

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
05~10~2021	25~10~2021

C O R A M:

THE HONOURABLE Mr.JUSTICE N.SATHISH KUMAR

Original Petition No.421 of 2014

Malu Sleepers Ltd.,
(Formerly Malu Sleepers Private Limited)
Represented by its Managing Director
No.8, 1st Main, Gandhi Nagar,
Bangalore-560009.

... Petitioner

Vs

1. The Union of India

Represented by the Chief Engineer
Southern Railway, Park Town,
Chennai 600003.

2. Mr.Rajendra Prasad (Sole Arbitrator)

Presently the Group General manager (Engineering)
Dedicated Freight Corridor Corporation of India Ltd.,
A Government of India (Ministry of Railways) Enterprise
5th Floor, Pragati Maidan Metro Station Building Complex
New Delhi 110001.

... Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the impugned Award dated 21.05.2014 made in the Arbitration of the disputes arising out of the Agreement No.CS/1/CE of 1994 dated 09.02.1994 and the Rider Agreement No.CS/Rider-1/CE of 2000 dated 05.07.2000 passed by the Arbitrator and pass a fresh Award allowing all the claims of the Petitioner.

For Petitioner ... Mr.A.L.Somayaji
Senior Counsel for
M/s. Amalaraj

For Respondents ... Mr. V. Radhakrishnan
Senior Counsel for
M/s.P.T.Ramkumar

ORDER

1. Aggrieved over the Award passed by the sole Arbitrator, the present Petition has been filed challenging the Award.

1.a. Parties are arrayed as per their own rankings before the Arbitral Tribunal.

2. Brief fact leading to file this Original Petition is as follows:

2.a. The Claimants were awarded contract by the Respondents for manufacture and supply of 5 lakhs BG PSC track sleepers at a contract value of Rs.18.395 Crores governed by IRS conditions of contract and by an Agreement dated 09.02.1994. Thereafter, the Railway Board vide its letter dated 28.03.1995 has refixed the quantum of the inputs of raw materials

used in the manufacture of PSC Sleepers as follows:-

	Cement	HTS Wire
Existing/Present	60 Kg Per Sleeper	9.7. Kg. Per Sleeper
Revised Quantity	55 Kg Per Sleeper	9 Kg. Per Sleeper

2.b. The Petitioner has supplied the entire track sleepers before July 1997. During the currency of contract the Railways introduced revised norms, the level of inputs for manufacture were reduced and new norms for price variation linked to whole sale price index and Consumer Price Index were introduced. Though the Claimant addressed a letter indicating that revised norms cannot be effected from 28.3.1995 and the bill for the period prior to 01.12.1996 should be paid as per the terms of the original contract and not in accordance with the revised norms, the Respondent proceeded to enforce the revised norms as per its letter dated 13/17.12.1997, with effect from 28.03.1995. Thereafter, by subsequent negotiations, resulted in, implementing new norms and Rider Agreement came to be executed between the parties and it is agreed to implement new norms for the purpose of payment of escalation with effect from 01.10.1996 over and above the updated rate of a PSC Sleeper as on 30.09.1996.

2.c. As the dispute arose between the parties, the matter has been referred to sole Arbitrator in the earlier occasion. The learned Arbitrator in earlier occasion observed that the only dispute was as to whether or not adhoc price variation amounts already paid for respective periods based on updated price of 30.09.1996, is deductible or not from the price variation amount newly calculated as per Rider Agreement from 01.10.1996. The Award passed by the Sole Arbitrator was challenged before this Court by both sides in O.P.No.14 of 2005 and O.P.No.525 of 2005. This Court by order dated 13.8.2008 set aside the Award passed by the earlier Arbitrator on the ground that the Learned Arbitrator has not interpreted the terms of the Rider Agreement and he has gone beyond the agreement. Accordingly, as both side submitted a new Arbitrator may be appointed by the Railway Administration, the Award has been set aside and the Respondent was directed to appoint an Arbitrator to consider the dispute between the parties and pass an Award as expeditiously.

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2.d. Pursuant to the above orders the present Arbitrator was appointed by the Railway Administration, who has passed the impugned

Award. Before the Learned Arbitral Tribunal almost similar claims were made except claiming payment for escalation bills amounting to Rs.5,00,93,061. Following is the claim:

“Claim No.1-A : a direction to the Respondent Department to make payment of the Escalation Bills amounting to about Rs.5,00,93,061/- to the Claimant as per the Rider Agreement No.CS/Rider-1/CE of 2000 dated 5.7.000 in Agreement No.CS/1/CE/1994 dated 9.2.1994, strictly as per the Railway Board's clarification in its Letter No.92/TK-II/22/II/4 [GGKN] dated 27.08.2002 and also its subsequent proceedings.”

3. It is the case of the Respondent that in pursuant to the direction to the Railway Board, the Claimant and Respondent have mutually agreed to implement the revised norms with effect from 01.10.1996 and also agreed that the said agreement shall be varied and/or added to in the manner hereinafter mentioned. Accordingly, Rider Agreement with revised input norms and revised formula for price variation was executed with implementation effective from 1.10.1996. There is no dispute regarding the date of implementation of revised norms. Both Claimant and Respondent

agreed that the date of implementation of revised norms is 1.10.1996 and disputed the claim in entirety. The Respondent also raised counter claim of Rs.88,077,746/- being the money excessively paid and lying with the Claimant.

4. Learned Senior Counsel appearing for the Petitioner mainly challenge the Award on the ground that the Arbitrator has not interpreted the Rider Agreement. Despite a specific direction by the Railway Board, the Respondent has not adopted the value. Instead of adopting the net rate of sleeper on which escalation is payable as per the letter dated 04.01.2012 of Government of India, Respondent had adopted the value at the rate of interest 2.77% which is contrary to the Rider Agreement, which has not been considered by the learned Arbitrator. The earlier Award which has been set aside mainly on the ground that the Rider Agreement has not been properly interpreted. Despite specific reference was made the Arbitrator has not taken note of the Rider Agreement along with annexures and particularly letter dated 04.01.2002 issued by Government of India, Ministry of Railways in this regard. The dispute itself with regard to applying at the

rate of Rs.142.30 by the Southern Railway instead of Rs.193.77/- as per the Government of India which has not been discussed by the learned Arbitrator in the entire Award. Learned Arbitrator has not given any reasons for dismissing the Claim. Further, allowing the counter claim no reason has been assigned. The entire Award is bereft of details. Therefore, it is his contention that the Award is nothing but falls within the ambit of perversity. Important documents and letters have not been considered by the learned Arbitrator. Hence submitted that the Award has to be set aside.

5. Whereas the learned counsel for the Respondent submitted that the Arbitrator in fact considered the relevant clause of the contract and letters and the reasons have been given for rejecting the claim. Further, Tribunal also clearly found that the Respondent has clarified in the counter statement about the excess amount and allowed the counter claim. Therefore his contention is that when the Arbitrator has taken note of all the relevant materials and given reasons, though it is not elaborate Award, cannot be interfered. It is his further contention that the entire payment have been made applying calculation as directed by the Government of India, Ministry

of Railways by letter dated 04.01.2002. The Arbitrator considering all these facts has rejected the Claim and allowed the Counter Claim. Therefore, it is his contention that entire bill has been paid as per the correct calculation. Hence submitted that the Learned Arbitrator in fact, taken note of all clauses and given reasons, the same cannot be said to be perversity. In support of his contention he relied upon the judgement in ***Dyna Technologies Private Limited vs. Crompton Greaves Limited [(2019) 20 SCC 1]***.

6. As pointed out by the learned Senior Counsel for the Petitioner, in the earlier occasion the Award has been set aside by this Court and the Respondent was directed to appoint fresh Arbitrator to go into the question as regards the interpretation of the rider agreement clauses with reference to cost escalation. The only dispute referred to the Arbitration is with regard to the Rider Agreement between the Parties and clauses with reference to the cost escalation. It is not disputed that the original agreement was entered on 09.02.1994 for manufacture and supply of 5 lakhs BG PSC track sleepers. The total value of the contract is Rs.18.395 Crores at the rate for piece at Rs.367.90. As per the Original contract the supply must be

completed by 1.4.99. It is not disputed by both sides that the supply was completed before July 1997.

7. As per the Original Contract accepted rate per sleeper is Rs.367.90 as on 1.5.1990. The same is based on the following basic of Raw Material/Wages:

- "I. HTS Wiro - Rs.23,209.26 per MT for works station/work siding, Birur.*
- II. Special Coment - Rs.1,618.21 per MT -do-*
- III. Wages - Rs.9.50 per day"*

8. It is not disputed that the Board of Railways introduced revised norms for payment and parties entered into the Rider Agreement dated 05.07.2000. As per the Rider Agreement parties have mutually agreed to implement the revised norms with effect from 01.10.1996 and also agreed that the said agreement shall be varied and/or added to in the manner herein after mentioned. As per the Rider Agreement the following are the existing and amended conditions:

AS EXISTING	AS AMENDED														
1.BASIC PRICE: (CI: NO.5) The accepted rate is Rs. 367.90 per sleeper based on a wage level per worker at Rs. 9.50 per day at the quoted location at factory, Birur shall from the basis for computation of wages escalation and shall be effective from 1.5.90. (Pl. element on the date of offer is taken as Nil for the purpose of escalation). 2.INPUTS: <u>PARAMETER</u> Labour Cement HTS wire(3x3 strand) Wastage of MCI inserts <u>AS EXISTING</u> 2 mandays/sleeper 60 kg/sleeper 9.7 kg/sleeper up to 2% of actual requirements	The accepted rate is Rs. 367.90 per sleeper based on a wage level per worker at Rs. 9.50 per day at the quoted location at factory, Birur shall from the basis for computation of wages escalation and shall be effective from 1.5.90. The cost of HTS wire will be exclude for the purpose of escalation. HTS wire being free supply item. <u>PARAMETER</u> Labour Cement HTS wire(3x3 strand) Wastage of MCI inserts <u>AS AMENDED</u> 2 mandays/sleeper 55 kg/sleeper 9.0 kg/sleeper 0.5% of actual requirements														
Escalation in Prices of raw materials (CL20.1) If the cost of special cement and HTS as indicated above is increased or decreased, the contract price shall be correspondingly varied with effect from the date of such increase or decrease by the amount of variation in the price of special cement and HTS that may be actually purchased after the relevant date and during the period of supply of concrete sleepers subject to a running ceiling of the quantity required for concrete sleepers remaining to be manufactured after the relevant date. For the purpose of arriving at the requirement of raw material(including permissible wastage as per RDSO 's design) specified above the following quantities per sleeper would be taken into account and the scrap out of such quantities need not be accounted for.	Escalation/ de-escalation should be based on RBI per norms indicated below <table border="1"> <thead> <tr> <th>Item</th><th>Weightage</th></tr> </thead> <tbody> <tr> <td>Cement</td><td>33.34%</td></tr> <tr> <td>Other inputs</td><td>33.34%</td></tr> <tr> <td>Labour</td><td>16.67%</td></tr> <tr> <td>Fixed Components</td><td>16.65%</td></tr> <tr> <td>HTS wire (free supply)</td><td>0.00%</td></tr> <tr> <td></td><td>100.00%</td></tr> </tbody> </table> Based on time to time actual Rate (destination price) finalised By board. Whole sale price, index fuel, Power, light, lubricants in RBI Index. All India consumer price index For industrial workers as per RBI index. no escalation to be permitted	Item	Weightage	Cement	33.34%	Other inputs	33.34%	Labour	16.67%	Fixed Components	16.65%	HTS wire (free supply)	0.00%		100.00%
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9. By a letter dated 04.01.2002, the Government of India, Ministry of Railways directed the Chief Track Engineer, Southern Railway to follow the Annexure-I attached to the letter. As per the above letter and Annexure-1 net rate of sleeper on which escalation is payable is Rs.193.79. Immediately, the Claimant also sent a letter dated 3.4.2002. Southern Railway sent a letter dated 22.04.2002 indicating the basic price as Rs.142.77 as against Rs.193.79 fixed by the Ministry of Railways, which triggered the dispute.

10. It is the contention of the learned Senior Counsel for the Petitioner, despite the basic price fixed by the Government of India at the rate of Rs.193.79, Railway started calculating at Rs.142.77 which has not been properly considered by the learned Arbitrator. In fact, the dispute was raised in this regard vide letter of the Petitioner dated 28.08.2002. As indicated, the main dispute between the parties is with regard to the basic price as agreed by them in the Rider Agreement.

11. The learned Arbitrator in his finding has rejected the entire Claim and allowed the Counter Claim. Though the learned Arbitrator has given finding that the Claimant has worked out basic rate of Rs.367.90 as against the Rider Agreement, the real dispute appears to be with regard to basic rate as fixed by the Ministry of Railways and one adopted by the Railway authorities ignoring the letter dated 4.1.2002. In that aspect absolutely there is no discussion whatsoever made by the learned Arbitrator in the entire Award. Though the learned Arbitrator recorded in para 4.9 that both parties have agreed to follow the procedure given in Annexure-1 of the Railway Board's letter dated 4/7-1-2002, the Claimant did not agree for the calculation and they merely accepted the revised sample calculation given by the Respondent without any discussion or evidence. It is submitted by the learned Senior Counsel that the Respondent calculated the basic price at the rate of Rs.142.77, contrary to the rate fixed by Ministry of Railways in their letter dated 04.01.2002. Learned Arbitral Tribunal never as to whether basic price fixed by Ministry of Railways is applicable or not. Further, Further, it is not discussed on merits whether Railways are entitled to calculate at the rate of Rs.142.77 only. In such a view of the matter when

the Award does not give a proper reasoning and just followed the sample calculation of escalation submitted by the Respondent, ignoring Annexure-I attached to letter dated 04.01.2002 issued by Ministry of Railway Board such Award is nothing but falls within the ambit of perversity.

12. The learned Arbitrator also allowed the Counter Claim merely on the basis of the reply statement of the Respondent without any evidence on record. The learned Senior Counsel appearing for the Railways placed much reliance in ***Dyna Technologies Pvt. Ltd., case*** (supra) wherein it is held as follows:

*“35. When we consider the requirement of a reasoned order three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasoning in the order are improper, they reveal a flaw in the decisionmaking process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under **Section 34** of the Arbitration Act. If the*

challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under [Section 34](#) has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.”

13. Absolutely, there is no dispute with regard to above Judgment. Whereas the documents referred above, make it very clear that the Ministry of Railway has fixed certain basic price. The Annexure attached to letter dated 04.01.2002 show that while fixing the net rate for sleeper on which escalation was payable MODVAT Less Cost of HTS wire 9.7 Kg (a) Rs.23209.26 per MT also taken note of. After deduction the basic price has been fixed at the rate of Rs.193.79. Therefore, the contention of the learned counsel for the Railway is that the rate was fixed after deducting the MODVAT at the rate of Rs.142.77 cannot be countenanced. This aspect has not been discussed anywhere in the Award. Therefore, when the Award do not contain any reasoning and is unintelligible, the same is liable to be set aside. The Counter Claim has been casually awarded without any evidence and just based on the clarifications. Therefore, the Award certainly falls under the category of unintelligible Award. Therefore, this Court is of the view that this Award certainly needs interference by this court. Despite the Specific direction by this Court in earlier occasion that interpretation is required in the Rider Agreement with connected clauses learned Arbitrator has failed to consider the same. Therefore, when the learned Arbitrator

ignored the vital document and passed an unintelligible Award the same is liable to be set aside. Accordingly it is set aside.

14. Accordingly the Award is set aside. **The Original Petition is allowed.** The Respondent is directed to nominate fresh Arbitrator within a period of two (2) months from the date of receipt of copy of this Order. Fresh Arbitrator appointed shall decide the issue taking note of the all the relevant documents by giving adequate reasons and pass an Award.

25.10.2021

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

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