

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)**

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 250 of 2009

Union of India

Versus

M/s. Pre-Stressed Udyog (i) Private Limited

Ms. A. Banerjee

.....For the petitioner

Mr. Priyankar Saha

Mr. Shashwat Nayak

Mr. Anirudhya Dutta

.....For the respondent

Heard on : 28.07.2022, 23.08.2022 & 31.08. 2022

Judgment on : 03.11.2022

Krishna Rao, J.:

This is an application under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award passed by the Learned Sole Arbitrator dt. 12.02.2009 wherein the Learned Sole Arbitrator has passed an award in favour of the claimant/respondent directing the petitioner to pay an amount of Rs. 19,43,318/- being full and final settlement of the claims made by the respondent within 45 days from the date of publication of award failing which simple interest @ 12% per annum is required to be paid

by the petitioner herein to the respondent from the date of award till the date of actual payment.

The brief fact of the instant case is as follows:-

“Initially an original order was issued in favour of the respondent for manufacture and supply of 2.1 lakhs numbers of PSC monoblock sleepers vide agreement No. W.520/2/3/12B dt. 16.10.1981. In continuation to the said original order, the petitioner herein have issued a repeat agreement in favour of the respondent for manufacturing of 7.5 lakhs of PSC Monoblock concrete sleepers and supplying the same to the Railways as per the terms and conditions enumerated in the agreement dt.22.03.1993.”

Subsequently, the Railway Board had decided to centralize the procurement of HTS wires for the manufacture of the concrete sleepers and a tender for the same was opened by the Railway Board on 08.11.1994. After opening of the said tender, the Railway Board vide letter dt. 02.01.1995 advised the respondent to discontinue the existing system of procurement of HTS wires from outside parties on three quotations basis with immediate effect, when the tender was opened, the Railway Board has also fixed the price @ Rs. 19,500/- per metric ton.

Vide letter dt. 18.01.1995, the petitioners herein have also informed the decision of the Railway Board to the respondent. On receipt of the said letter, the respondent had informed the petitioner that the petitioners have procured certain quantity of HTS wires from outside parties from 08.11.1994 to 18.01.1995 at the rate higher than the rate fixed by the Railway Board.

As the Railway Board has taken a decision by the fixing the price of Rs. 19,500/- per metric ton and accordingly the petitioners herein have made deduction from the bill of the respondent in excess to Rs. 19,500/- per metric ton of the HTS wire.

Due to fixation of rate by the Railway Board, a dispute was arose between the petitioner and the respondent for fixing-up the rates and accordingly the respondent had requested the petitioner to referred the matter for arbitration for taking appropriate decision. Though as per the request made by the respondent, the petitioners have not appointed the Arbitrator and accordingly the respondent had approached before this Court for appointment of an Arbitrator and in terms of the order passed by this Court, the petitioners herein have appointed an Arbitrator.

Learned Counsel for the petitioner submits that as per clause 2 (vii) of the letter dt. 12/15.04.1991 issued by the Railway Board *“the firm will have to give an undertaking that they would accept the method of fixation rate and also the sources supply of HTS and special cement by the purchaser as and when such a system is implemented”* and accordingly the respondent vide their letter dt. 04.05.1991 had given an unqualified acceptance of the terms and conditions mentioned in the letter dt. 12/15.04.1991.

Learned Counsel for the petitioner further submits that in terms of IRS conditions of contract clause 3300 and 12.2 of the Special Conditions of the Contract, the contractor is suppose to exercise utmost economy in the purchase of raw materials. He further submits that the Railway Board has fixed the rate of Rs. 19,500/- per metric ton but the respondent has

overcharged Rs. 4,700/- per metric ton in procurement of HTS wire rate on or after 08.11.1994.

Learned Counsel for the petitioner further submits that the Learned Sole Arbitrator has not considered the condition of the contract and had passed award in favour of the respondent. Learned Counsel for the petitioner further submits that the Learned Sole Arbitrator has awarded interest in favour of the respondent by travelling beyond the scope of the agreement and as per the terms and conditions of the agreement, the respondent is not entitled to get any interest as awarded by this Arbitrator.

Learned Counsel for the petitioner further submits that the petitioners have deducted the sum from the bill of the respondent but while passing the award, the Learned Sole Arbitrator has wrongly held that the petitioner nowhere either in the counter statement or through the herein as specifically disputed that the said deductions have actually be made from the bill of the respondent.

Counsel for the petitioner further submits that the Learned Sole Arbitrator has not considered that the dispute raised by the respondent was not arbitrable but even though the Learned Arbitrator has decided the claim in favour of the respondent.

Learned Counsel for the petitioner relied upon the judgment reported in (2015) 9 SCC 695 (Union of India vs. Bright Power Project (India) Private Limited), AIR 2010 SC 3337 (M/s. Sree Kamatchi Amman Construction vs. Divisional Railway Manager) and submits that the Learned Sole Arbitrator

has not interpreted Section 31(7)(a) of the Arbitration and Conciliation Act, 1996 before taking a decision for awarding interest.

Learned Counsel for the petitioner further relied upon the judgment reported in (2015) 3 SCC 49 (Associate Builders vs. Delhi Development Authority) and reported in (2008) 13 SCC 80 (Delhi Development Authority vs. R. S. Sharma and Company) and AIR 2010 SC 3543 (M/s. Rashtriya Chemicals and Fertilizers Limited vs. M/s. Chowgule Brothers and Ors.) and submits that the award passed by the Learned Sole Arbitrator is patently illegal as the Learned Sole Arbitrator has passed the award without considering the terms and conditions of the contract.

Per contra, Learned Counsel for the respondent submits that the petitioners have issued supply order for supply of 7.50 lakhs PSC monoblock concrete sleepers to the petitioner. The Counsel for the respondent relied upon clause 2 of the repeat agreement dt. 22.03.1993 and submits that the said clause provides that the petitioner shall pay to the respondent at the rate and in the manner as provided in "Annexure – III".

Learned Counsel for the respondent further submits that any variation of the contract shall not be binding upon the respondent unless and until the same is endorsed on the contractor and incorporated in formal instrument in exchange of letters signed by the parties. Learned Counsel for the petitioner relied upon clause 3603 of the IRS Conditions of Contract.

Learned Counsel for the respondent further contended that since March, 1993 till the month of December, 1994, the respondent had supplied

the materials in terms of the contract and the petitioner has paid the same to the respondent in terms of the said contract.

Learned Counsel for the respondent submits that the petitioners have unilaterally fixed the rate during the midst of the agreement by violating the clause 3603 of the IRS Conditions of Contract.

Learned Counsel for the respondent further submits that the Learned Arbitrator has rightly interpreted the document and has passed the award and if this Court finds that there is a different view is possible but this court cannot upset the award passed by the Arbitrator on an under Section 34 of the Arbitration and Conciliation Act, 1996.

Learned Counsel for the respondent further submits that the Learned Arbitrator had considered the rival submissions of both the parties and also had considered the document relied by the parties and had passed the award and thus this Court cannot sit in appeal over the award passed by the Learned Sole Arbitrator by reassessing or re-appreciating the evidence.

Learned Counsel for the respondent further submits that there is nothing on the award to say that the same shocks be conscious of this Court. Learned Counsel for the respondent further submits that the Learned Sole Arbitrator has passed a reasoned award by considering all the materials available on record and as such the same cannot be interfered with. Learned Counsel for the respondent further submits that there is no bar in the contract for awarding interest and accordingly the Learned

Arbitrator has the power for grant interest and accordingly interest was granted.

Learned Counsel for the respondent relied upon the judgment reported in (2017) SCC OnLine Cal 13272 (State of West Bengal vs. Pam Developments Private Limited) submits that the award passed by *the* Learned Sole Arbitrator do not appear to be unconscionable or any shocking and the reason assigned by the Arbitrator is well reasoned after considering the documents available on record.

Learned Counsel for the petitioner relied upon the judgment reported in (2012) 1 SCC 594 (P.R. Shah Shares and Stock Brokers Private Limited vs. B.H. H Securities Private Limited & Ors.) and submits that this Court cannot sit in appeal over the award passed by the Learned Arbitrator by reassessing or re-appreciating the evidence. He further submits that the ground on which the petitioner has filed the instant application is not covered any of the ground as available under Section 34 of the Arbitration and Conciliation Act, 1996.

Learned Counsel for the petitioner further relied upon the judgment reported in (2019) 15 SCC 131 (Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India) and submits that power of the Court to set aside the award is limited only to the extent the grounds provided under Section 34 of the Arbitration and Conciliation Act, 1996. He further relied upon the judgment of Associate Builders (*supra*) and submits that the award could be set aside for error of law on the face of

record but in the instant case, there is no error appearing on the face of record.

Learned Counsel for the petitioner further relied upon the judgment reported in (2017) 14 SCC 323 (M/s. Ambika Construction vs. Union of India & Ors.) and submits that there is no bar to award interest on the amounts payable under the contract.

Heard, the Learned Counsel for the respective parties considered the documents available on record and the judgment relied by the parties. In continuation to the agreement of 1981, a repeat agreement was entered between the parties on 22.03.1993 for supply of 7.50 lakhs PSC monoblock concrete sleepers. Subsequent to the said repeat agreement, a letter was issued on 12/15.04.1991 wherein in clause 2 (vii) is specified that :-

“The firm will have to give an undertaking that they would accept the method of fixation of rates and also the sources of supply of HTS and the Special Cement by the purchaser as and when such a system is implemented. In the said letter in clause 4.1 stipulates that : “A repeat order may be placed on M/s. Pre-stressed Udyog (India) Private Limited at Chota Ambana on receipt of unqualified acceptance from them on the above terms and conditions. In reply to the said letter, the respondent vide letter dt. 04.05.1991 had informed to the petitioner stating that : - “We hereby communicate our unqualified acceptance of the terms and conditions stipulated in Railway Board’s letter referred to above.”

Clause 2401 of IRS Conditions of Contract reads as follows:-

“Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the Contractor, the purchaser shall be entitled to withhold and also to have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by the Contractor and for the purpose aforesaid, the purchaser shall be entitled to withhold the said cash security deposit or the security, if any, furnished as the case may be and also have a lien over the same

pending finalization or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the Contractor, the purchaser shall be entitled to withhold and have lien to retain to the extent of the such claimed amount or amounts referred to supra, from any sum or sums found payable or which at any time thereafter may become payable to the Contractor under the same contract or any other contract with the purchaser or the Government pending finalization or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above, by the purchaser will be kept withheld or retained as such by the Purchaser till the claim arising out of or under the contract is determined by the Arbitrator (if the contract is governed by the arbitration clause) or by the competent court as prescribed under Clause 2703 hereinafter provided, as the case may be, and as such that the Contractor will have no claim for interest or damage whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the Contractor.”

Clause 3603 of IRS Contract Conditions reads as follows:-

“Any variation of this contract shall not be binding on the Purchaser or until the same is endorsed on the contract or incorporated in a former instrument in exchange of letters and signed by the parties.”

Section 12.2 of the Special Conditions of Contract reads as follows:-

“12.2 :- The Contractor shall exercise utmost economy in the purchase of three principal raw materials. Escalation will be admitted on the basis of the actual price prayed for the respective raw material, subject to a ceiling on the prices as under :-

- a. In the case of materials under statutory price control, the price as applicable on the date of purchase of the said material, in terms of the Price Control Order.*
- b. Where the material does not come under any statutory price control, the price fixed by any recognized agency exercising control on the prices of the products of their representative units, such as Joint Plant Committee, Cement Corporation etc.*
- c. In the case of raw material not covered by either of the above, the lowest price (FOR destination) arrived at on the basis of quotations obtained by the Contractor for each supply from the various established sources of supply of the raw materials.”*

In terms of the repeat agreement dt. 22.03.1993, the respondent had started supplying the materials @ Rs. 24,200/- per metric ton and the same was duly accepted by the petitioner without any objection. Only in the year 1994 i.e., after the period of more than 1½ years i.e. on 08.11.1994, the Railway Board had opened the tender and have fixed the rate of Rs. 19,500/- per metric ton and the same was communicated the respondent on 18.01.1995. While accepting the rate by the Railway Board, the Railway Board has taken the decision that the said rate will be given retrospective effect and also directed the respondent not to procure HTS wires from outside parties on three quotation basis. While deciding the issue raised by the respective parties, the Learned Sole Arbitrator has categorically held that the only point of dispute is raised before the Learned Sole Arbitrator whether the deduction made by the petitioners on the bill raised by the claimant on the basis of the decision taken by the Railway Authorities subsequent to the repeat agreement can be given retrospective effect or not.

The petitioners have relied upon clause 2 (vii) of the Additional Conditions of the Contract dt. 12/15.04.1991 wherein it was mentioned that the respondent has to give an undertaking that they would accept the method of fixation of rates and also the sources of supply of the HTS and special cement by the petitioner as and when such system is implemented. The petitioners have also relied upon clause 12.2 of the Original Contract Agreement as referred above. The contract with respect of the instant case started on 22.03.1993 and the clause 2 (vii) as relied by the petitioners is of 1991 i.e., prior to the repeat agreement. An undertaking given by the

respondent is also of 1991 i.e., prior to the repeat agreement. After the issuance of repeat agreement, the petitioner have not asked for any undertaking from the respondent and after the repeat agreement dt. 22.03.1993, the respondent had started supply of PSC Monoblock concrete sleepers @ Rs. 24,200/- and the rate quoted by the respondent was duly accepted by the petitioners without any objection. Clause 3603 of the IRS as mentioned above speaks about variation of the contract in the instant case, though the petitioners (Railway Authorities) have taken decision after opening of tender on 08.11.1994 which was communicated to the respondent on 18.01.1995 in the mean time, the respondent had already supplied the materials and submitted bills @ Rs. 24,200/- per metric ton. The petitioners have not come forward for calling upon the respondent for amendment of the agreement by fixing @ Rs. 19,000/- and on their accord they have taken the decision by fixing the rate of Rs. 19,000/- per metric ton .

It is found from record, the arbitrator while deciding the issue considered the undertaking submitted by the respondent and held that the respondent had given undertaking by accepting the method of fixation of rates as well, as sources of supply of HTS wire and the said undertaking cannot be treated that the respondent bound to accept the rate of the petitioner retrospective effect.

Para 5 and condition no. 2 of the repeat agreement reads as follows :

“In the repeat agreement dated 22.03.1993, it is mentioned that :-

“It has been agreed by and between the parties herein that the contractor shall manufacture and supply 7.50 lakhs numbers of PSC monoblock concrete sleeper to Drg. No. RDSO/T – 2495 Alt. II/RDSO – T 2496 Alt. I, as may be required by the purchaser, at the rates and on the terms and conditions contained in Annexure – ‘ III ’ thereto, subject to the condition that in the event any conflict between the conditions laid down in Annexure – ‘ I ’ and those laid down in Annexure – ‘ III ’, later shall prevail.”

Clause 2 of the repeat agreement dated 02.03.1993 reads as follows :-

“2. That for the performance of the aforesaid manufacturing, supply and delivery of goods by the contractors, the purchaser shall pay to the contractors at the rate and in the manner as provided in the said agreement.”

Additional Condition no. 3(i) of Annexure-III reads as follows :

“3(i). The new rate for the repeat order at para-1 above will be effective from the date of completion of existing order.”

The above clauses read with clause 3603 of the IRS Conditions of contract it is find that terms of repeat agreement was not amended by exchange of letters on signing by the parties.

In view of the above, this Court finds that there is no patent illegality in the award passed by the Learned Arbitrator. Learned Arbitrator has considered each and every terms and conditions of the contract and had passed the award considering the four corners of the contract. As regard the interest, the Learned Arbitrator has held that the respondent would have earned a profit around 10% on the amount due to the claimant and as such

this Court has also finds that the Arbitrator has not committed any error by awarding interest in favour of the respondent.

In view of the above, this Court do not finds any reasons to interfere with the award passed by the Learned Sole Arbitrator.

Accordingly, **AP 250 of 2009** is **dismissed**.

(Krishna Rao, J.)