



IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 10th DAY OF FEBRUARY 2022

THE HON'BLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

O.P. No.495 of 2013

In the matter of Arbitration and
Conciliation Act

And

In the matter of the Arbitral Award
Dated 13.6.2011 and further Award
Dated 14.12.2011 made in relation to
Disputes arising out of Agreement No.
14/Dy.CE/GC/MDU/HQ/2009.

1) Union of India

Represented by the General Manager,
Southern Railway,
Chennai.

2) The Chief Engineer / South, Construction,
Southern Railway,
Chennai.

3) The Deputy Chief Engineer/Construction -I,
Southern Railway,
Madurai.

...Petitioners

Vs

1) Sri K.Adinarayanarao,
Railway Contractor,
No.202, Vanshi Rishi Residency,
6-3-865/B, Green Land X Roads,
Begumpet,
Hyderabad – 500 016.

2) Mr. A.K.Khandelwal,
Chief Engineer/Construction,



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Survey and Road Bridges,
Southern Railway, Chennai.
(Presiding Arbitrator)

- 3) Mr. Deepak Bhalla
Chief Signal and Telecommunication
Engineer/Planning,
Southern Railway,
Chennai.(Arbitrator)
- 4) Ms. Malathy,
Deputy Financial Adviser and
Chief Accounts Officer / Construction, (Retd.),
Southern Railway, Chennai.
(Arbitrator)

...Respondents

Original Petition praying that this Hon'ble Court be pleased to set aside the arbitral award of Respondents 2 to 4 dated 13.6.2011 and the further award dated 14.12.2011 made in relation to Agreement No.14/Dy.CE/GC/ MDU/ HQ/2009.

This Original Petition coming on this day before this Court for hearing in the presence of Mr.C.V.Ramachandramurthy, Advocate for the Petitioner herein and Mr. R.Thiagarajan, Advocate for the 1st respondent herein and upon reading the petition filed herein and this Court having observed that when considered cumulatively, the decision of the Arbitral Tribunal to direct return of the performance guarantee and to reject the claim for forfeiture of the security deposit cannot be construed as patently



illegal, it is ordered as follows:-

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That the award of a consolidated sum as interest on claim No.1 in the pre-reference period and pendente lite period, be and is hereby set aside.

2) That in all other respects, no interference is warranted with the Awards.

3) That there shall be no order as to costs.

WITNESS THE HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI, ACTING CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE 10th DAY OF FEBRUARY 2022.

Sd/-

ASSISTANT REGISTRAR(O.S.II)

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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07.03.2022

O.P. No.495 of 2013

ORDER

DATED : 10.02.2022

THE HON'BLE MR. JUSTICE
SENTHILKUMAR RAMAMOORTHY

FOR APPROVAL: 01.04.2022

APPROVED ON : 05.04.2022



IN THE HIGH COURT OF JUDICATURE AT MADRAS

D A T E D : 10.02.2022

C O R A M :

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

O.P.No.495 of 2013

1.Union of India

Rep. by the General Manager,
Southern Railway,
Chennai.

2.The Chief Engineer / South, Construction,
Southern Railway,
Chennai.

3.The Deputy Chief Engineer/Construction -I,
Southern Railway,
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... Petitioners

Vs

1.Sri.K.Adinarayanarao,
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Chief Engineer/Construction,
Survey and Road Bridges,
Southern Railway, Chennai.
(Presiding Arbitrator)

3.Mr.Deepak Bhalla
Chief Signal and Telecommunication
Engineer/Planning,



Southern Railway,
Chennai.(Arbitrator)

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4.Ms.Malathy
Deputy Financial Adviser and
Chief Accounts Officer / Construction,
Southern Railway, Chennai.
(Arbitrator)

... Respondents

This Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the arbitral Award of Respondents 2 to 4 dated 13.06.2011 and the further Award dated 14.12.2011 made in relation to Agreement No.14/Dy.CE/GC/ MDU/ HQ/2009.

For Petitioners : Mr.C.V.Ramachandramurthy

For 1st Respondent: Mr.R.Thiagarajan

ORDER

The Petitioners were the respondents before the Arbitral Tribunal. An arbitral award dated 13.06.2011 (the Award) and the further Award dated 14.12.2011 are assailed under Section 34 of the Arbitration and Conciliation Act,1996 (the Arbitration Act). The Award and further Award are referred to collectively as the Awards.

2. A contract was awarded on 28.03.2009 to the first Respondent by

the Petitioners for the work of doubling of track between Dindigul and



Madurai section by gauge conversion. The total contract value was a sum of Rs.5,17,73,362/-. The contract was on measure and pay basis with a bill of quantities(BoQ) annexed thereto, and work was to be completed within a period of six months.

3. In spite of granting extensions, it is stated that the first Respondent did not complete work. Therefore, the work was awarded to a third party contractor and completed in such manner. The first Respondent made about 6 claims before the Arbitral Tribunal for an aggregate sum of Rs.1,33,85,336/-. By a reply statement, the Petitioners denied the claims and made four counter claims. The Arbitral Tribunal did not frame issues, but dealt with each claim and counter claim. Both parties adduced documentary evidence. Eventually, by the Awards, the Arbitral Tribunal awarded a sum of Rs.57,67,377/- + Rs.4,62,382.74, thereby aggregating to a sum of Rs.62,29,759.74, to the first Respondent herein. The said Awards are assailed herein. The three members of the Arbitral Tribunal are the second to fourth Respondents herein, who are neither necessary nor proper parties.

4. The Petitioner assails the Awards on three grounds. The first ground of challenge relates to claim No.1. Under claim No.1, several sub-



claims were made. Sub-claims (A), (B), (C) and (D) were awarded by the Arbitral Tribunal at 100% of the relevant BoQ rate. The Petitioners challenge the same on the ground that Clause 43.6 of the Contract was relied upon by the Petitioners but disregarded by the Arbitral Tribunal. On the other hand, the first Respondent submits that the said clause was not disregarded by the Arbitral Tribunal. Clause 43.6 is as under:

"43.6. In case, increase in quantity of an individual non-schedule item by more than 25% of the agreement quantity is considered as unavoidable, the same can be got executed by floating a fresh tender. If floating a fresh tender is considered not practicable by Railways, negotiation will be held with the contractor for arriving at reasonable rates for additional quantities in excess of 125% of agreement quantity."

5. The contention of the Petitioners that Clause 43.6 was disregarded is incorrect. In fact, the Arbitral Tribunal noticed Clause 43.6 and thereafter recorded the following finding at internal page 9 of the Award:

"Tribunal's discussion and Award: Respondent Railways had addressed one letter to CE/CN/N/MS on 27-5-09 (Exhibit R.26). Accordingly, item No.5 of Annexure A and item 4, 40,41,42 of Annexure B were



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executed in excess over to agreement quantities.

Because of this 90% of rate were admitted for payment.

In that letter, they were furnished floating of tender is not practicable at this stage for additional quantities.

For having ordered the work, non-releasing of payment is injudicious. When CE/CN/N/MS has given approval vide letter No.W.148/DG MDU/47/CN of 1-6-09 to conduct negotiation as per Clause 43.6 for quantities exceeding more than 25%. By extending currency by 2 times i.e. one from 4.8.09 to 31.12.09 and another from 1-1-2011 to 30-4-2011 works were given but could not find time interval for conducting negotiations to settle the payment for additional work done...."

6. In light of the above findings, it cannot be said that the Arbitral Tribunal disregarded Clause 43.6 as contended by the Petitioners. On the contrary, it is evident from the Award that the said clause was considered by the Arbitral Tribunal and that the Arbitral Tribunal concluded that the Petitioners did not conduct negotiations to arrive at the agreed rate for additional quantities. In such circumstances, the Arbitral Tribunal applied



measure and pay contract to which a BoQ is annexed, the award of claims at the rates specified in such BoQ cannot be construed as arbitrary or patently illegal. Moreover, it should be noticed that each sub-claim under claim No.1 was made by the first Respondent at the alleged market rate, which was a higher rate than the BoQ rate. However, the Arbitral Tribunal did not award these claims at the alleged market rate. Instead, the BoQ rate was adopted by relying upon the measurement book and proceeding on the basis of quantities recorded therein. Upon taking into consideration the aforesaid factors, in my view, the Award in respect of claim No.1 does not warrant interference.

7. The second aspect on which the Awards are assailed is with regard to the grant of interest from 26.05.2009 to 13.06.2011 at 10% per annum. On this issue, the Petitioners contended that Clause 64.5 of the General Conditions of Contract prohibits the grant of interest up to the date of the Award. Clause 64.5 is as under:

"64.5 Where the Arbitral Award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the Award is made."



8. By advertng to the reply statement made before the Arbitral Tribunal, the Petitioners contended that Clause 64.5 was brought to the notice of the Arbitral Tribunal. In spite of drawing the attention of the Arbitral Tribunal to Clause 64.5, the Petitioners contended that interest was awarded from the pre-reference period onwards. The Petitioners referred to judgments of the Hon'ble Supreme Court wherein it was concluded that interest cannot be awarded in the pre-reference period if the contract prohibits the grant of interest. In response, learned counsel for the first Respondent relied upon the judgment in *State of Rajasthan and Another v. Nav Bharat Construction Co.* 2002 (1) SCC 659 to contend that the Arbitral Tribunal has discretion to award interest under Section 31(7) of the Arbitration Act.

9. The settled legal position is that the Arbitral Tribunal cannot award interest in the pre-reference period if the relevant contract prohibits the grant of interest. As regards the *pendente lite* period, some discretion is vested on the Arbitral Tribunal depending on the terms of the contract. In the case at hand, interest was awarded from 26.05.2009 to 13.06.2011(the date of the Award). Thus, consolidated interest has been awarded both in the pre-reference and *pendente lite* period in an aggregate sum of Rs.1,05,674/-. In view of Clause 64.5 of the General Conditions of



disregarded by the Arbitral Tribunal, interference is warranted with this aspect of the Award.

10. The third aspect on which the Awards are assailed is the grant of refund of the performance guarantee and security deposit. On this aspect, the Petitioners contended that the Arbitral Tribunal disregarded Clause 11 of the Special Conditions of Contract which deals with the security deposit. In particular, the Petitioners rely upon Clause 11.3, which is as under:

"11.3. Security Deposit will be returned to the contractor after the physical completion of the work as certified by Competent Authority and after the expiry of Maintenance Period and after passing the final bill as certified by the Competent Authority. The Competent Authority shall normally be the authority that is competent to sign the contract. If the competent Authority is of the rank lower than JA Grade, then a JA grade Officer (concerned with the work) should issue the certificate. The certificate *inter alia*, should mention that the work has been completed in respects and that all the contractual obligations have been fulfilled by the contractors and there is no due from the contractor to Railways against the contract concerned.



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Before releasing the SD, an unconditional and unequivocal no claim certificate will be required to be submitted by the contractor concerned."

11. According to the Petitioners, the security deposit is liable to be returned to the contractor only upon completion of work and certification thereof as provided in the contract. In this case, the Petitioners state that the admitted position is that the contractor failed to complete the work and abandoned the project site. In order to substantiate this contention, the Petitioners refer to the finding of the Arbitral Tribunal on Claim No.5 relating to loss of profit. The Arbitral Tribunal had recorded the following finding in respect of this claim:

"Tribunal's decision and Award: On account bills were released in time by Respondent Railways soon after the measurements taken. The Claimant has been advised to speed up the work and there was no response from the Claimant and the real facts is the Claimant had deserted from site and refused to extend the currency period with determination not to continue the work assigned/identified after extended completion period of contract and hence Tribunal recommend Nil award."



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12. Once the Arbitral Tribunal recorded a finding that the first Respondent herein/Claimant had deserted the site and refused to continue work, the Petitioners contended that the performance guarantee was liable to be invoked and the security deposit was not liable to be returned. Especially in light of Clause 11.3, the Petitioners contend that the findings of the Arbitral Tribunal on this issue warrant interference.

13. The first Respondent, on the other hand, referred to the discussions and findings with regard to the performance security in the additional award. In specific, the following finding was relied upon by the first Respondent:

"Tribunal's discussion and Award: In the original Award release on 23.06.11 under Claim No.3, Tribunal has recommended to return the Performance Guarantee given by the Claimant Contractor has to be returned back. Hence, there is no need to stress separate advice by the Claimant contractor. Moreover, there are some official formalities for the Respondent to get Chief Administrative Officer/Construction's sanction for honouring the Award and get their Associate Finance clearance. It is ascertained from CAO/CN/MS



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and Sr.AFA/CN/MDU that the sanction is already over and action is under process to return the Performance Guarantee. Hence, there needs no further Award on their Performance Guarantee release."

Thus, the Arbitral Tribunal appears to have taken into consideration subsequent developments whereby sanction was granted for the release of performance guarantee. Such subsequent developments cannot and should not be the basis for directing the return of the performance guarantee. Therefore, the findings in the original Award should be examined. The Arbitral Tribunal recorded the following finding at internal page 14 of the Award:

"....Claimant's PG for the wrong agreemental value was lying with Railway and renewed two times for the period of non availability of works. Hence, Tribunal recommends to return the Performance Guarantee to the Claimant. Like wise, Security Deposit amount recovered cannot be forfeited as such because what ever the work given have been in one way or other way done by the Claimant contractor. 7



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had not been served. In the absence of formalities observed by Respondent Railways, security deposit amount recovered cannot be freezed by Railways."

14. On the basis of the above findings, the counter claims of the Petitioners herein for the performance guarantee amount and the security deposit amount were rejected. These findings are based on an appraisal of the facts on record and on the basis of the conclusion that contractual requirements by way of notice requirements were not fulfilled by the Petitioners. In addition, it appears that no evidence of loss was adduced by the Petitioners. A counter claim for forfeiture should satisfy the requirements of Section 74 of the Indian Contract Act 1872, as held in *Fateh Chand v. Balkishan Das* AIR 1963 SC 1405. Without adducing evidence of loss, the Petitioners have forfeited about Rs.50 lakhs towards performance guarantee and security deposit. When considered cumulatively, the decision of the Arbitral Tribunal to direct return of the performance guarantee and to reject the claim for forfeiture of the security deposit cannot be construed as patently illegal.



15 For reasons set out above, the award of a consolidated sum as interest on Claim No.1 in the pre-reference period and *pendente lite* period is set aside. In all other respects, no interference is warranted with the Awards. O.P.No.495 of 2013 is partly allowed to the extent indicated above. There will be no order as to costs.

Sd/-S.K.R.J.
10.02.2022

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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