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Arb.O.P(Com.Div)No.148 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.10.2022

CORAM

THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

Arb.O.P.(Com.Div)No.148 of 2022

and

A.No.1399 of 2022

- 1.The Union of India
Rep. by the General Manager,
Southern Railway, Chennai – 600 003.
- 2.The Chief Engineer(Construction),
Office of the Chief Administrative Officer,
(Construction), Southern Railway,
Egmore, Chennai – 600 008.
- 3.The Deputy Chief Engineer(Gauge Conversion),
East Tambaram, Near DSK Office,
Southern Railway, East Tambaram,
Chennai – 600 059.
Presently the Deputy Chief Engineer(Construction),
My Lady's Garden, Park Town,
Chennai – 600 003.

... Petitioners

vs.

M/s.R.K. Constructions,
Rep. by its Managing Partner, Mr.Kumar,
New 4th ward, Chinnagoundampatti,
Tharamangalam Post, Omalur Taluk,
Salem district.

... Respondent



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PRAYER: Petition filed under Section 34(2)(a)(iv), (b)(ii) of the Arbitration and Conciliation Act, 1996 as amended by amendment Act 2015, praying to set aside the Arbitral Award passed by the learned Arbitrator herein dated 20.04.2021 made in relation to disputes arising out of Agreement No.329/CN/2005 dated 13.10.2005 in so far as Claim No.4(award of pendente lite interest @ 12% p.a.) for a sum of Rs.7,31,785/- from 28.08.2007 to till the date of award (i.e.) 20.04.2021 is concerned.

For Petitioners : Mr.P.T.Ramkumar

For Respondent : Mr.S.Amalaraj

ORDER

The dispute before this Court lies within a narrow compass: the petitioners assail the arbitral award dated 20.04.2021 (the Award) in respect of the grant of *pendente lite* interest under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).



2. A contract was awarded by the petitioners to the respondent in relation to the collection, supply and related activities as regards machine crushed hard granite stone ballast between specified segments of the Turinjapuram and Thiruvannamalai stations, Reach VIII. In this connection, letter of acceptance dated 10.06.2005 (the LoA) was issued to the respondent. This was followed by an agreement dated 13.10.2005 (the Agreement). The Agreement was terminated by notice dated 15.05.2007. Thereupon, the respondent invoked the arbitration clause by communication dated 28.08.2007. At least on two occasions, the arbitral tribunal constituted to adjudicate the matter could not proceed further. Eventually, the Arbitral Tribunal, which pronounced the Award, was constituted.

3. Before the Arbitral Tribunal, the petitioner made five claims. The challenge in the present petition is confined to the verdict on the fourth claim, which pertained to interest on the security deposit *pendente lite* and in the post award period, but was allowed only as regards *pendente lite* interest. In response to the statement of claim, the petitioners herein filed a counter statement. In such counter statement, the petitioners herein



contended that the demand for refund of security deposit is not reasonable and cannot be accepted. However, the issue relating to interest was not expressly dealt with. The respondent herein adduced documentary evidence by exhibiting 27 documents as Exs.C1 to C27 and the petitioners herein exhibited five documents as Exs.R1 to R5. Neither party adduced oral evidence before the Arbitral Tribunal. The petitioners were directed to refund the security deposit of Rs.7,31,785/- and pay simple interest thereon at 12% per annum from 28.08.2007 until the date of the Award. The admitted position is that the security deposit was refunded while the present petition was pending adjudication before this Court. It should be noticed that the Award does not grant post award interest.

4. The main basis of challenge by learned counsel for the petitioners is that the General Conditions of Contract (the GCC) prohibit the grant of interest either in the pre-reference period or *pendente lite*. In support of this contention, learned counsel refers to and relies upon Clause 16(3) of the GCC, which reads as under:



"(3) No interest will be payable upon the Earnest Money and Security Deposit or amounts payable to the Contractor under the contract, but Government Securities deposited in terms of Sub-Clause(1) of this clause will be payable with interest accrued thereon."

Learned counsel also relies upon Clause 64(5) of the GCC, which reads 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."

By relying upon a recent judgment of the Hon'ble Supreme Court in *Union of India v. Manraj Enterprises (Manraj Enterprises)*, (2022) 2 SCC 331, learned counsel contends that a claim for *pendente lite* interest had been entertained in the said case in spite of a similar clause prohibiting the grant of interest. In those circumstances, the Hon'ble Supreme Court concluded that the learned Arbitrator had erred and that the decision warranted interference.



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5. Although there was no pleading with regard to the prohibition on interest, learned counsel for the petitioners relies upon a judgment of this Court in *M/s.Unique Builders v. The Union of India and others*, O.P.Nos.894 of 2010 and 965 of 2017 to contend that a plea that the relevant contract prohibits the grant of interest may be raised in course of a Section 34 petition even if not raised before the Arbitral Tribunal. Therefore, learned counsel contends that the Award calls for interference insofar as it awards *pendente lite* interest to the respondent.

6. Learned counsel for the respondent refutes the above contentions. By turning to a typed set filed on 08.04.2022, learned counsel for the respondent states that this volume contains the entire pleadings and evidence placed before the Arbitral Tribunal. After drawing reference to the claim petition, which contains the claim for *pendente lite* interest at 24% per annum and post award interest at the same rate, he turned to the counter statement. By drawing reference to paragraphs 8 and 9 thereof, he pointed out that the petitioners herein averred that the Agreement was terminated in terms of clause 62 of the GCC, which is binding on both the contractor and the Railways, but did not advert to Clause 16(3) or Clause 64(5) or place the



relevant contract before the Arbitral Tribunal. By drawing reference to the Award, he pointed out that the Arbitral Tribunal recorded in paragraph 12 thereof that "the respondents in their counter statement did not even comment on the claimant's claim for interest and costs, leave alone seeking for their rejection". He also referred to paragraph 15 of the Award, which deals with the failure of parties to produce the contract. The said paragraph is extracted below:

"15. The claimant and the respondents both failed to produce a copy of the full contract containing all the special and general conditions for the Tribunal to appreciate the aforesaid clause-28 of special conditions and clause - 62 of general conditions. They also did not produce even the extracts of the above two conditions. The learned counsel for claimant submitted that the claimant is unable to trace the extracts of the two conditions as the railway's termination order is dated 15.05.2007 and that the claimant had approached the Hon'ble High Court on two different occasions spanning over a decade and filed O.P.No:837 of 2007 and thereafter filed O.P.No.603 of 2016."

7. Thereafter, with reference to paragraph 24 of the Award, he pointed



out that the Arbitral Tribunal noticed the respondent's claim for interest at 24% per annum from the date of commencement of arbitration and that the petitioners herein had not made any comments on the claims for interest and costs. Eventually, he submitted that the Arbitral Tribunal decided the claim for interest in the context of the pleadings and evidence placed before the Tribunal by holding as under in paragraph 24 of the Award:

"The respondents in their pleadings have not even formally contended that the claimant's claims for interest and costs must be rejected. The respondents have also not produced any contract conditions or clauses that stipulate, specify, or restricts any applicable rate of interest between the parties. The exhibits filed before this tribunal by both parties do not mention anything about the applicable interest.

The claimant has been deprived of the use of Rs.7,31,785/-, awarded under claim No.3, by the respondents and therefore the claimant is entitled for interest. As far as the rate of interest to be awarded is concerned, it must be borne in mind that around the year 2007 and subsequently for a long period, the rate of interest levied by the Banks was high and therefore, this Tribunal is of the view that interest at the rate of



12% will be reasonable and just to be awarded. Accordingly, the claimant is entitled to interest at the rate of 12% on the principal sum of Rs.7,31,785/- from 28.08.2007 till the date of Award, the interest on Rs.7,31,785/- works out to Rs.11,99,082/-."

8. In support of the contention that the contractual clauses prohibiting the grant of interest cannot be relied upon at this juncture, learned counsel for the respondent relied on the judgment of the Hon'ble Supreme Court in *Union of India v. Susaka Private Limited and others (Susaka)*, (2018) 2 SCC 182. He also invited my attention to Section 4 of the Arbitration Act which provides for waiver of objections with regard to any requirement under the agreement or any derogable provision of the Arbitration Act. In the case at hand, he submitted that the Section 21 notice was issued on 28.08.2007 and that arbitral proceedings culminated in the Award of 20.04.2021. Throughout the above period, he submitted that the petitioners herein failed to produce the GCC or contend before the Arbitral Tribunal that the interest claims are prohibited by contract. Hence, he concluded his submissions by contending that the Award does not call for interference.



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9. In the adversarial system adopted for adjudication of disputes in the entire common law world, including this country, adjudication is carried out on the basis of pleadings and evidence placed before the adjudicator by the parties to the proceedings. The Award discloses that the respondent herein exhibited 27 documents as Exs.C1 to C27 and the petitioners herein exhibited five documents as Exs.R1 to R5. On examining the documents placed before the Arbitral Tribunal, it appears that the LoA was exhibited as Ex.C1. Ex.C1 does provide in Clause 3(a) that no interest will be payable on the security deposit except with regard to Government deposits. However, the admitted position is that the attention of the Arbitral Tribunal was not drawn to this clause. Consequently, the Arbitral Tribunal had no occasion to construe this clause and decide whether it applies only during the original term of the contract or even after termination thereof. The Agreement between the parties was placed before the Tribunal as Ex.C2 and the recitals thereto make reference to the GCC. Apart from such reference, the undisputed position is that the GCC was not placed before the Arbitral Tribunal. It should be recognised that the GCC should have been tendered in evidence and is not a statute that the Arbitral Tribunal could take



cognisance of otherwise. The pleadings of parties on interest have been set out earlier in this order and it is evident therefrom that the petitioners did not aver that the interest claim is barred by contract. In the context of the pleadings and evidence placed before the Arbitral Tribunal, the Arbitral Tribunal recorded the finding in paragraph 24, which is also extracted above, that the petitioners herein had not produced any contract conditions or clauses that stipulate, specify or restrict any applicable rate of interest between the parties. In that context, interest was granted at 12% per annum after taking into account the applicable rate of interest at the relevant point of time although the interest claim was at 24% per annum.

10. Learned counsel for the petitioners contended that the Arbitral Tribunal is a creature of contract and therefore should have taken into consideration the terms and conditions of the contract. In this regard, he relied upon Section 28(3) of the Arbitration Act. Section 28(3) of the Arbitration Act (as amended by Act 3 of 2016) is as under:-

"(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction."



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11. The mandate of Section 28(3) is that the Arbitral Tribunal shall, in all cases, take into account the terms of the contract. For the Arbitral Tribunal to fulfil the above mandate, it was incumbent on the parties to the dispute to place before the Arbitral Tribunal the contract between the parties. As discussed earlier, apart from the LoA(Ex.C1) and the Agreement (Ex.C2), the GCC was not placed before the Tribunal. The Tribunal noticed and recorded in paragraph 15 that the full contract had not been placed before the Tribunal by either party and, in fact, the Tribunal expressly recorded in paragraph 24 that the respondents therein/petitioners herein did not produce any contract clauses that restrict the grant of interest. In the facts and circumstances, the Arbitral Tribunal examined the pleadings and the contract documents placed before the Tribunal and arrived at conclusions on such basis.

12. In a challenge under Section 34 of the Arbitration Act, the question that arises is whether the award calls for interference on the grounds set out therein. These grounds can be divided into two broad categories: the first, pertaining to the decision making process such as the manner of constitution of the arbitral tribunal, whether reasonable



opportunity was provided to parties to present their case, whether the arbitral tribunal exceeded the scope of reference and whether the award was improperly procured; and the second, pertaining to the decision but limited to violation of public policy, as defined, or patent illegality. This scrutiny cannot be carried out in a vacuum and should be carried out by taking into account the pleadings and documents that were placed before the Arbitral Tribunal. Indeed, in a Section 34 challenge, except in extraordinary situations such as post-award evidence of improper procurement of the award, no evidence that was not placed before the arbitral tribunal is permitted to be produced or relied on. Thus, the award is tested on the basis of pleadings and evidence forming the record of the arbitral tribunal. If so tested, in the absence of any evidence that the relevant contract prohibited the grant of interest, can it be said that the Arbitral Tribunal committed a patent error in granting interest at 12% per annum? The self evident answer is in the negative.

13. It should also be borne in mind that the Arbitration Act enables parties to opt out of the public court system and subjects the arbitral process to limited regulation with minimal intervention. The grounds of intervention



are clearly set out and the object of intervention is to prevent miscarriage of justice. The relevant contract was awarded to the respondent in June 2005 and the security deposit was remitted around that time. The contract was terminated in May 2007 and, pursuant to the Award, the security deposit was refunded recently after the institution of the present proceedings. In these circumstances, it cannot be said that the grant of interest at 12% per annum, from the date of commencement of arbitration up to the date of Award, results in miscarriage of justice. In **Manraj Enterprises**, there is nothing in the judgment to indicate that the relevant contract prohibiting the grant of interest was not placed before the arbitral tribunal. Therefore, the said judgment cannot be applied in this context. On the other hand, the ratio of **Susaka** applies and there is basis to conclude that the petitioners herein waived their contractual right to resist a claim for interest *pendente lite* by not raising the plea that such claim is prohibited by contract before the Arbitral Tribunal. In addition, as dilated upon earlier, the Award should be tested on the basis of the pleadings and evidence placed before the Arbitral Tribunal, and not evidence produced at the Section 34 stage. This situation is also not analogous to a jurisdictional challenge, which is permitted in a



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Section 34 petition although not raised earlier, because the foundation of the dispute resolution process hinges on the authority of the adjudicator and such authority would be undermined if such challenge is successful. By contrast, the authority of an arbitral tribunal to award *pendente lite* interest is statutory [Section 31(7(a))] and such power may be exercised in the absence of evidence of contractual prohibition or upon express or implied waiver of such contractual right. Hence, when viewed in context, the Award does not call for interference under Section 34 of the Arbitration Act. Before concluding, it should also be noticed that this is not an appropriate case to remit the Award to the Arbitral Tribunal under Section 34(4) of the Arbitration Act because it cannot be said that there is a curable lacuna in the Award.

14. For reasons set out above, Arb.O.P.(Com.Div)No.148 of 2022 is dismissed without any order as to costs. Consequently, connected application is closed.

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