

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**(6) APPEAL NO. 1 OF 2023
IN
ARBITRATION PETITION NO. 1109 OF 2016**

R. Gangaiah & Co.,	...Appellant
Versus	
Union of India	
(Chief General Manager) and Anr	...Respondents

**AND
(7) APPEAL NO. 2 OF 2023
IN
ARBITRATION PETITION NO. 512 OF 2013**

R. Gangaiah & Co.,	...Appellant
Versus	
Union of India	
(Chief General Manager) and Anr	...Respondents

Mr. Nikhil Wadikar a/w. Faiza Shaik a/w. Malhar Pawar i/b. Mr. Nandu Pawar
for appellant.

Mrs. Shehnaz V. Bharucha i/b. A. A. Ansari for Respondents-Union of India.

**CORAM: K.R. SHRIRAM &
RAJESH S. PATIL, JJ**

DATED: 28th March, 2023

PC:-

1. The appeal is impugning a common judgment dated 12th March 2019 passed by the learned Single Judge of this Court, disposing two petitions filed under Section 34 of the Arbitration and Conciliation Act 1996 (the said Act). Both these petitions were challenging certain parts of the award made by sole arbitrator. Arbitration Petition No. 512 of 2013 that was filed by the Union of India was allowed and Arbitration Petition No. 1109 of 2016 that was filed by the contractor came to be dismissed.

2. Facts in brief are, in circa 2007, respondent had invited tenders for construction of 153 Nos. of type 'D' quarters comprised in 26 three storey buildings in the same campus at Aswapuram, Khammam District, Andhra Pradesh. Appellant was the successful bidder. A Letter of Intent dated 27th November 2007 was issued to appellant followed by a formal work order dated 28th December 2007. On 05th January 2008, appellant commenced the work at site. On 4th July 2009, appellant requested for extension of time upto 28th February 2010 for completion of the work. It was respondent's case that the progress of work by appellant was not upto the mark and if proper progress was not made and the work was not completed in time, action for

rescinding the contract could be initiated under clause 3 of the General Conditions of Contract (“GCC”). Respondent, nevertheless, by its order dated 31st August 2009, extended the time for completion of work upto 31st January 2010 subject to levy of compensation under clause 2 of GCC. Finally, appellant completed the work by 15th June 2010. Respondent, on its part, granted extension of time upto 15th June 2010, again subject to levy of compensation under clause 2 of GCC.

3. By a letter dated 2nd December 2010, respondent informed appellant about the levy of compensation and also issued show cause notice issued under clause 2 of GCC to appellant. Appellant protested against such levy and signed the final bill prepared by respondent under protest. Since, there were various other issues involved, appellant invoked arbitration and lodged 10 heads of claim. Arbitrator allowed four heads of claims. Respondent’s counter claim was rejected by the arbitrator. Appellant in its petition challenged the arbitrator’s decision on the rejection of its claims but argued before the learned Single Judge only the rejection of claim no.6 (overhead expenses for establishment due to undue prolongation of work together with interest thereon) . Likewise, respondent challenged the rejection of its counter claim as also awarding claim nos. 1 and 4 to appellant. But,

principally argued only the award of claim nos. 1 and 4 to appellant. The learned Single Judge allowed respondent's petition and set aside the arbitrator's award regarding appellant's claim nos. 1 and 4. Consequently, interest that was awarded under claim no. 9 and awarded under clause 10 also got set aside. The claims, the amounts awarded by the arbitrator and what was awarded by the High Court read as under :-

Claim Table

Claim No.	Short Description	Amount Claimed Rs.	Amount Awarded Rs. By Arbitrator	Amount Awarded by High Court.
1.	Refund of amount of Rs. 20,90,000.00 illegally recovered in the final bill	20,90,000.00	20,90,000.00	Nil
2.	Interest @ 24% p.a. due to delayed payment of escalation	2,58,772.00	Nil	Nil
3.	Refund of illegally deducted amount of escalation in the final bill	16,36,215.00	Nil	Nil
4.	Balance payments of escalation beyond the stipulate completion date till the date of actual completion of work together with interest of 24%. P.a.	69,95,430.00	20,43,154.00 (refer claim 9 for interest)	Nil
5.	Interest at 24% p.a. due to delayed	1,61,999.00	Nil	Nil

	payment of final bill.			
6.	Overhead establishment expense due to undue prolongation of work together with interest of 24 % p.a.	15,16,077.00	Nil	Nil
7.	Interest payable to security deposit deducted from running bills and also interest on BG amount	9,72,014.00	Nil	Nil
8.	Loss of Production and business loss @20%	27,26,101.00	Nil	Nil
9.	Interest on all the above claims till date of payment Against claim No.1 Against claim No.4		3,89,599.00 3,80,866.00	Nil
10.	Cost of arbitration and litigation	3,00,000.00	3,00,000.00	Nil
	Total amount	1,93,56,608.00	52,03,619.00	

4. Mr. Wadikar, at the outset, relying upon a judgment of the Apex Court in *Sudarshan Trading Co. V/s. State of Kerala and Anr.* reported in *AIR 1989 SC 890*, submitted that if two views are possible, the learned Single Judge should not have interfered with the award. Though compilation contained about 8 judgments, Mr. Wadikar only relied on this judgment. We agree with the submission made by Mr. Wadikar. But, the issue was whether the view taken

by arbitrator is a possible or acceptable view. The learned Single Judge has, while dealing with the three heads, very well articulated the reason why he felt the award of claim nos. 1 and 4 to appellant required interference and for claimant no.6 did not require any interference.

5. Mrs. Bharucha submitted that clause 2 of GCC provides for extension of date of completion. But it is very clear that even if such an extension was granted that was without prejudice to respondent's right to claim compensation for the delay and that the contract provides for what should be the compensation.

6. Mr. Wadikar submitted that the arbitrator's conclusion that time was not the essence of the contract was a possible conclusion because clause no.2 GCC provides for extension of the period.

7. Having heard the counsel and considering the documents and as also the award and the impugned judgment, we agree with the views expressed by the learned Single Judge.

8. As regards, Claim No.1, i.e., refund of Rs. 20,90,000/-, clause

No.2 of GCC reads as under :-

“If the contractor fails to maintain the required progress in terms of clause 5 or to complete the work and clear the site on or before the contract or extended date of compensation, he shall, without prejudice to any other right or remedy available under the law to the government on account of such breach, pay as agreed, compensation the amount calculated at the rates stipulated below or such smaller amounts as the Superintending Engineer (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/week (as applicable) that the progress remains below that specified in Clause 5 of that the work remains incomplete”

9. Clause No.4 of the work order, expressly provided that the time is of the essence. Clause No.2 of GCC which provides for extended date of completion gives an indication that time was of the essence. The arbitrator has totally disregarded the work order dated 22nd December 2007 issued by respondent to appellant in which clause 4.0 states that time was of essence of the contract. The work order formed part of the contract. Clause 2 of GCC required that if the contractor failed to maintain the required progress in terms of clause 5 or to complete the work and clear the site on or before the contract or extended date of completion, he would, without prejudice to any other right or remedy available under the law to the employer on account of such breach, pay as agreed compensation the amount calculated at the rates

stipulated or such similar amount as the Superintending Engineer (whose decision in writing was to be final and binding) may decide on the amount of tendered value of the work for every completed day/week (as applicable) that the progress remained below what was specified in clause 5 or that the work remained incomplete.

10. The clause indicated that if the completion period (as originally stipulated) did not exceed three months, the compensation would be one percent per day, provided always that the total amount of compensation for such delay should not exceed 10 percent of the tendered value of the work. The arbitrator has, in the award accepted, not only under these heads of claim and but other heads of claim as well, that appellant was not deploying adequate resources by way of shuttering material, manpower, i.e., labour as well as technical/engineering staff etc. The arbitrator has also noted that appellant has accepted or not disputed the discussion in the minutes of the meeting where it has been recorded about the lack of progress. Appellant was signatory to the minutes of the meeting and shortfall of progress has also been recorded. The arbitrator has also accepted that the prolongation of work was also as a result of inadequate deployment of resources by appellant.

11. Therefore, in the face of such finding in the award, the learned arbitrator should not have interfered with the levy of compensation by respondent. The arbitrator has proceeded purely on the footing that time was not the essence of the contract, but, in the bargain completely ignored or disregarded crucial contractual documents, namely, work order providing for time as essence of the contract and the schedule providing for stage-wise progress of the contract work. The contractual documents read with clause 2 of GCC make it clear that it was the Superintending Engineer whose decision in writing was to be final and binding so far as the amount of compensation to be levied under clause 2 of GCC. If appellant did not maintain the required progress or delayed completion of work beyond the contractual or extended date of completion, the Superintending Engineer could direct such levy upto a specified limit.

12. It is also not in dispute that the arbitrator did find delay on the part of appellant and whilst granting extension, respondent had put appellant to notice that the extension was being granted subject to provision of clause 2 of GCC. What was the compensation payable being levied was also communicated in the final bill. Therefore, the learned Single Judge was correct in interfering with this head of claim granted by the arbitrator.

13. As regards, claim 4, i.e., balance payment of escalation beyond the stipulated completion date, it would be useful to reproduce clause 10 (CC) and clause 4.26 of Special Conditions of Contract ('SCC') :-

"10 (CC)... :- Subject to the condition that such compensation for escalation in prices shall be available only for the work done during the stipulated period of the contract. No escalation shall be paid for work executed in extended contract period even if extension of time is granted without any action under clause 2 and also no such compensation shall be payable for a work for which the stipulated period of completion is 18 months or less."

*.....
"4.26 Tech bidder should note that the subject clause shall not be applicable for the period beyond stipulated period of completion if the delay is attributable to the contractor."*

14. Though the clause 10 (CC) of GCC made the escalation provision applicable only for for work done during the stipulated period of contract and not for work executed in the extended period, the arbitrator held that the SCC would have precedence over GCC and accordingly, under para 4.26 of SCC, the contractor became eligible for payment of escalation even during the extended period of contract if the delays were not attributable to him.

15. Clause 4.26 of SCC makes it clear that clause 10 (CC) of GCC was

applicable to the period of construction and para 4.26 also provides that the subject clause shall not be applicable for the period beyond stipulated period of completion if the delay is attributable to the contractor. Mr. Wadikar submitted that even though part of the delay was attributable to appellant, this clause should be read as if the delay is solely attributable to the contractor only then he would not be entitled to escalation. We cannot read the clause in that manner. We cannot read in that clause 4.26 of SCC, if the delay is not attributable solely to the contractor, compensation under clause 10 CC would become payable even if the work were to be executed during the extended period of contract. Admittedly, there has been delay attributable to appellant. Further, clause 10 CC of GCC expressly provides :-

“.....

no such compensation shall be payable for work which stipulated period of completion is 18 months or less.”

16. Admittedly, the stipulated period of completion in the contract in issue was for 18 months. Therefore, the escalation clause will not be applicable at all to the case at hand. The learned Arbitrator has totally ignored this absolute restriction in the contract and, therefore, could not have ordered compensation for escalation for the extended period of contract.

17. The arbitrator was contractually restrained from awarding any compensation on this count. Reading clause 4.26 of SCC it is clear that it only determines how clause 10 of GCC should be held in cases where it is applicable. In the case at hand stipulated period of completion was 18 months Clause 10 of GCC was certainly applicable. Therefore, the learned Single Judge was justified in interfering.

18. Claim No.6 while deciding, i.e.,overhead establishment expenses due to undue prolongation of work together with interest, the learned arbitrator has, in paragraph no.1, observed as under :-

“1. The submissions of the Respondents which are not being disputed by the Claimants with respect to the Minutes of Meeting and shortfall of the progress., are very clear to indicate that the Claimants have not been deploying adequate resources by way of shuttering material manpower i.e, labour as well as technical/engineering staff. This position was brought to the notice of the Claimants time and again and the Claimants were the Signatories to the minutes of meeting. As such the prolongation of work was also as a result of inadequate deployment of resources by the Claimants, apart from the delays accountable to the Respondents.”

19. The learned arbitrator has rejected the claim on the ground that appellant had not proved having deployed adequate resources by way of shuttering material, manpower, i.e., labour as well as technical/engineering staff etc. The learned single Judge correctly refused to interfere by holding that the issue was essentially a

matter of fact and the arbitrator has taken a view that appellant was responsible for undue prolongation of work. The learned Single Judge correctly felt it would be a possible view on the basis of material placed before the arbitrator and hence, required no interference.

20. Accordingly, appeals dismissed.

(RAJESH S. PATIL,J.)

(K.R. SHRIRAM,J.)