IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 12.02.2024	Delivered on 11.03.2024

CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR JUSTICE R.SAKTHIVEL

Original Side Appeal No.100 of 2020
CMP No. 4615 of 2020

Nellai Concrete Products and
Constructions Co. Pvt. Ltd.
Rep. by its Managing Director,
Mr.K.Jacob, New No.398, Old No.766,
Poonamallee High Road, Kilpauk,
Chennai 600 010. ... Appellant

Versus

1. Union of India,
   Rep. by its Secretary,
   Ministry of Railway,
   Rail Bhavan, Rafi Marg,
   New Delhi 110 001.

2. The Chief Engineer (Central)
   Construction/Stores,
   Office of the Chief Administrative Officer,
   Construction, Southern Railway,
   Egmore, Chennai 600 008.

3. The Deputy Chief Engineer-Construction/Stores,
   Southern Railway,
   Egmore, Chennai 600 008. .... Respondents

PRAYER: Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of Letters Patent, to set aside the judgment and decree dated 11.12.2018 in OP. No.1022 of 2017.

For Appellant : Mr. E.Manoharan

For Respondent : Mr.P.T.Ramkumar

J U D G M E N T

(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

Challenge in this Appeal is to the order of the learned Single Judge passed in exercise of the powers conferred under Section 34 of the Arbitration and conciliation Act 1996, in and by which, the learned Single Judge set aside the award of the Arbitrator with reference to the interest portion alone.

2. The brief facts that led to the challenge to the award are as follows:

The appellant was awarded a contract for supply of 100 sets of Concrete Sleepers to the Railways vide agreement dated 10.09.2013. Certain disputes arose in the performance of the contract which led to the appellant making a request for appointment of an Arbitrator on 23.01.2014. Subsequently on 29.05.2014, the railways terminated the contract and forfeited the security deposit of Rs. 10,00,000/-. Upon being moved under section 11 of the Arbitration and Conciliation Act in OP No.14 of 2015, this court appointed a Former Judge of this Court as the Arbitrator. The Arbitrator initiated the arbitration and a claim was made by the appellant on the following heads:

> *1. Refund of Security Deposit of Rs.10,00,000/- to the Claimant.*
>
> *2. Pay a sum of Rs.76,342/- (amended on 29.07.2016) towards the differential Basic Value of 36 sets of 1 in 8.5 Turnout Sleepers sold at different Basic prices to the claimant.*

3. Pay a sum of Rs.8,78,164/- (amended on 29.07.2016) towards the value of 4 sets of 1 in 8.5. Turn Out Sleepers available on stock (219541x4) to the claimant.

4. Pay a sum of Rs.11,63,567/- towards 10% value of 53 sets of 1 in 8.5 Turn Out Sleepers (219541 x 53 x 10%) to claimant.

5. Pay a sum of Rs.11,15,310/- towards the value of 1 set of Mould fabricated exclusively for executing this contract agreement, to the claimant.

6. Pay interest on Rs.10,00,000/- at 18% to the Claimant (in accordance with the Micro, Small and Medium Enterprises Development Act, 2006), from the date of encashment of Bank Guarantee (i.e.,) 12.09.2014 till the amount is refunded.

7. Pay interest in accordance with the Micro, Small and Medium Enterprises Development Act, 2006 on value of 4 sets (i.e.,) Rs.8,78,164/-. (amended on 29.07.2016) *from 09.11.2013 till the amount is released to the claimant.*

8. Pay interest of Rs.12,86,837/- (amended on 29.07.2016) to the claimant (in accordance with the Micro, Small and Medium Enterprises Development Act, 2006) – interest on the basic value of 40 sets of 1 in 8.5 Turn Outs sleepers and 7 sets of Trap switches from 09.11.2013 till the Sale at different basic prices.

9. *Pay interest (in accordance with the Micro, Small and Medium Enterprises Development Act, 2006) on 1 set of Mould i.e. Rs.11,15,310/- from 09.11.2013, date of completion of 47 sets of 1 in 8.5 Turn Out Sleepers till the amount is realized, to the claimant.*

3. The Railways filed a counter and also raised a counter claim. The counter set out in detail, the denials for each and every claim, and also made a counter claim, stating that, in view of the delay on the part of the appellant, the Railways had suffered 7% interest loss on invested capital which works out to Rs.20.13 Crores. On the basis of the pleadings the Arbitrator framed the following issues:

> *1)Whether the Claimant is a "New Firm" as sought to be projected by the respondent;*
>
> *2) Whether the respondent has committed any breach of contract;*
>
> *3) Whether the Claimant has committed any breach of contract;*
>
> *4) Whether the claimant is entitled to the relief claimed by them;*
>
> *5) Whether the respondent is entitled to the counter-claim raised by them; and*
>
> *6) What other reliefs the parties are entitled to?*

4. Both the oral and documentary evidence was placed before the learned Arbitrator. The Arbitrator by his award dated 19.01.2017 rejected all the claims except the one for refund of security deposit. The counter claim was also rejected. On the issue, as to who committed the breach of the contract, the arbitrator recorded a conclusive finding to the effect that the breach was committed on the part of the Railways by its whimsical interpretation of the contract and the claimant was not at fault. As a consequence, the learned Arbitrator concluded that the termination of the contract was bad. He also directed the refund of the advance of Rs. 10,00,000/- with 18% interest from 12.09.2014 till date of actual payment. The Arbitrator also rejected the counter claim.

5. While the contractor, viz. the appellant accepted the award, the Railways moved this Court under Section 34 of the Arbitration and Conciliation Act, only on the question of payment of interest on the security deposit of Rs.10,00,000/-. The security deposit of Rs.10,00,000/- was refunded by the Railways soon after the award on 13.03.2017. Therefore, the proceedings before the learned Single Judge in OP No.1022 of 2017, the application under Section 34 of the Arbitration and Conciliation Act 1996, were confined only to the correctness of the grant of interest by the Arbitrator. Before the learned Single Judge, another plea was taken by the appellant herein contending that since it is an enterprise covered by the

Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to the *MSME Act, 2006*) the grant of interest is justified.

6. The grant of interest was specifically challenged by the Railways relying upon Clauses 2401 and 2403 of the Indian Railway Standard Conditions of contract (IRS conditions) (General Conditions of contract applicable to Railways) which according to the Railways prohibited grant of interest. The learned Single Judge accepted the contention of the Railways on the interpretation of Clauses 2401 and 2403 of IRS conditions and concluded that the portion of the award granting interest needs to be set aside. Adverting to the claim under *the MSME Act 2006*, the learned Single Judge directed the appellant herein to invoke the provisions of the said Act by moving the Felicitation Council under Section 18 of *the MSME Act 2006*. Aggrieved by the order of the learned Single Judge partially setting aside the award, the appellant has come up with this Appeal.

7. We have heard Mr.E.Manoharan, learned counsel for the appellant and Mr.P.T.Ramkumar, learned counsel appearing for the respondents/Railways.

8. Mr.E.Manoharan, learned counsel appearing for the appellant would submit that the learned Single Judge was not right in applying Clauses 2401 and 2403 which deal with withholding and lien, the correct provision that would be applicable is Clauses 503 & 504 which deals with forfeiture of security deposit. The learned counsel would submit that there is a difference between forfeiture of security deposit and withholding of amounts due to the contractor. He would also point out the difference in language between Clause 503 and Clause 2403 of the IRS conditions to contend that Clause 2403 would not apply to the case on hand since it was a case of forfeiture and not withholding. Therefore, according to the learned counsel, the learned Single Judge was not justified in setting aside the award in respect of interest.

9. Contending contra Mr.P.T.Ramkumar, learned counsel appearing for the respondent/Railways would submit that the learned Single Judge had followed the judgment of the Hon'ble Supreme Court in ***Union of India vs. Concrete Product Construction Company and others,*** reported in ***2014 (4) SCC 416,*** where the Hon'ble Supreme Court has considered the effect of Clauses 2401 and 2403 of the IRS conditions, to come to the conclusion that the contractor will not be entitled to interest on the amounts that were withheld by the Railways and therefore, the contention of the learned counsel for the petitioner cannot be accepted. On the claim under *the MSME Act*, the learned counsel for the Railways would point out that the appellant not being a registered supplier under the said Act, is not entitled to invoke the provisions of the said Act.

10. We have considered the rival submissions.

The following points arise for determination in this Appeal:

(i) Whether Clauses 503 and 504 or Clauses 2401 and 2403 of the

IRS conditions would apply to the case on hand;

(ii) Whether the provisions of *the MSME Act,* would stand attracted.

Point No.(i):

11. The whole dispute lies within a very narrow campus. While the learned counsel for the claimant/appellant would contend that it is Clauses 503 and 504 of the IRS condition which deal with forfeiture of security deposit that would apply to the case on hand, the learned counsel for the Railways would submit that it is Clauses 2401 and 2403 which deal with withholding and lien in respect of sums claim.

Clauses 503 and 504 read as follows:

> *"**503**. No claim shall lie against the purchaser in respect of interest on cash deposits or Government Securities or depreciation thereof.*
>
> ***504**. The Purchaser shall be entitled and it shall be lawful on his part of forfeit the said security deposit in whole or in part in the event of any default, failure or neglect on the part of the contractor in the fulfilment or performance in all respect of the contract under reference or any other*

contract with the purchaser or any part thereafter the satisfaction of the purchaser and the purchaser shall also be entitled to deduct from the said deposits any loss or damage which the purchaser may suffer or be put by reason of or due to any act or other default, recoverable by the purchaser from the contractor in respect of the contract under reference or any other contract and in either of the events aforesaid to call upon the contractor to maintain the said security deposit at its original limit by making further deposits, provided further that the purchaser shall be entitled to recover any such claim from any sum then due or which at any time thereafter may become due to the Contractor under this or any other contracts with the purchaser."

Clauses 2400 to 2403 read as follows:

"***2400*. *Withholding and lien in respect of sums claimed*.**

2401. *Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall* *be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by the contractor and for the purpose aforesaid, the purchaser shall be entitled to withhold the said cash security deposit or the security, if any, furnished as the case may be and also have a lien over the same pending finalization or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the purchaser shall be entitled to withhold and have lien to retain to the extent of the such claimed amount of amounts referred to supra, from any sum or sums found payable or which at any time thereafter may become payable to the contractor under the same contract or any other contract with the purchaser or the Government pending finalization or adjudication of any such claim.*

It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above, by the purchaser will be kept withheld or retained as such by the purchaser till the claim arising out of or under the *contract is determined by the Arbitrator (if the contract is governed by the arbitration clause) or by the competent court as prescribed under Clause 2703 hereinafter provided, as the case may be and that the contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the contractor.*

***2402**. For the purpose of Clause 2401, where the contractor is a partnership firm or a limited company, the purchaser shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found payable to any partner/limited company, as the case may be, whether in his individual capacity or otherwise.*

***2403**. **Lien in respect of Claims in other contracts**.- Any sum of money due and payable to the contractor (including the security deposit returnable to him) under the contract may withhold or retain by way of lien by the purchaser or Government against any claim of the purchaser or Government in respect of payment of a sum of money arising out of or under* *any other contract made by the Contractor with the purchaser or Government. It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the purchaser or Government will be kept withheld or retained as such by the purchaser or Government till his claim arising out of in the same contract or any other contract is either mutually settled or determined by the arbitrator, if the contract is governed by the arbitration clause or by the competent court under Clause 2703 hereinafter provided, as the case may be, and that the contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the contractor."*

11.1. Clauses 503 and 504 extracted above, come under the subheading security deposit and Clause 504 in particular deals with forfeiture of the security deposit on termination or otherwise of the contract. Clauses 2401 to 2403 come under the sub-heading withholding and lien in respect of sums claim and they vest the power in the Railways to withhold any money belonging to the contractor, as security for any claim that it may have against the contractor. The two terms forfeiture and withholding are not synonyms.

11.2. The meaning of the word "forfeiture" as per Black's Law Dictionary is as follows:

> *1. The divestiture of property without compensation.*
>
> *2. The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.* ***Title is instantaneously transferred to another, such as the government, a corporation, or a private person.*** *(EmphasisSupplied)*
>
> *3. A destruction or deprivation of some estate or right because of the failure to perform some contractual obligation or condition.*

In P.Ramanatha Aiyar's Advanced Law Lexicon, the word "forfeiture" is assigned the following meaning:

> *"Forfeiture, is the divestiture of specific property without compensation in consequence of some default or act forbidden by law.*
>
> *Amounts contributed for terminated and non-vested participants; such amounts may be allocated to the remaining participants accounts in profit-sharing plan whereas such amounts must be applied for reducing further employer contributions in a pension plan.*
>
> ***The compulsory surrender of property for failure to comply with a contract or with the law."***
>
> *(emphasis supplied)*

11.3. From the above, it is clear that forfeiture means taking away the property of a party to the contract for its failure to perform the contract by the other party to the contract. The right to forfeit would also be dependant on proof of damages governed by Section 74 of the Contract Act.

The phrase "withholding" has been defined as follows in Black's Law Dictionary:

> "***Withholding***. *1. The practice of deducting a certain amount from person's, salary, wages, dividends, winnings, or other income, usu. for tax purposes, especially an employers practice of taking out a portion of an employee's, gross earnings and paying that portion to the garment for income tax and social security purposes.*
>
> *2. The money, so deducted also termed as income tax with holding."*

The meaning assigned to the phrase "withholding" in P.Ramanatha Aiyar's Advanced Law Lexicon, is as follows:

> *"Deduction from wages or salary, made by an employer usually to pay income tax, which the employer remits to the tax authority.*
> *The dictionary meaning of the word 'withholding' is to hold back; to keep back; to restrain or decline to grant. The holding back or keeping back is not an isolated act but is a continuous process by which the property is not returned or restored to the company and the company is deprived of its possession."*

11.4. From the above, it is clear that the power to forfeit and the right to withholding are essentially two different concepts. Probably, understanding the difference between the two, the IRS Conditions deal with the two phrases in two different sets of clauses. Of course, the learned Single Judge has relied upon the judgment of the Hon'ble Supreme Court in ***Union of India vs. Concrete Products and Construction Company and others,***

which dealt with a lien of the employer over the amounts payable to the contractor. The challenge in those proceedings which culminated before the Hon'ble Supreme Court was to the order of the Railway Administration in directing recovery of certain excess payments made to the contractors from the amounts payable to them in the current running contracts. Therefore, the Hon'ble Supreme Court adverted to Clauses 2401 and 2403 of the IRS conditions and concluded that the contractor would not be entitled to interest. We are unable to see the said judgment of the Hon'ble Supreme Court as one constituting a precedent for the proposition that the Railways will not be liable to pay interest even for amounts that are wrongly forfeited by it.

11.5. Mr.P.T.Ramkumar, learned counsel appearing for the Railways would also draw our attention to the judgment of the Hon'ble Supreme Court in ***Union of India vs. Manraj Enterprises,*** reported in ***2022 (2) SCC 331***, wherein it was held that the power of the Arbitral Tribunal would not extend to grant of interest contrary to the terms of the contract. We have no quarrel with the said proposition of law. To the same effect is the judgment of the Hon'ble Supreme Court in ***Jayaprakash Associates Limited (JAL) vs. Tehri Hydro Development Corporation (I) Limited (THDC),*** *reported in **2019 (17) SCC 786***. The question that looms large before us, as to whether, a wrongful forfeiture of security deposit would fall within Clauses 2401 to 2403 of the IRS conditions, so as to deny the claim of interest by the contractor.

11.6. We have referred to the meaning of the two terms, viz. "*forfeiture*" and "*withholding*". It is clear to our mind that they are two different concepts and they have been dealt with separately in IRS conditions of contract. While forfeiture is dealt with under Clause 503 and 504 withholding is dealt with under Clauses 2401 to 2403. While Clauses 2401 and 2403 contain a specific provision to the effect that the contractor will not be entitled to interest for the amounts withheld by the Railways, there is no such provision in Clause 504 which provides for forfeiture. We must also point out that Clause 503 of the IRS condition, which reads as follows:

> ***"503***. *No claim shall lie against the purchaser in respect of interest on cash deposits or Government Securities or depreciation thereof."*

provides that the contractor cannot claim interest from the Railways on cash deposits or Government securities or depreciation thereof. Such provision is absent in Clause 504 which provides for forfeiture of security deposit. Therefore, we are unable to sustain the finding of the learned Single Judge to the effect that the grant of interest by the Arbitrator is against the contract between the parties.

11.7. We therefore conclude that the claimant/appellant would be entitled to interest as granted by the Arbitrator from 12.09.2014 till date of payment of the principal amount of Rs.10,00,000/- by the Railways i.e. till 13.03.2017 viz. the date of refund of the principal amount of Rs.10,00,000/-.

Point No.2:

12. The appellant made a claim that it being an enterprise under the *MSME Act 2006*, it would be entitled to interest *de hors* the provisions of the contract. We can straight away state that the appellant is not entitled to the benefit of said enactment since it is not a '*supplier'* within the meaning of Section 2(n) of the said Act. Section 2(n) of the *MSME Act 2006*, defines a supplier as follows:

> *"2. (n) "supplier" means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section(1) of section 8, and includes,--*
>
> *(i) the National Small Industries Development Corporation, being a company, registered under the Companies Act, 1956 (1 of 1956);*
>
> *(ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956); any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or*

small enterprises and rendering services which are provided by such enterprises;

Sections 15 to 18 of the said Act provide for a machinery for recovery of monies due to the supplier as defined under Section 2(n) of the said Act.

13. Mr.E.Manokaran, learned counsel appearing for the appellant would concede that the appellant registered itself as a supplier under the *MSME Act* only from the financial year. We find from the records produced before us that the registration was actually done on 10.05.2022. Therefore, on the date of the supply or on the date of the contract with Railways, the appellant was not a registered supplier within the meaning of Section 2(n) of the *MSME Act*. Hence it is not entitled to claim the benefits of the said enactment. The direction of the learned Single Judge granting liberty to the appellant to move the MSME Council is also erroneous and therefore, it is also liable to be set aside.

14. In fine, the Appeal is **allowed**, the order of the learned Single Judge setting aside the portion of the award granting interest to the appellant is set aside and the entire award stands restored. The liberty granted to the appellant to move the MSME Council is also set aside. The parties shall bear their own costs in this Appeal. Consequently, the connected miscellaneous petition is closed.

(R.SUBRAMANIAN, J.) **(R.SAKTHIVEL, J.)**

11.03.2024

jv

Index : Yes
Internet : Yes
Neutral Citation : Yes
Speaking order

To
The Section Officer,
Original Side,
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R.SUBRAMANIAN, J.

and

R.SAKTHIVEL, J.

jv

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