs. Saw Pipes Ltd., [(2003) 5 SCC 705]*
2. *Ganesh Babu vs. Adventures India and Another [Order in O.P.182 of 2015 dated 21.07.2020 Madras High Court]*
3. *Vishal Engineers and Building vs. Indian Oil Corporation Ltd., [2011 SCC Online Delhi 5124]*
4. *State of Goa vs. Praveen Enterprises [(2012) 12 SCC 581]*
5. *Grasim Industries vs. State of Kerala [(2018) 14 SCC 265]*



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of 2017 dated 14.02.2018 Madras High Court.]

7. Whereas learned counsel appearing for the Respondent submitted that despite the specific condition in the agreement to complete the construction within 4 months, extension was granted for 6 times and ultimately the work was completed only on 29.02.2011. Though there was a delay of 499 days, the Respondent took reasonable stand and calculated and delay attributable solely to the Petitioner which has been proved before the Arbitral Tribunal. Learned Arbitral Tribunal has considered every document and accepted the delay caused by the Petitioner. It is the further contention of the learned counsel for the Respondent that the learned Arbitrator is a reputed Civil Engineer, has considered all the documents and found that 100 days delay only attributable to the Petitioner.

8. It is submitted by the learned counsel for the Respondent that as far as the Additional Claim in respect of additional expenditure were made only on 24.12.2013 and such dispute was not raised while the matter was referred to the Arbitration. Only after the proceedings commenced, additional claims have been made. At any event it is his contention that Clause 15.1 and its sub-clauses provide for a mechanism



to resolve dispute arising out of the Contract, such procedure has not been followed. What was addressed and complained to the Superintending Engineer is only a levy of compensation i.e., liquidated damages and not in respect of additional expenditure. When the specific clauses govern the parties as to the manner in which the matter has to be dealt with is not followed, the additional claim cannot be entertained, which has been correctly held by the Arbitrator. Hence, prayed for dismissal of the Petition. In support of his contention he relied upon the following judgements:

1. *Ssangyong Engineering & Construction Company Ltd., vs. National High ways Authority of India (NHAI) [(2019) 15 SCC 131]*
2. *NCC Ltd., vs. Indian Institute of Technology & Another [2020 SCC Online Mad 5857]*
3. *Municipal Corporation, Jabalpur and others vs. Rajesh Construction Co. [(2007) 5 SCC 344]*



claims. What was referred to arbitration ordinarily as against the levy of liquidated damages and refund of the same with interest. It is undisputed fact that Contract has to be completed within 4 months. However, there were 6 times extension granted by the Respondent reserving the right to levy of liquidated damages. The work was ultimately completed on 29.02.2011 and there were 499 days delay in completion of the work. However, the Respondent has levied liquidated damaged for the delay of 100 days only and the reasons for delay of 399 days was accepted by the Respondent. The Petitioner submitted that the entire delay has not attributed to him and there was several other factors. The learned Arbitrator has considered the submissions and elaborately discussed the same in Paragraph 4.44 to 4.75 of the Award and appreciated all the documents and found that the delay of 100 days is attributable only to the Petitioner and not on the Respondent. Every document has been analysed by the learned Arbitrator. Therefore, this Court is of the view that the Arbitrator being a Civil Engineer, analysed the entire aspects particularly, the documents and factually found that the delay of 100 days attributable only to the applicant, therefore, this Court cannot re-appreciate the evidence.



Petitioner that without establishing the loss and damages by the Respondent the compensation cannot be levied. The learned Arbitrator in para 4.72 of the Award has discussed about the manner in which the premier institute has suffered damage though not monetarily but reputation and inconvenience to the students etc., Besides, learned Arbitrator has also considered the law laid down by the Apex Court in ***Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd., [2003 (5) SCC 705]*** wherein the Apex Court has held that when parties have expressly agreed for recovery from the contractor for breach of the contract a pre-estimated genuine liquidated damages and not by way of penalty. It is held that if the compensation named in the contract for such breach is genuine pre- estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him and rejected the claim of the Claimant for refund of liquidated damages. In the above judgment the Honourable Supreme Court has held that if the illegality goes to the root of the matter the award has be set aside. If the illegality is of trivial nature it cannot be held that the award is against the public policy. When the award is unfair and unreasonable that they shock the conscience of the court and such award opposed to public policy, the same is required



to be adjudged void. Whereas in the given case, the learned Arbitrator in fact has considered the relevant documents and found that the delay of 100 days solely attributable to the Petitioner herein and justified levying of the liquidated damage as per the contract agreed between the parties.

11. The learned counsel for the Petitioner relied upon ***Ganesh Babu's case O.P.No.182 of 2015 (supra)*** wherein, this Court has set aside the Award mainly on the ground that the Award talks about the preponderance of probabilities and does not advert to a single exhibit, though exhibits were admittedly before the Arbitral Tribunal. No reason was given by the Arbitral Tribunal. Therefore, there is a violation of Section 31(3) of the Arbitration and Conciliation Act, besides being vitiated by ignoring vital evidence facet of patent illegality slot.

12. In ***Vishal Engineers and Building's case [2011 SCC Online Delhi 5124]*** (supra) Delhi High Court has ordered to refund the amount recovered as liquidated damages mainly on the ground that the entire bill cannot be attributable to the Appellant.

13. In ***Grasim Industries Ltd., case [(2018) 14 SCC 265]*** (supra)

the Honourable Supreme Court has held that Section 28(b) of the



Contract Act unequivocally proves that an agreement which extinguishes the right of a party on the expiry of the specific period, would be void.

Therefore, even if a restricted period for raising an arbitral dispute had actually been provided for, the same would have to be treated as void.

14. Learned counsel appearing for the Petitioner submitted that the time stipulated in Clause 15 of the Agreement to raise the dispute is void as per Section 28 of the Contract Act. Therefore, additional claim raised before the Arbitrator ought to have been decided by him. Clause 15.1.1. of the Agreement deals excepted matters in the contract, time duration for the grievances to be addressed to the various authorities within the period stipulated in the clause. The clause also deals with the procedure for addressing to the Superintending Engineer for his decision and thereafter, appeal to the Chairman. If the Petitioner is dissatisfied with the decision of the Chairman appeal to the Director. Even after if the Petitioner is not satisfied, he can seek for appointment of Arbitrator to adjudicate his claim. In the year 2012 itself notice for invoking Arbitration was issued. Thereafter, only on 24.12.2013 the additional claims have been referred by Respondent. In this regard in ***Rajesh Construction Co. case[2007 (5) SCC 344] (supra)*** the Honourable Apex



addressed to the Superintending Engineer claiming compensation of Rs.81,76,264/- for which no decision was taken by the Superintending Engineer for the additional expenditure. In the appeal to the Chairman on 25.06.2012 (Exhibit R-38) also the Petitioner claimed additional expenditure. Then finally the Petitioner by letter dated 22.08.2012 (Exhibit R-40) addressed to the Director requested for additional expenditure as per Clause 15 of the Agreement. The Director vide his letter dated 15.10.2012 (Exhibit R-42) rejected the appeal. Thereafter, Notice of invocation sent by the Petitioner on 29.10.2012 (Exhibit R-43) to the Director to refer the disputes to the Arbitration. By way a repeated requests made by the Petitioner and an application before the Superintending Engineer, thereafter, before the Chairman and Director. Finally other additional claims were referred only on 24.12.2013 to the Arbitrator by the Respondent.

16. Letters referred above indicate that from the very beginning the petitioner not only canvas his case as against the levy of liquidated damages but also additional expenses due to the delay of 499 days. However, the Director of the IITM referred only one claim for Arbitration. Only on 24.12.2013 other claims were referred. Therefore, when the respondent themselves admitted that 399 days delay is not attributable to the petitioner, only 100 days delay was attributable. The



learned Arbitrator ought to have gone into the aspect of the additional expenditures incurred due to delay of 399 days on merits. Only on the repeated letters sent to the Superintending Engineer, thereafter Chairman and Director appeal was filed, thereafter, the matter was referred to the Arbitrator on 24.12.2013. Therefore, merely the claims have not been made with specific format, it cannot be said that no procedure has been followed. When the Petitioner/Claimant has made proper claim to the Arbitrator for additional expenses, learned Arbitrator ought to have seen the merits of the case as to whether the additional expenditure was actually incurred and whether or not delay of 399 days attributable to the petitioner/claimant. Without deciding the above matter just non-suiting the claim on the ground of non-following the procedure is, in fact, not according to law. When the Arbitrator has ignored the vital documents and considered only irrelevant material in reaching conclusion, such Award cannot be sustained in the eye of law.

17. In ***J.G.Engineers Pvt. Ltd., vs. Union of India and Another*** [(2011) 5 SCC 758] the Honourable Apex Court has held as follows:

“25. It is now well settled that if an Award deals with and decides several claims separately and distinctly, even if the Court finds that the Award in regard to some items is bad, the Court will segregate the Award on items which did not suffer from any



infirmity and uphold the Award to that extent. As the Award on items 2,4,6,7,8,9 was upheld by the Civil Court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to Claims 2,4,6,7,8 and 9 of the Appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to Claims 2,4,6,7,8 and 9.”

18. In view of the above judgment, in this case on hand, the Award with regard to Claim No.1 is upheld. With regard to the other Claims i.e, Item 2 to 4 (Additional Claims) the Award is set aside. Parties are at liberty to refer the above dispute viz., Additional Claims, to the same Arbitrator by consent. If no consensus, seek an appointment of fresh Arbitrator as per law.

19. Accordingly, the Original Petition is partly allowed.

Sd./-N.S.K.J.
30.06.2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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