IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	02.08.2024
Pronounced on	30.10.2024

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) Nos.74 and 287 of 2023

M/s.Nilakantan & Sons Private Limited
rep. by its Managing Director,
Mr.N.Jayachandran ... Petitioner in
Arb.O.P(Com.Div.)No.74 of 2023
and
... Respondent in
Arb.O.P(Com.Div.) No.287 of 2023

Versus

Union of India,
rep.by the Chief Engineer (Construction),
Office of the CAO/Construction,
Southern Railway, Egmore,
Chennai-600 008. ... Petitioner in
Arb.O.P(Com.Div.)No.287 of 2023
and
... Respondent in
Arb.O.P(Com.Div.) No.74 of 2023

Prayer in Arb.O.P(Com.Div.)No.74 of 2023:

Arbitration Original Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996, seeking to set aside the Arbitral Award dated 29.09.2022 pertaining to the findings in relation to Claim Nos.1,2,3,5,7 and 8 which have been delivered to the parties on 30.09.2022.

Prayer in Arb.O.P(Com.Div.)No.287 of 2023:

Arbitration Original Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996 seeking to set aside the Arbitration Award passed by the Sole Arbitrator, dated 20.09.2022 and to direct the respondent to pay the costs.

For Petitioner in Arb.O.P.(Com.Div.)No.74 of 2023 and Respondent in Arb.O.P(Com.Div.) No.287 of 2023 ... Mr.Anirudh Krishnan

For Petitioner in Arb.O.P.(Com.Div.)No.287 of 2023 and Respondent in Arb.O.P.(Com.Div.) No.74 of 2023 ... Mr.M.Karthikeyan, SPC

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COMMON ORDER

These Arbitration Original Petitions arise out of the same Arbitral Award dated 20.09.2022 passed by the Sole Arbitrator.

2. The petitioner in Arb.O.P.No.74 of 2023 has challenged the findings of the Sole Arbitrator in respect of rejection of their claim Nos.1,2,3,5,7 and 8. However, the petitioner/Southern Railway in Arb O.P.No.287 of 2023 has challenged the Award in toto.

3. For the sake of convenience, the claimant, who is the petitioner in Arb.O.P.No.74 of 2023 will be hereinafter referred to as 'the petitioner' while the petitioner/Southern Railway in Arb O.P.No.287 of 2023 will be hereinafter referred to as 'the respondent'.

4. The brief facts, which led to the filing of the present petitions, are as follows:

4.1 The respondent floated a Tender on 25.10.2022 for proposed construction of the work of Construction of Road Over Bridge Clear Span of 2 X 35.00 m Clear Span PSC Box Girder, at Km 354/32-33, in lieu of existing level Crossing No.116, in Magudanchavadi Yard, Jolarpettai Section. After negotiation, the contract was awarded to the petitioner vide Letter of Acceptance dated 17.04.2003 for a total value of Rs. 1,14,04,289/- with a period of completion of 12 months i.e., to complete the works on or before 16/04/2004. Thereafter, both the parties have entered into an Agreement on 08.09.2003, which is subject to the General Conditions of Contract (in short, 'GCC") of the respondent. The award of contract comprised into 4 components, viz., Annexure-A: First Component for Rs.23,57,539/- comprising of Excavation work, CC, RCC etc., Annexure- B - Second Component for Rs.1,05,750/- relating to removing of the existing lifting barriers and restoration of Track etc., Annexure -C- Rs.56,00,000/- comprising of Design and Construction of Pre-stressed Concrete Superstructure (Box Type), Parapet walls, including Casting in position etc., conforming to Railways General Arrangement Drawings No.CN/332-2000/1 and to Contractors' Design and Detailed Drawings, duly satisfying the provisions in various IRC Codes and approval by the Railways; and

Annexure D-Rs.33,41,000/- relating to supply of Cement and Steel.

4.2 The petitioner has also furnished Security Deposit of Rs.3,00,000/- after adjustment of EMD of Rs.50,000/- and balance Rs.2,50,000/- in the form of Bank Guarantee.

4.3 While so, the dispute arises between the parties, which according to the learned counsel for the petitioner is as follows:

4.4 The petitioner sent a letter dated 02/05/2003 to the Respondent seeking Drawings for RCC details of Raft Foundation, Column, Trestle Beam etc., along with GAD, for execution of the ROB Work. The petitioner had submitted Design of PSC Box Girder Superstructure given by their Consultant i.e., M/s.Jayshila Consultants, to the respondent on 09/07/2003. Thereafter, the petitioner, vide letter dated 10.07.2003, in order to commence the work of Foundation and Sub-Structure, requested the respondent to furnish Drawings. However, the respondent informed on 09/07/2003 that the minor changes in the already approved Drawings will be at capping Beam level and all the Structures can be cased up to that level and that alignment marking was yet to be finalized with the Highways Department.

4.5 The petitioner, vide letter dated 15/09/2003, having mobilized Men and Machinery at site, requested the respondent to furnish Working Drawings from to commence the work. But the respondent, only on 14/10/2003 only, the respondent sent the Drawings showing the detail of Substructure for the ROB work. However, the petitioner, vide letter dated 31.10.2003 pointed out that an impediment had to be removed at the Third Foundation location and once again requested the respondent to expedite the approval for Superstructure Designs and Drawings.

4.6 According to the petitioner, nearly eight month period has been lost in carrying out the Sub-structure work itself and still the Design and Drawings for the Superstructure Box Girder furnished by the petitioner on 09/07/2003, had not been approved by the Respondent. Also considering the steep increase in the Steel and Sand Prices and difficulty in procuring the same, the petitioner requested for their First Extension to the Currency of the Contract by 16/12/2004. The petitioner, vide letter dated 27.4.2004, pointed out to the respondent that for want of approval for extension of time, the work of foundation for Pier 1, ready for concreting with reinforcement and progress in Column in Pier 2, got held up. The petitioner also brought to the notice of the respondent the inconvenience that they confronted vide letter dated 21.05.2004, mainly on account of change of Officers, holdup of execution work for want of extension of currency, losses on account of idling of establishment infrastructure and labour, very high rates of the market price of Reinforcement Steel and not even getting the First Payment for the work done so far etc.,

4.7 The petitioner vide letter dated 30/06/2004 addressed to the Respondent stating that they submitted the Design and Drawing for the Staging Arrangements for the ROB, after completing the Foundation and Sub-structure work in anticipation of the approval for Superstructure. Further, the petitioner also vide letter date 31/07/2004, informed the respondent that the interference of the Highways Engineers to reduce the depth of the Box Girder in the Railway's Portion and the Claimants inclination of not adducing to that, on account of the Detailed Designs already submitted to the Respondent more than a year back, has not been approved yet. Any reduction will require redesigning and checking, causing further delay and increased quantities of pre-stressed cables and other materials etc., have also been brought out in that communication.

4.8 The petitioner, vide letter dated 07/09/2004, sought clearance from the Respondent seeking change in level of the Trestle Beam and mentioned that the Final lift concreting of Column for the work had been kept pending. In reply to that the petitioner mentioned that the respondent served on them a Seven Days' Notice on 20/09/2004, as per Clause 62 of the GCC accusing them for not adhering to the programme charted, despite extension of currency upto 30/09/2004, under Clause 17 (2) of the GCC.

4.9 The petitioner, vide letter dated 22.09.2004 mentioned various reasons caused the delay in the completion of works such as, the Highways Department sought Realignment of the Bridge alignment and these changes were made by Railways warranting redoing the work, receipt of request for reducing the Road Level etc., The petitioner also mentioned that due to that the Trestle Beam Levels are proposed for change and the Revised levels had not been fixed and the last lift of Column could not be concreted. The position of non-approval of Box Girder Design and Staging Arrangement Drawings were also part of that communication. However, the Claimant requested for extending the period of contract upto 28/03/2005.

4.10 According to the petitioner, they have suitably replied the Respondent, as to what were the problems faced by them while executing the work after the receipt of LOA, attributable on the part of the Respondent and the Highways Department, including delay in the payment of their CC Bills, and requested them to refrain from taking any stringent action. Based on that the Respondent vide his communication dated 15/10/2004 under the same Clause 17(2) of the GCC, extended the time for completion of work from 01/10/2004 to 28/03/2005.

4.11 The petitioner vide letter 24.07.2005, pointed that due to non-submission of Design and Drawings for Superstructure for Staging works as per GCC, having awarded the work on 17/04/2003, the entire delay was on account of the Respondent only. The petitioner brought to the notice of the respondent vide letter dated 10.08.2005 the reasons for the hold up of work i.e., for want of approval of Drawings for the Staging arrangements and Superstructure Design and Drawings, having submitted to the Respondents on 30/06/04 and 09/07/2003 respectively and the losses on account of Idle Machinery and Overheads and also brought out that if the Costs of Construction with interest @ 21%, not compensated, which necessitated the petitioner to take steps to resolve them through Arbitration process.

4.12 The petitioner, vide letter dated 19.09.2005 informed the respondent detailing all the events that had taken place right from the beginning of execution of work and the reasons for the delay and seeking extension(s) of time and requested to withdraw the 48 Hours' Notice served on them by the Respondent on 16/09/2005 and refer to their claims for damages, to an independent and impartial Tribunal on mutual consent.

5. However, after expiry of the 48 Hours' Notice period, the respondent vide Termination Notice, dated 14.11.2005, terminated the contract in terms of Clause 62 of the GCC.

6. On the other hand, the learned Senior Panel Counsel appearing for the respondent, would submit the following:

6.1. The respondent, vide communication dated 09.07.2003, advised the petitioner to start the work since the foundation and substructure Drawing had been issued to the petitioner.

6.2 As regards shortcomings in the execution of Foundation work on the Third Location pointed out by the petitioner, the respondent vide communication dated 03.11.2003, duly advised the petitioner to remove the debris and commence the work on the Two Pier locations. The Respondent, vide letter dated 31/07/2003 informed the petitioner that the progress of work was not up to the required rates expected, as observed during the Inspection at the Site, and to make up the deficiency by increasing men and machinery, so as to complete the work within the currency period, failing which, they would proceed against the petitioner for the poor progress of the work and advised them to restart and speed up the progress of work. Further, vide letters dated 19/02/04 and 05/06/2004 also, the respondent informed the petitioner that the progress of work was very poor, citing various reasons and wanted the petitioner to increase the ,en and machinery for achieving the execution of Pier works and complete the Bridge work within the currency period granted.

6.3 However, since the petitioner has not been adhering to the target dates and also having failed to seek extension of time beyond 28/03/2005, the respondent served on the petitioner a Seven Days' Notice on 18/03/2005 and advised the petitioner to make good the defaults and carry on the work, to the entire satisfaction of the Engineer-in-charge. Thereafter, the Claimant was also served again a Seven Days' Notice on 03/08/2005 inasmuch as the work was not progressing as per the programme and not adhering to the target dates.

6.4 Therefore, followed by Seven Days' Notice, the respondent has served 48 Hours' Notice on the petitioner on 16.09.2005 as there was no progress of work at the site.

6.5 The petitioner, vide communication dated 26/09/2005 has mentioned that after completion of sub-structure, the work was stopped, as the Staging Design and Drawing have not been approved. In reply tho this, the Respondent also mentioned that based on the advice from Dy.CE/Design/MS vide his letter dated 22/05/2005, the petitioner was advised to rectify the defects vide letter dated 24/08/2005 and the same not received and the petitioner had also not asked for further extension of currency. As the currency was expiring on 30/11/2005, the respondent terminated the Contract by invoking Clause 62 of GCC.

7. The petitioner has approached this Court by way of filing O.P.No.13 of 2021, seeking for appointment of Sole Arbitrator to adjudicate the dispute between the parties. This Court, vide order dated 13.08.2021, appointed one Thiru V.Murali Mohan as Sole Arbitrator.

8. On consideration of both Statement of claims and counter statement filed by both parties *vis-a-vis* documentary evidence and arguments advanced, the learned Sole Arbitrator has passed the Award dated 29.09.2022.

9. Challenging the same, both the parties have come forward with the present Original Petition.

10. Heard the learned counsel for the petitioner and the learned Senior Panel Counsel for the respondent and perused the entire materials available on record.

11. In the case on hand, 8 claims and 4 counter claims were filed before the Arbitral Tribunal by the claimant and the respondent respectively. Out of those claims, Claim Nos. 4 & 6 were awarded in entirety, Claim Nos.2 & 7 were awarded partially and the Claim Nos.1, 3, 5 & 8 were rejected. Further, the Tribunal has arrived at a conclusion that the contract

was illegally terminated by the respondents and hence, all the 4 counter claims filed by the respondent were rejected by the Tribunal.

12. **CLAIM No.1:**

12.1 Claim No.1 is pertaining to the *"Loss of profit due to reduced turnover of work"* and the amount claimed under this head is a sum of Rs.13,46,097/-. The Arbitral Tribunal had rejected this claim in entirety.

12.2 While rejecting this claim, the Tribunal has stated that the claimant was able to complete the work only to the tune of a sum of Rs.24,43,543.45 out of the total value of contract i.e., a sum of Rs.1,14,04,289/-, that too, the said work was completed with a lapse of 23 months from the date of LOA, which works out to a value of Rs.1,06,444/- per month.

12.3 According to the petitioner, the said lapse has occurred only due to the delay on the part of the respondent in approving the drawings and realignments and hence, the said lapse is only attributable to the respondent.

However, without considering this aspect, the Tribunal had rejected this claim of the petitioner in entirety.

12.4 On the other hand, according to the respondent, the Arbitral Tribunal had considered all the aspects in a proper perspective and decided the matter based on the available facts. Hence, there is no requirement for this Court to interfere either on the aspect of illegality or on the aspect of public policy.

12.5 Upon perusal of award, it appears that the Tribunal had applied Clause 60(2) of General Conditions of Contract – "*Determination of Contract*", wherein it has been stated that the Contractor shall have no claim to any payment of compensation or otherwise, howsoever on account of any profit or advantage which he might have derived from the execution of the work in full, but which he did not derive in consequence of determination of the contract.

12.6 In this case, even after the expiry of Contract period, i.e., after a lapse of 23 months, the claimant was only able to complete the work to the tune of Rs.24,44,223/- out of total contract value of Rs.1,14,04,289/-. Further, the claimant was in agreement for extending the contract from time to time. In such case, without completing the work, that too, when the claimant was not inclined to continue the work, they cannot expect any amount towards this head. On the other hand, if the work was duly completed by the petitioner, all these issues would have been considered in an affirmative way by the Arbitral Tribunal. However, the claim under the head Loss of profit due to reduced turnover of work would not arise for partial completion of work. All these aspects were well considered by the Tribunal.

12.7 Further, the Tribunal had considered and awarded the compensation under the other heads viz., i) loss due to extended use of materials, machineries and equipment, ii) damages due to non-payment/delay on various claims, iii) loss due to increased cost of carrying out the work, iv) overhead for the extended period. In view of the provisions of GCC and based on the available facts and circumstances of this case, the Tribunal had rightly considered the claim and passed the award. Therefore, this Court does not find any error in rejecting the claim under the head Loss of profit due to reduced turnover of work as the claimant was compensated appropriately under the other heads.

13. **<u>CLAIM No.2:</u>**

13.1 The Claim No.2 is pertaining to *"Losses due to extended use of Materials, Machineries and Equipment"* and the amount claimed under this head is a sum of Rs.30,12,355/-. This claim was partially awarded by the Tribunal to the extent of a sum of Rs.15,06,178/-.

13.2 The grievance of the claimant is that though the Tribunal had considered this claim in favour of the claimant, all of a sudden, the compensation under this head was reduced to the extent of 50% by the Tribunal without assigning any reason.

13.3 In reply, it was contended by the respondent that as per the terms of Clause 17 of GCC, no claim can be made for the extended period under the present head. However, even without any bill with regard to the additional work for extended use of materials, machineries and equipment, the Tribunal had awarded 50% of the claim and hence, the same is liable to be set aside.

13.4 Upon perusal of award, it appears that 50% of the claim amount was awarded by the Tribunal under this head. It is an admitted fact that the work was delayed for a period of 23 months, despite which, the work was not completed by the claimant and they have not made any attempt to extend for further period to carry on and complete the work. At this juncture, the contract was illegally terminated by the respondent. Hence, the Tribunal arrived at a conclusion that 50% of the loss under this head is attributable to the respondent and they are liable to pay the same. On the other hand, if any attempt was made by the claimant to continue and complete the work, the Tribunal would have considered this claim and awarded the compensation to the full extent.

13.5 All the above aspects were well considered by the Tribunal and hence, the question of violation of basic notion of justice would not arise. Further, this Court does not find any error in awarding this claim partially. Therefore, the same stands confirmed.

14. **CLAIM No.3**

14.1 The Claim No.3 is pertaining to *"Payment towards work done: Design of Superstructure"* and the claim amount is a sum of Rs.2,80,000/-. This claim was rejected by the Tribunal.

14.2 According to the claimant, they have provided the Design of Superstructure and hence, they are entitled fees for the same. However, no amount was awarded by the Tribunal under this head. On the other hand, as per the contention of the respondent, the claimant had only submitted a rough drawing of Superstructure on 09.07.2003, however, the same was not approved by the respondent. Further, the claimant had neither provided the original drawing of Superstructure nor cooperated with the respondent for further process. Hence, according to the respondent, the Tribunal has rightly rejected the claim.

14.3 A perusal of award and documents available on record makes in clear that only the rough drawing of Superstructure was provided by the claimant and the originals of those drawings were not provided. Further, it was stated by the Tribunal that there was no cooperation from the claimant for taking joint final measurements after the termination of Contract and the same was recorded as 'ex-parte'. Hence, the question of violation of basic notion of justice would not arise and therefore, this Court is of the view that the Tribunal had rightly rejected the claim.

15. **CLAIM No.4:**

15.1 The Claim No.4 is pertaining to the *"Increased costs of carrying out the work"* and the amount claimed under this head is a sum of Rs.5,60,528/-. This claim was awarded by the Tribunal in its entirety.

15.2 An objection was raised by the respondent in allowing this claim. According to the respondent, due to the violation on the part of the claimant in executing the work, this claim should have been rejected by the Tribunal. However, in non-application of mind, this claim was awarded by the Tribunal in its entirety.

15.3 In this case, the Contract was prolonged for a period of 23 months, even beyond the period, which was determined by the parties concerned. Naturally, based on the market conditions, the cost of work and labour would have increased. In such case, this Court is of the view that the Tribunal has rightly considered all these aspects and awarded the compensation and hence, it stands confirmed.

16. **CLAIM No.5**

16.1 The Claim No.5 is pertaining to *"Losses due to Labour"* and the claim amount is a sum of Rs.4,48,699/-. This Claim was rejected by the Tribunal.

16.2 Upon perusal of award, it is clear that the Tribunal has already awarded compensation under the heads, viz., i) loss due to extended use of materials, machineries and equipment, ii) damages due to non-payment/delay on various claims, iii) loss due to increased cost of carrying out the work, iv) overhead for the extended period. In such case, certainly, the Tribunal cannot award separate compensation under this head. The loss claimed under this head was already covered under different heads and hence, if any compensation was awarded under this head, it will amount to double entries.

16.3 In view of the above, this Court does not find any error in rejecting the claim under this head. Hence, the same stands confirmed.

17. **<u>CLAIM No.6</u>**

17.1 The Claim No.6 is pertaining to the *"Overheads for extended period"* and the amount claimed is a sum of Rs.27,01,970/-. This claim was awarded by the Tribunal at its entirety.

17.2 The Tribunal has arrived at a conclusion that the contract was illegally terminated by the respondent. That apart, there was a delay of 23 months in execution of partial work by the claimant. In such case, the claimant was supposed to maintain Office with minimum staffs, materials, etc and hence, the overheads would have occurred. Taking all these aspects into consideration, the Tribunal has awarded the claim under this head in its entirety.

17.3 In view of the above, this Court is of the view that there is no merits in the objections made by the learned counsel for the respondent. Accordingly, the compensation awarded by the Tribunal under this head stands confirmed.

18. **<u>CLAIM No.7:</u>**

18.1 The Claim No.7 is pertaining to *"Damages due to non-payment/Delay on the various claims @18% per annum from 10.08.2005"*. The claim amount was not quantified by the claimant, however, the Tribunal has quantified and awarded a sum of Rs.16,19,573/-.

18.2 In this claim, the Tribunal has awarded interest at the rate of 18% per annum, for the compensation awarded in Claim No.4, from the date of filing of claim till the date of award. i.e., for a period of 5859 days. According to the claimant, the awarding of interest by the Tribunal is improper and in contravention to Clause 64.5 of GCC.

18.3 The Claim No.4 is with regard to the "Increased costs of carrying out the work" and hence, the Tribunal felt that it would be appropriate to award interest only for those type claims, etc. That apart, while awarding damages, the Tribunal has applied its mind and felt that the quantified amount would be sufficient. The said decision arrived at by the Tribunal is not against the fundamental policy of Indian Law. Therefore, this Court is not inclined to interfere with the decision of the Arbitral Tribunal. Accordingly, the same stands confirmed.

19. **CLAIM No.8:**

19.1 The Claim No.8 is pertaining to the *"Cost of Arbitration"* and the same was rejected by the Arbitral Tribunal. Though this claim was raised before this Court, it was not pressed during the argument and hence, the rejection of this claim stands confirmed.

20. **COUNTER CLAIMS 1 to 4:**

20.1 As far as rejection of counter claims is concerned, this Court is of the view that once the Tribunal has arrived at a conclusion that the Contract was illegally terminated by the respondent, the awarding of compensation for the heads pertaining to counter claims would not arise.

20.2 In this case, the Tribunal had already traced out the fault on the part of the respondent. When such being the case, this Court is of the view that the Tribunal has rightly rejected the counter claims filed by the respondent.

21. Both the learned counsel had referred various judgments. The law laid down by the Hon'ble Apex Court is settled law. However, in view of the decision arrived at by this Court, the aforesaid judgments referred by both the learned counsel have not been considered by this Court.

22. For all the reasons stated above, this Court does not find any merits in both the original petitions and hence, the same are liable to be dismissed. Accordingly, these Arbitration Original Petitions are dismissed. No cost.

30.10.2024

Speaking order : Yes
Index : Yes
Neutral Citation: Yes
suk/nsa

KRISHNAN RAMASAMY.J.,

suk/nsa

Arb.O.P (Com.Div.) Nos.74 and 287 of 2023

30.10.2024