

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.
ARBITRATION APPEAL NO. 17/2018

Union of India represented by
 General Manager, South Eastern,
 Railway Garden Reach, Kolkata – 440010.

... **APPELLANT /**
 Ori. Respondent.

VERSUS

M/s. Jimmy Construction Pvt. Ltd.,
 Engineers & Contractors, 19,
 Dharampet Extension, Shankar Nagar
 Square, Nagpur-440010.

... **RESPONDENT /**
Ori. Claimant

Mr. N.P. Lambat, Advocate for appellant.
 Mr. A.C. Dharmadhikari, Advocate for respondent.

CORAM : **VINAY JOSHI, J.**

RESERVING THE JUDGMENT ON : **29.09.2022**
PRONOUNCING THE JUDGMENT ON : **11.01.2023**

JUDGMENT :

This appeal under under Section 37 of the Arbitration and Conciliation Act, 1996 ('Act of 1996') raises a challenge to the arbitral award dated 22.03.2021 along with dismissal of arbitral application

under Section 34 of the Act of 1996 by the learned Principal District Judge. The appellant is the Union of India through its General Manager, South Easter Railway, whilst the respondent is a Contractor. There has been work contract in between the parties vide contract agreement No. 287/T-99/1998/JCPL dated 01.04.1999 for execution of earth work from chainage 16000 meter to chainage 18000 meter in Gondia-Balaghat Project in connection with Gondia-Jabalpur Gauge conversion project. The work was awarded to the respondent by acceptance letter dated 01.01.1999 with completion period of 12 months i.e. upto 31.12.1999 at a total cost of Rs. 33,87,212/-. As per estimate, the value of work was Rs. 72,22,200/- whilst respondent/Contractor offered his rate 53.1% below the estimate rate and the same was accepted by the appellant/Railway.

2. As per contract, the work was to be executed in two stages i.e. Stage-1 work was upto existing formation level along the Narrow Gauge Track and upto new formation level of Broad Gauge Track on detoured alignment and stage-2 balance work upto proposed Broad Gauge level along the existing narrow Gauge Track, due to early completion of Broad Gauge and anticipation to block Narrow Gauge Traffic within a year. There was a time gap between Stage-1 and Stage-2 work. In the said Gauge Conversion work, after completion of

Stage-1 work, the Narrow Gauge Track was to be dismantled and thereafter Stage-2 work was supposed to be commenced.

3. There happened to be initial delay in commencement of the work. The appellant/Railway has issued several notices under General Conditions of Contract ('GCC') to commence the work. On the other hand, the respondent stated variety of reasons for non-commencement of work attributing delay on the part of the appellant/Railway. The Contractor has not completed Stage-1 work within the stipulated period. However, it was completed on 30.06.2000 of the total value of Rs. 9,13,407/-. In the meantime, the contract period was extended by appellant/Railway from 31.12.1999 to 30.06.2000 and further extended upto 31.12.2000 and then upto 31.10.2001. However, the appellant/Railway unilaterally terminated the contract on 23.03.2001 under Clause 61(1) of GCC which was objected by the Contractor. It gave rise to dispute and differences between the parties, on which the Contractor lodged various claims vide letter dated 18.09.2001 under Clause 63 of GCC payable by appellant/Railway.

4. Since the dispute arose between the parties, the Contractor has filed Misc. Civil Application No. 47/2008 for appointment of Arbitrator under Section 11 of the Act of 1996 before this Court. In the said proceeding Shri H.S. Prasad has been appointed as a sole

Arbitrator to adjudicate the claim. After constitution of Arbitral Tribunal, the Contractor made a statement of claim quantifying claim under 13 heads. The appellant/Railway resisted the claim by filing reply as well as raising counter claim. Considering the pleadings, documents and submissions of both side, the learned Arbitrator has partly allowed the claim to the extent of Claim Nos. 1 to 5 and 7 whilst rejected the rest. The counter claim filed by appellant/Railway was dismissed. Accordingly, the learned Arbitrator has passed award dated 22.03.2011 quantifying the total award of Rs. 49,16,778/- to be paid within 30 days from the date of award with a rider to pay interest at the rate of 15% per annum on its failure. The said award has been challenged by the appellant/Railway in terms of Section 34 of the Act of 1996 vide Civil M.A. No. 520/2011. The learned District Judge after considering rival contentions and on perusal of record dealt with each claim separately. Ultimately, the learned Principal District Judge did not find a case for setting aside the arbitral award and accordingly vide impugned judgment and order dated 13.12.2017, dismissed the application.

5. Heard Mr. Lambat, the learned counsel appearing for the appellant/Railway and Mr. Dharmadhikari, the learned counsel appearing for the respondent/Contractor. Perused the record made

available by the parties as well as gone through the decisions cited by both sides. The appellant/Railway has assailed the impugned award as well as order passed by the learned Principal District Judge on various counts.

6. Mr. Lambat, learned counsel for the appellant/Railway has submitted that there are serious objections about the claim allowed by the learned Arbitrator under claim Nos. 3, 4 and claim No. 14 pertaining to the interest. It is stated that extensions were granted in terms of Clause 17(3) of GCC, therefore the Contractor is not entitled to claim damages or compensation. Moreover, it is submitted that, in supplementary agreement there is no specific clause to grant damages on account of work became idle. The learned Arbitrator failed to consider that in terms of Clause 17(3) of GCC, the Railway is entitled to grant extension without giving right to claim damages. He would submit that the appellant/Railway has filed labour register deployed by contract at site which was not considered by the learned Arbitrator. There is no specific proof tendered by the Contractor about providing man-power and machinery and in absence of that by merely doing guess work, the learned Arbitrator awarded compensation which is against the law. On the point of interest, it is argued that in terms of Clause 16(2) of GCC, no interest would be payable and thus, the

Arbitrator has exceeded its jurisdiction in granting interest.

7. On the other hand, Mr. Dharmadhikari, for the respondent/ Contractor has supported the impugned judgment and award. According to him, the extension was granted at the instance of Railway since the employer was not in position to hand over the site and remove the deficiencies. It is submitted that the last extension was till 31.10.2001, however the contract was unilaterally terminated on 23.03.2001 which gave rise to claim damages on various counts. It is submitted that the Clause 16(2) of GCC would not apply as the claim is towards compensation, which according to him, would not fall within Clause 16(2) of GCC. According to the respondent, since the contract was terminated midway, the Railway cannot take benefit of Clause 17(3) of GCC for their benefit. Lastly, it is submitted that scope of application under Section 34 of the Act of 1996 is quite limited as the challenge is to be entertained only under the parameters set out in Section 34 of the Act of 1996.

8. It is not in dispute that there was an agreement dated 01.04.1999 for aforesaid work. The period for completion of work was extended from time to time and last extension was upto 31.10.2001. There is no dispute that the Railway has terminated the contract on 23.03.2001 i.e. prior to the extended period on account of their own

difficulty. The learned Arbitrator after considering the material on record held that there was breach on the part of the Railway in supplying requisite site and to remove other difficulties enabling the Contractor to complete the agreed work. There were exchange of correspondence in between the parties. It reveals that the Contractor time and again requested the appellant/Railway about various hindrances in executing the contract work. It was repeatedly requested to make available the area free from all obstructions like removal of telephone polls and complete the land acquisition process, but, it was not timely responded. After considering the entire material, the learned Arbitrator has come to the conclusion that the delay was attributed to the respondent for the reasons like delay in handing over site, work could not be undertaken due to Birisola Station Yard, forest land, delay in shifting of telephone polls and non-removal of existing Narrow Gauge Track and non-closer of traffic. The said conclusion is based on the material tendered in the proceeding which calls no interference.

9. The learned counsel for the appellant/Railway submitted that that the Contractor is not entitled to claim damages on account of extension granted in terms of Clause 17(3) of GCC. In support of said contention, reliance is placed on the decision in cases of *General*

Manager, Northern Railway and another Vs. Sarvesh Chopra, (2002) 4 SCC 45, Ramnath International Construction Pvt. Ltd. Vs. Union of India (Appeal Civil) 3167-3168/2005 decided on 11.12.2006) and Bharat Coking Coal Ltd. Vs. Annapurna Construction, (2003) 8 SCC 154.

10. In above referred case of **General Manager Northern Railway**, it has been observed that in spite of there being a contract between the parties whereunder the Contractor has undertaken not to make any claim for delay in performance of the contract, still a claim would be entertainable in three contingencies stated therein. In case at hand, the employer at his own, has given an extension of time by entering into supplementary agreement which is not in dispute, therefore it makes the Contractor entitled for delayed payment. In another case of **Ramnath International Construction Pvt. Ltd** facts are based on distinct clauses and thus, it is of no assistance. In case of **Bharat Coking Coal Ltd.**, the general proposition about the error within the jurisdiction and error in excess of jurisdiction has been explained. Herein, there is no material to indicate that the learned Arbitrator has acted without jurisdiction. In the decision of the Supreme Court in case of *M/s. A. T. Brij Paul Singh and Bros. Vs. State of Gujarat, AIR 1984 SCC 1703*, it has been observed that the Contractor is entitled to claim

damages on the basis of expected profit on balance of work contract. The said decision relates to the breach committed by the employer, wherein the Contractor's right to claim damages has been recognized.

11. The Contractor raises claim under various heads. It is apparent from record that the appellant/Railway was not prepared to get executed the work as they could not close the Narrow Gauge Traffic on the station. The learned counsel appearing for the appellant/Railway has not pointed as to how the claim raised by the Contractor falls under excepted matters falling in Clause 63 of GCC. True, the Railway has right to determine the contract under Clause 61(1) of GCC, however, it does not preclude the Contractor from claiming damages. Perusal of various heads under which damages have been awarded reveals that unsustainable claims, for instance, claim Nos. 8, 9, 10, 11, 12, 13 have been rejected by the learned Arbitrator. While awarding, the rest claims, logical conclusion has been arrived on the material placed before the Arbitrator. Though it is argued that the learned Arbitral has awarded compensation by doing guesswork, however, it was found to be reasonable as there are no means to calculate unquantified damages.

12. So far as the award of interest is concerned, the learned Arbitrator has awarded interest from 18.09.2001 to 22.03.2011

@ 12% per annum. According to the appellant/Railway in terms of Clause 16(2) of GCC, Contractor is not entitled for interest and thus, award of interest is outside the scope of arbitration. The relevant Clause 16(2) of GCC is reproduced herein below:-

“16(1)....

(2) *No interest will be payable upon the earnest money or the 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 repayable with interest accrued thereon.*

Interest on the said Government Security will be drawn by the Railway Administration and credited to the Contractor and the Contractor shall not be entitled to claim any other sum by way of interest or profit on the said Security Deposit than the amount actually drawn by the Railway Administration from the Government.”

13. The learned counsel for the appellant/Railway by placing reliance on the decision in case of ***Jaiprakash Associates Limited (JAL) through its Director Vs. Theri Hydro Development Corporation (India) Limited (THDC) through its Director, (2019) 17 SCC 786*** would submit that when there is express bar in the agreement against award of interest, the Arbitrator has no jurisdiction to grant interest. In this regard, the learned counsel for respondent would submit that the contractual bar created in Clause 16(2) of GCC would not apply as the interest is awarded on damages. In other words, he would submit that in Clause 16(2) of GCC does not deal about the interest on damages. The said clause only bars interest upon the earnest money, security

deposit or amounts payable to the Contractor under the contract. In support of said contention, he has placed reliance on the decision of the Supreme Court in case of *M/s. Raveechee and Co. Vs. Union of India, 2018 ALL SCR 1425*, wherein a similar Clause 16(3) falls for consideration. In the light of that, it has been observed that the Arbitrator has power to award interest pendent lite as Clause does not deal with the issue of grant of interest pendent lite. The learned Arbitrator has not awarded interest under any of the above three heads. In-fact, the learned Arbitrator has awarded interest on account of loss suffered by Contractor for abrupt determination of contract. Certainly, said amount was not awarded on account of any payment due to the Contractor under the contract and therefore, Clause 16(2) would not come into play.

14. The learned counsel appearing for the respondent/Contractor would submit that in appeal under Section 37 of the Act of 1996, the Court cannot enter into merits of claim. In this regard, he relied on the decision of the Supreme Court in case of *Haryana Tourism Limited Vs. Kandhari Beverages Limited, (2022) 3 SCC 237*. In this regard, he lays emphasis on para No. 9 of the said decision which reads as below:-

Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial Court. Thus, the High Court has excised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable.”

15. No doubt, this Court has very limited scope and jurisdiction while deciding appeal under Section 37 of the Act of 1996. Basically the scope under Section 34 of the Act of 1996 itself is limited as the arbitral award can be set aside for the grounds stated under Sub-clause (2) to Section 34 of the Act of 1996. There is no dispute that the arbitration agreement was valid and full opportunity was given to the parties by the learned Arbitrator. The appellant/Railway has not pointed out as to how the arbitral award is in conflict with the public policy of India or it is in contravention with the settled position of law.

16. The learned Arbitrator as well as the learned Principal District Judge has considered all the aspects in proper perspective. It is only when issue decided by the Arbitral Tribunal is found to be bad in law in the light of any specified ground set out in Section 34 of the Act of 1996, the Court may consider it appropriate to interfere in award,

else not.

17. In the light of above discussion, no case is made out for interference, hence appeal stands dismissed. The respondent is at liberty to withdraw the amount, if any lying with this Court.

(VINAY JOSHI, J.)

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