

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

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 1717 of 2015

Union of India

Versus

Neo Built Corporation

Ms. Aparna Banerjee, Adv.

.....For the petitioner

Mr. Sakya Sen, Sr. Adv.

Mr. Supratim Laha, Adv.

Mr. Sabyasachi Sen, Adv.

.....For the respondent

Heard on : 18.05.2022

Judgment on : 13.07.2022

Krishna Rao, J.: The petitioner has filed the instant application under Section 34 of the Arbitration and Conciliation Act, 1996 against the award passed by the Arbitrators dt. 01.9.2015.

On 03.10.2008, the Chief Engineer, Metro Railway/ Calcutta had published a tender notice with respect of execution of ROB and road approaches at Kharagpur in replacement of Manned Level Crossing at KM

118/ 4-5, KM 0/18 and 123/2-3 in Kharagpur - Bhadrak Section of South Eastern Railway.

The respondent had participated in the said tender and the said work was awarded in favour of the respondent. The petitioners vide letter dt. 05.02.2009 accepted the rate quoted by the respondent for an amount of Rs. 18,77,85,218.89/- against the estimated value of Rs. 17,99,99,99.40/-.

On 29.09.2009, an agreement was executed between the petitioner and the respondent being agreement no. MTP/Civil/887 and the time of completion of the said work was 24 months from the date of issue of the letter of the acceptance.

On 05.02.2009 a letter of acceptance was issued in favour of the respondent but the progress of the work was very slow. In spite of several notices and reminders the progress of the work was very slow and accordingly vide notice dt. 12.07.2010, the petitioners by invoking Clause 62 of General Clause of Contract, 2001, the Contract was terminated.

As per the agreement the stipulated period of completion of the work was 04.02.2011 but the contract was cancelled 12.07.2010, much prior to the date of completion on the ground that the respondent had executed only 29 % of the work and 71 % of the work was remain to be completed.

The petitioner has terminated the Contract and has also not made the payment to the respondent and accordingly the respondent had sought for settlement of dispute through the arbitrator and accordingly, the petitioner had appointed consisting of three arbitrators.

The respondent had filed statement of claim consisting of 16 claims total amounting to Rs. 12,26,53,003.00/- along with interest which are as follows:-

Claim No.	Description	Amount (Rs.)
1(a)	Amount payable for the work executed but not paid (Details, vide, ANNEXURE – I,II,III)	3,19,50,515.00
1(b)	Price Variation as per Clause No. 2. 18, Page 42, Section 2, Special condition of Contract. (Details, vide, ANNEXURE – IV).	28,57,989.00
2	Amount payable for refund of Security Deposit (S.D) Wrongfully forfeited : A) Earnest Money adjusted to S.D. = Rs.10,50,000.00 B) <u>S.D. deducted from Bills</u> = Rs. 16,82,660.00 TOTAL = Rs. 27,32,660.00	27,32,660.00
3.	Amount payable for refund of Performance Guarantee wrongfully encashed/ forfeited.	93,89,261.00
4.	Amount payable for dewatering work at different stages of work for the structures falling on 'P' & 'X' lines of R.O.B. (Details, vide, ANNEXURE – V).	2,87,725.00
5	Amount payable for filling and leveling up the swampy land which was being used as drainage basin/receptacle of drainage water from the adjoining areas (Sub-Divisional) Hospital side, I.I.T. side etc.) with earth, moorum, sand etc. for making the area fit for execution of R.O.B. (Details, vide, ANNEXURE – VI)	1,18,39,356.00
6	Amount payable for expenditures incurred for carriage of steel materials and cement by Van/Hand Cart from stack yard to workplace including loading, unloading etc. complete (Details, vide, ANNEXURE-VII).	3,53,875.00
7	Amount payable for expenditures incurred for rehandling and recarriage of materials due to scarcity of space in the working site for stacking of materials (Details, vide, ANNEXURE – VIII).	2,37,200.00
8	Amount payable for expenditures incurred for cutting trees, dismantling Goomty adjacent to Signal Cabin & making table at the Signal Cabin. (Details, Vide, ANNEXURE – IX)	8,000.00
9	Amount payable for use of CICO PLAST SUPER and INTER PLASSE in cement concrete in bored pile, pier shaft, pier cap & bottom of girder	3,35,600.00

	<i>(Details, vide, ANNEXURE – X).</i>	
10	Amount payable against materials available at site in the expectation of completing the entire work but could not be utilized due to wrongful termination of Contract <i>(Details, vide, ANNEXURE – XI).</i>	2,75,87,277.00
11	Amount payable against enabling works like hutments etc. executed in the expectation of completing the whole work <i>(Details, vide, ANNEXURE – XII).</i>	9,16,360.00
12	Amount payable against reimbursement of payment made to M/S S.K.Mitra & Associates in connection with soil investigation work <i>(Details, vide, ANNEXURE – XIII).</i>	1,19,676.00
13	Compensation payable on account of loss of expected profit on the value of work which could not be executed due to various breaches/ defaults, inter alia, wrongful termination of Contract by the Respondent <i>(Details, vide, ANNEXURE – XIV).</i>	2,04,22,517.00
14	Compensation payable for losses suffered on account of non/under utilization of on-site overheads during the period of 18 months from 05.02.09 (Stipulated date of commencement) to 14.08.10 (the date up to which the Respondent allowed to continue the work after wrongful termination of the contract on 09.07.10) due to various breaches/defaults on the part of the Respondent <i>(Details, vide, ANNEXURE – XV).</i>	1,36,14,992.00
	TOTAL	12,26,53,003.00
15	Any other amount/claim that may be found due to the Claimant	As accrued
16	Interest @ 12 % on the claim/ due amount from the date of receipt of the claim of the Claimant till payment if the claim/due is not paid within 30 days from the date of receipt of the claim.	As accrued

The petitioner has filed written statement along with the counter-claim for an amount of Rs. 93,81,261/- along with interest @ 18 %.

On 01.09.2015, the Arbitral Tribunal passed an award for an amount of Rs. 2,83,09,412/- with interest and had rejected the counter-claim of the

petitioner but directed the respondent to pay Rs. 68,885/- being the license fee for use of railway land.

The petitioner has filed the instant application under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the part award dt. 01.09.2015 with respect of claim nos. 1(a), 1(b), 2, 3, 8 (a), 8(b) and 12 as well as against the rejection of counter-claim.

Counsel for the petitioner submits that as the progress of the work of the respondent was very poor and accordingly, seven days notice dt. 25.01.2010 was issued to the respondent by invoking Clause 62 of General Clause of Contract, 2001 but in spite of the receipt of the notice, the respondent did not improve the progress of the work awarded to the respondent and thus again on 01.07.2010, a notice was issued to the respondent but in spite of receipt of the notice the respondent failed to show any progress of the work awarded to the respondent.

The Counsel for the petitioner further submits that in spite of receipt of notices the respondent failed to made progress in the work awarded to the respondent and accordingly vide letter dt. 12.07.2010, by invoking the provision of 62 of GCC, 2001 and Clause 1.16(d) of instructions to the tender the agreement was terminated and the Security Deposit of Rs. 27,32,660/- was forfeited.

The Counsel for the petitioner further submits that claim 3 of the respondent is for refund of forfeited of in cash Bank Guarantee bond amounting to Rs. 93,89,261/- but the petitioner did not in cash the Bank

Guarantee even after termination of the agreement under Clause 62 of GCC, 2001.

The Counsel for the petitioner submits that as per Clause 62 of GCC, 2001 and Clause 1.16 (d) of instructions of tender the petitioner entitled to forfeit and en-cash Bank Guarantee Bond but the petitioner did not en-cash the said Bank Guarantee Bond and as such the petitioner is entitled to get an amount of Rs. 93,89,261/-.

Ld. Counsel for the petitioner submits that Ld. Arbitral Tribunal violated the provisions of Section 28 (3) of the Arbitration and Conciliation Act, 1996 by allowing claim no. 2 and claim no. 3 in favour of the respondent and by rejecting the counter claim of the petitioner.

The Ld. Counsel for the petitioner submits that the observation and finding of the Ld. Arbitral Tribunal with respect of issue no. 6 i.e., “Premature and wrongful termination of the contract when time was not the essence of the contract” are contrary and perverse in nature and the said award is vitiated by patent illegality appearing on the face of award.

Ld. Counsel for the petitioner further submits that the Ld. Co-Arbitrator Mr. M.K. Sapathy had disagreed for refund of Security Deposit and Performance Bank Guarantee being Claim nos. 2 and 3 in terms of Clause 1.16 (d) of the instructions of the tender and Clause 62 of GCC, 2001 of Eastern Railway as the contract was rescinded due to poor performance of the respondent.

Ld. Counsel for the petitioner further submits that the Ld. Arbitrator Tribunal while allowing Claim nos. 8 (b) and 12, failed to appreciate that the final bill of Rs. 1,47,82,820.88/-, which was admitted by the petitioner as the same was based on the final measurement as per the measurement book includes the claim of 8 (b) and claim no. 12.

Ld. Counsel for the petitioner submits that the claim no. 8 (b) with regard to dismantling goomty and claim no. 12 with regard to the expenditure for soil investigation have already been included in the final bill amount of Rs. 1,47,82,820/- which is claim no. 1 and the same was already admitted and allowed by the Arbitrator Tribunal and thus the part of the award allowing claim no. 8 (b) and claim no. 12 is liable to be set aside.

Ld. Counsel for the petitioner for the petitioner submits that the award passed by the Arbitral Tribunal is perverse in nature and patent illegality on the face of record and as such the same is liable to be set aside.

Per contra, the Ld. Counsel for the respondent submits that the Ld. Arbitral Tribunal while deciding the claim made by the respondent come to the finding that the petitioner delayed in handing over of the land and the drawing and accordingly, the respondent was eligible for additional time of two months and 4 days at the first instance in terms of Clause 2.12.2 of the special condition of the contract.

Ld. Counsel for the respondent submits that as per the documents submitted by the respondents the factors impleading the progress of the work as claimed by the respondent was clearly admitted and based on the

same, the Ld. Arbitral Tribunal concluded that on the date of termination of contract, encroachments were existing and as such the respondent was entitled for extension of time for lack of free asses of work.

Ld. Counsel for the respondents submits that time was not the essence of contract in view of Clause 2.12 in the Contract Agreement and thus the contract cannot be terminated on the ground of non-completion of the work within the time frame of the contract.

Ld. Counsel for the respondents submits that even after termination of the contract, the petitioner had allowed the respondents to carry on further work at site in the month of July and August, 2010 as during the said period the respondents has completed four numbers of foundation, two numbers of structure and 2.5 span.

Ld. Counsel for the respondent submits that claim no. 1(a) for an amount of Rs. 1,47,82,821/- was allowed by the Ld. Arbitral Tribunal on the basis of the audited final bill submitted with the documents. Claim 1 (b) for an amount of Rs. 12,84,031/- was allowed on the basis of certification of the accounts of the petitioner. The claim nos. 2 and 3 for refund of Security Deposit and forfeiture of Bank Guarantee are consequential and based upon the finding of facts recorded by the Ld. Arbitral Tribunal. As regard claim no. 8 (a) and 8 (b), the Ld. Tribunal had allowed only Rs. 963/-. Claim no. 12 is only for Rs. 1,19,676/- is with regard to soil investigation work which has been duly proved though the documents.

The Counsel for the respondent submits that the grounds on which the petitioner had filed the instant application are not covered under any of the ground as provided under Section 34 of the Arbitration and Conciliation Act, 1996.

Claim No. 1(a). The Claimant had claimed Rs. 3,19,50,515/- but the Arbitral Tribunal Awarded only Rs. 1,47,82,8120.88. The Ld. Tribunal while deciding the claim held that after careful scrutiny of the documents relied by the parties it was found that the claimant is also partly failed to mobilized adequate labour and machinery resulting delay in completion of work. The Ld. Tribunal also considered the common prudence and technical requirements for execution of the said work. Ld. Tribunal has not awarded the remaining amount of claim no. 1 (a) by assigning the reason that breaking of hard rock is not payable as the said item is not covered under Item No. A1 of schedule A of the Schedule of Quantities and the materials procured by the claimant are not payable unless the material was consumed at site in the material statement.

Claim No. 1(b). Claimant had claimed Rs. 28,57,989.00 but the Arbitral Tribunal Awarded only Rs.12,07,031/-. Ld. Tribunal while deciding the said claim have considered that the gross value of the escalation bill was certified by the accounts department amounting to Rs. 12,84,031 with deduction of Rs. 76,691/-.

Claim no. 2. Claimant had claimed Rs. 27,32,660/- being the refund of security deposit and the Ld. Tribunal had awarded the total claim in favour of the claimant. Ld. Tribunal had considered Clause 2.12.2, under

section 2 (Special Condition of Contract) of the Contract Agreement wherein it provides that “if there is any delay in handing over of land /or issue of drawing in time” suitable extension to the completion date shall be given in accordance with clause 17 of the General Clause of Contract.”

Considering the said terms of contract, the Ld. Tribunal held that the claimant was entitle for additional time of two months and four days. Ld. Tribunal also considers that petitioners failed to intimate their inability to the claimant to make the land available to the claimant for which there was delay in commencing the work. The Tribunal also considers that about seven reasons for delay in completion of work which was beyond the control of the claimant. The Tribunal also considered the relevant documents such as daily diary correspondences made by the claimant, section 55 and 62 of the Indian Contract Act and held that the termination of the contract has been done in a very hasty manner and accordingly passed an award for refund of the security deposit of Rs.27,32,660/-.

Claim no.3. Refund of Performance Guarantee of Rs. 93,89,261/-.

The Tribunal consisting of three members (One Presiding Arbitrator and two Co- Arbitrators) out of which one of the Co- Arbitrator disagree for refund of security deposit and performance guarantee on the ground that term of clause 1.16d of the instructions to the Tenders and clause 62 of the General Clauses of Tender ,2001 of the Eastern Railway the contract was rescinded due to poor performance of the contractor and the plea raised by the contractor that even after termination of contract , the claimant was allowed to continue with the work which the claimant failed to prove and the

claimant was asked to cover the exposed reinforcements of the structures for safety of the structure.

The majority of the Tribunal held that the termination of the contract has been done in a hasty manner and have given appropriate reasons that the claimant was entitle for additional time of two months and four days. Ld. Majority Members also consider that petitioners failed to intimate their inability to the claimant to make the land available to the claimant for which there was delay in commencing the work. The Tribunal also considers that about seven reasons for delay in completion of work which was beyond the control of the claimant. The Majority Members of the Tribunal have passed an Award with respect of claim no. 3 for a total amount of Rs. 93,89,261/- as per section 29 of the Arbitration and Conciliation Act, 1996.

Claim No. 8(a) and (b). Claim of Rs. 7000/- for carrying out extra work of cutting 4 nos. of trees and dismantling of goomty. The Tribunal held that as per clause 2.11, the site clearance including felling of trees for execution of work is the responsibility of the contractor within the overall rates accepted by the contractor and no claim was allowed. The Tribunal also held that there is no evidence for dismantling of goomty and no payment was allowed but the petitioners herein have admitted for remodeling existing cable signal for an amount of Rs. 963 and the Tribunal has granted only Rs. 963 in favour of the claimant.

Claim No. 12. An amount of Rs. 1,19,676/- for the actual expenditure incurred on account of payment made to M/s S. K. Mitra & Associates for Soil Investigation Work. The Ld. Tribunal held that the

petitioner has proposed the item as Non Schedule item as the same was found necessary and the claimant has made payment to M/s. S. K. Mitra and Associates through the invoice and accordingly an amount of Rs. 1,19,676/- was is awarded in favour of the claimant.

17. In Associates Builders' case (supra), the Hon'ble Supreme Court after referring to the earlier Judgments of Apex Court analysed each of the heads contained in Saw Pipes's case and observed as under:

"33. It must clearly be understood that when a court is applying the 'public policy' test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.

40. We now come to the fourth head of public policy, namely, patent illegality. It must be remembered that under the Explanation to Section 34(2)(b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator.

42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

42.1: (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute__ (1) Where the place of arbitration is situated in India__

(a) In an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.

42.2: (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality _ for example if an arbitrator gives no reasons for an award in contravention of Section 31 of the Act, such award will be liable to be set aside.

42.3: (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute__ (1)(2)

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

(emphasis supplied).

This last contravention must be understood with a caveat. An arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."

This Court finds that the claimant had raised altogether 16(Sixteen) claims but the Ld. Arbitral Tribunal allowed only 5 (Five) claims and the Tribunal has allowed the said claim after considering the terms of contract and documents supplied by the parties. Ld. Tribunal assigned well reasons while allowing the claim of the claimant.

In view of the above this court did not find any material to interfere with the Award passed by the Ld. Arbitral Tribunal dt. 1st September, 2015.

AP No. 1717 of 2015 is dismissed.

(Krishna Rao, J.)