
(2009) 02 MAD CK 0196
In the Madras High Court
Case No : O.P. No. 22 of 2007

The Union of India (UOI)

APPELLANT

Vs

Emjay Constructions and Hon'ble Mr. Justice A. Abdul Hadi
(Retd.) Arbitrator

RESPONDENT

Date of Decision : 03-02-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(7), 34

Citation : (2009) 02 MAD CK 0196

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : Thiagarajan for T.S. Sivagnanam, for the Appellant; Amalaraj S. Penikilapatti, for Respondent 1, for the Respondent

Judgement

S. Rajeswaran, J.—The petitioners are challenging the award passed by the second respondent/Arbitrator u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act 1996).

2. The petition averments are as under:

Open tenders were called for by the petitioners on 21.12.2001 for the work being construction of 1 x 32.00 M Span PSC Box Girder Road over Bridge (ROB) in lieu of existing level crossing No. 485 at KM 651/12, 13 in between Melavittan and Tuticorin stations. The agreement was executed on 25.11.2002. The letters of acceptance was issued on 28.6.2002 for doing the above stated work at a value of Rs. 78,61,158/-. The period of completion was stipulated as ten months. As already referred to, the agreement was signed by both the parties on 25.11.2002. Disputes arose between the parties in relation to the said agreement and this Court by order dated 2.9.2005, made in O.P. No. 286 of 2005, appointed the second respondent as the Sole Arbitrator to go into the said disputes. The second respondent by award dated 26.6.2006, awarded various sums in favour of the first respondent herein which are as under:

- i) Rs. 4,00,000/- payment for work further to RA Bill IV Part
- ii) Rs. 2,47,330/- Towards refund of Security Deposit
- iii) Rs. 3,00,000/- as damages due to the cost of initial idling under utilisation, additional establishment and infrastructure.
- iv) Rs. 9,00,000/- as damages due to cost of idling, under utilisation of labour, machinery, tools.
- v) Rs. 6,00,000/- as compensation for anticipated profits.
- vi) Interest at the rate of 12% on the Award amount of Rs. 24,47,330/- from 14.12.2004 to 23.6.2006 (Date of Award)
- vii) Interest at the rate of 18% on Rs. 24,47,330/- from the date of Award till realisation.
- Viii) Rs. 2,94,000/- as costs being the entire fee for the Hon''ble Arbitrator (i.e.) Rs. 1,51,000/- + Rs. 63,000/- and the claimants counsel fee of Rs. 80,000/-.

3. Aggrieved by the above said award, the petitioners preferred the above Original petition u/s 34 of the Arbitration and Conciliation Act, 1996.

4. Heard Thiru S. Thiyagarajan, the learned Senior Counsel for the petitioners and the learned Counsel for the first respondent. I have also perused the entire materials including the award under challenge.

5. The learned Senior Counsel for the petitioners submits that the second respondent/Arbitrator has wrongly decided that the Railway administration committed a default and in fact, the termination has been validly done, as the first respondent did not show adequate progress. He further submitted that the first respondent could not claim any compensation towards the idle labour, machinery, etc. as the conditions of the contract do not contemplate any claim over and excess of the contracted sum. He further submitted as per clause 51(3) of the General Conditions of contract (GCC), the Security Deposit would be refunded on successful completion of all the works done and after the completion of the maintenance period. Since the work has been terminated, the refund of Security Deposit is subject to the risk and cost. He further pointed out that as per clause 16(2) and 64(5) of the General Conditions of Contract, no interest is payable by the administration and in view of Section 31(7)(a) of the Act 1996, the claim for interest was not at all sustainable. He further contended that the counter claims of the Railways were rejected without any basis and therefore, the award is to be set aside. In support of his submissions, the learned Senior counsel relied on a decision of a Division Bench of this Court reported in Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager/Works, Palghat Division, Southern Railway, Mr. Pancham [Presiding Arbitrator], Chief Engineer, Construction III, Southern Railway, Mr. T.P.R. Narayana Rao [Arbitrator], Financial Advisor and Chief Accounts Officer, Metropolitan Transport Project, Southern Railway and Mr. M. Jayachandran [Arbitrator], Financial Advisor

and Chief Accounts Officer, Metropolitan Transport Project, Southern Railway, and another judgment of the Hon''ble Supreme Court reported in 2001(2) SCC 721 (Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v. N.C. Budharaj (Deceased) by L.Rs. and Ors.).

6. The learned Senior counsel has also referred to an un-reported judgment of this Court dated 29.8.2007 made in O.P. No. 756 of 2006.

7. Per contra, the learned Counsel for the first respondent submits that the award is a reasoned one and the same has been passed after evaluating the entire evidence adduced before the second respondent/Arbitrator. According to him, it is not open to the petitioners to assail the award, as if this Court was sitting in its appellate jurisdiction and therefore, the Original petition is to be dismissed. He further pointed out that none of the grounds as set out u/s 34 of the Act 1996 get attracted in the present case and therefore, according to him, the Original petition itself is not maintainable.

8. The learned Counsel for the first respondent relies on a plethora of judgments in support of his contentions. (I will refer to them if necessary).

9. I have considered the rival submissions carefully with regard to facts and citations.

10. The first respondent made the following claims before the second respondent/Arbitrator:

1) To declare the termination of the Contract and call of tenders for the balance work at the risk and cost of the claimant, as wrongful and illegal. 2) Payment for the work done further to RA Bill No. IV and part Rs. 4,00,000/- 3) Refund of the Security deposit amount 2,47,330/- 4) Compensation for idle labour, machinery, etc. 11,11,545/- 5) Compensation towards loss of overheads and establishments at 10% of the value of the contract for workdone during the extended period 12,72,232/- 6) Loss of profit at the rate of 15% on the value of the contract for workdone during the extended period 19,08,360/- 7) Extra rate of 25% of the Contract value for the workdone during the extended period 9,00,000/- 8) Interest charges at 18% p.a. on the amount of the award from the date of cause of action till date of payment -- To be calculated on passing of the award 9) Cost of Arbitration - will be furnished at the time of last hearing Total: Rs. 58,39,467/-

11. The petitioners, in their reply statement, made the following counter claims:

1) Cost of vitiation recovery Rs. 1,55,434/- 2) Risk and cost liability for executing the balance work 66,15,444/- 3) Interest element for the sub structure which was not put into use due to the failure of the claimant 7,96,620/- 4) The cost of inconvenience caused to the public Not quantified Total Rs. 75,67,498/-

12. The following issues were framed by the second respondent/Arbitrator on the

basis of the pleadings and the evidence adduced before him:

1. Whether the arbitral tribunal has jurisdiction to adjudicate the present claim;
2. Whether the petitioners herein handed over the work site to the first respondent in time ?
3. Whether the petitioners herein posted the supervisory personnel for the contract work on time ?
4. Whether the petitioners herein discharged their duty of arranging the shifting of the existing level crossing by providing the Electrical and Signalling arrangements and providing the requisites temporary gate - lodging material to the first respondent on time ?
5. Whether the petitioners herein cleared and shifted the hurdles and utilities in the work site ?
6. Whether the petitioners herein obtained the necessary permission from the Highways Department and co-ordinated with the Traffic and Municipal authorities for providing a proper Diversion road and the resultant unhindered work site to the first respondent ?
7. Whether the petitioners herein provided drawings for the super-structure to the first respondent ?
8. Whether the first respondent is justified in seeking extra rates for the extended period of the work ?
9. Whether the petitioners' termination of the contract under the risk and cost of the first respondent is legal and whether the petitioners are entitled to make any recoveries ?
10. Whether the first respondent is entitled to payment for the work done further to RA Bill No. 4 to the extent of Rs. 4.0 lacs ?
11. Whether the first respondent is entitled for the return of Security Deposit, Earnest Money Deposit and the other Retained amounts.
12. Whether the petitioners are entitled to the counter claim No. 1 under the Heading "claim for vitiation ?
13. Whether the first respondent is entitled to be compensated for anticipated profits as claimed ?
14. Whether the first respondent is entitled for the damages due to the cost of idling and under utilisation of labour, machinery, tools and parts suffered by the first respondent ?
15. Whether the first respondent is entitled to the damages due to the cost of an initial idling, under-utilisation and the additional establishment and infrastructure suffered by the first respondent due to the extension of the project ?

16. Whether the first respondent is entitled to any interest as claimed ?

17. Whether the first respondent is entitled to any cost?

18. Whether the petitioners are entitled to any notional compensation for the delay in completing the work?

13. Now, let me consider all the issues framed and the findings rendered by the second respondent/ Arbitrator.

14. In so far as the first issue is concerned, the second respondent/Arbitrator has held that there is no merit at all in the argument of the petitioners herein, that the tribunal has no jurisdiction to adjudicate the claim of the first respondent. I am in entire agreement with the second respondent/Arbitrator in deciding that the tribunal is within its jurisdiction to adjudicate the claim of the first respondent.

15. For issue No. 2, after going through the evidence and the pleadings, the second respondent/Arbitrator came to the conclusion that the site was handed over only on 19.10.2002, after a delay of about four months and the Railway is certainly at fault. These findings could not be challenged u/s 34 of the Act 1996 as they are based on facts and evidence.

16. Similarly, issue No. 3, 4, 5 and 6 were all issues of fact and it is not possible for this Court to interfere with the findings rendered by the second respondent/ Arbitrator in respect of those issues.

17. So, is the finding of the second respondent/ Arbitrator for Issue No. 7 wherein he held that the Railway alone has committed severe breaches of contract and it is liable for damages. These findings are rendered after analysing and evaluating the evidence adduced before the Arbitrator and this Court can hardly interfere with the same within the narrow scope of the Section 34 of the Act, 1996.

18. Issue No. 8 is negatived and the issue was answered against the first respondent and therefore, the same need not be considered at all in this petition.

19. Issue No. 9 is with regard to the termination of the contract by the petitioners and the findings of the Arbitrator for this issue is that, the Railway alone was at fault and it only committed severe breaches of contract. These findings are also based on facts and evidence which could not be interfered with within the scope of Section 34 of the Act, 1996. On that basis, the counter claims of the Railways are also disallowed.

20. While considering Issue Nos. 10 and 11 together, the Arbitrator held that as the Railway has committed breaches of contract, the retention of the Security Deposit, Earnest Money Deposit and other retained amounts is absolutely illegal and accordingly allowed those claims. Here also, I find it very difficult to interfere with the findings of the tribunal as this Court cannot re-appreciate the evidence to come to a different conclusion.

21. Issue No. 12 was decided against the Railways as according to the Arbitrator, it is the Railways which was at fault by committing several breaches. It is only a consequential finding and therefore, it cannot be interfered with.

22. Issue No. 13 is with regard to the compensation for anticipated profits of the first respondent. Here, the claim is for Rs. 19,08,360/-. But, the Arbitrator granted only a sum of Rs. 6 lakhs and following is the finding in this connection.

The claim here is for Rs. 19,08,360/-. But the claim statement claims this amount under the head "compensation towards loss of profit at 15% on the value of the contract for the workdone during the extended period" (the underlying is mine). The expression underlined is totally an understandable. I think there is typing mistake here regarding the above said underlined portion. The claim could be thought of only as the value of the contract remained unexecuted. In other words, in view of the expression "loss of profit at 15%, I read the whole claim only as "15% on the value of the contract remaining unexecuted. Nevertheless, I find beneath the description of the above said claim-head, it is baldly stated "based on above principles the loss of profit works out to Rs. 19,08,360/-. But what is that "above principles" is not stated at all. No detail is also given as to how the above said figure was worked out. I also find that even as per the written submissions, this claim is worked out at Rs. 7,29,174/- only. Further, as per the above said legal notice dated 10.12.2004 requesting for Arbitral reference, the claim under this head is only Rs. 6 lakhs. Since it is not strictly proved for allowing the above said claim to the extent of Rs. 7,29,174/-. I grant only the above said sum of Rs. 6 lakhs as claimed in the legal notice dated 10.12.2004. The issue is answered accordingly.

23. A perusal of the above findings will make it very clear that the same has been decided in favour of the first respondent by awarding a sum of Rs. 6 lakhs which is absolutely without any evidence and when a sum of Rs. 6 lakhs has been granted by the second respondent/ Arbitrator without any materials and evidence, the same amounts to awarding a sum of money without any materials and therefore, the same is liable to be set aside u/s 34 of the Act 1996. Hence, I am inclined to set aside the award of a sum of Rs. 6 lakhs granted by the second respondent/Arbitrator for issue No. 13.

24. Issue No. 14 is with regard to the damages due to the cost of idling and underutilisation of labour, machinery, tools and parts suffered by the first respondent. The following is the finding by the arbitral tribunal for this issue No. 14:

This claim is for Rs. 11,11,545/- for the period of 41/2 months i.e. 19.10.2002, the date of handing over of work site till 7.3.2003 when the piling work was started. But under this head of claim, the claim was only Rs. 9 lakhs in the above said letter dated 10.12.2004. There is also no strict proof of the details found in the enclosure to the claim statement to fix up the actual quantum of the claim under this head. Therefore, in view of my earlier findings, I hold that ends of

justice will be met if the above said Rs. 9 lakhs is granted under this head. The issue is answered accordingly.

25. Here also, a sum of Rs. 9 lakhs was granted by the second respondent/ Arbitrator without adequate materials and without any evidence. In fact, the Arbitrator himself has observed that there is also no strict proof of the details found in the enclosure to the claim statement to fix up the actual quantum of the claim, but, he went on to grant a sum of Rs. 9 lakhs which is based on no evidence. Hence, I have no hesitation in setting aside the award of a sum of Rs. 9 lakhs granted by the second respondent/Arbitrator under Issue No. 14.

26. Issue No. 15 is for damages due to the cost of initial idling, under-utilisation and additional establishments and infrastructure suffered by the first respondent due to the extension of the project. The following are the findings of the Arbitrator with regard to this Issue No. 15:

Here, the claim is for Rs. 12,72,232/-. But even in the claimant's letter through his counsel dated 10.12.2004 requesting for Arbitral reference of the claims, the claimant, claimed only Rs. 3 lakhs under this head (i.e. as additional establishment cost suffered in the extended period). In view of my findings that the Railway alone has committed breach of contract, the claimant is entitled to damages under this head but there is no strict proof for the quantum claimed. In this circumstances, ends of justice will be met if the above said Rs. 3 lakhs is granted as damages under this head and the issue is ordered accordingly.

27. Here also, I find a sum of Rs. 3 lakhs has been granted as damages just for the sake of giving without any evidence and materials and therefore, I am inclined to set aside the award of Rs. 3 lakhs granted by the Arbitrator under Issue No. 15.

28. Issue No. 16 is with regard to the interest claimed by the first respondent. This was seriously opposed by the petitioners herein by placing reliance on clause 16(3) and clause 64(5) of the General Conditions of Contract. Clause 16(3) of the GCC states that no interest would be payable upon the EMD and SD or amounts payable to the contractor, but, Government Securities deposited in terms of sub Clause (1) will be payable with interest accrued thereon.

29. According to clause 64(5) of the GCC, whether the arbitral award is for the payment of money, no interest shall be payable on the whole or any part of the money for any period till the date on which, the award is made. In respect of these clauses, the second respondent/ Arbitrator deemed it reasonable to grant the rate of 12% per annum as interest on the total sum awarded, which, in my view, is absolutely incorrect and which is contrary to the clauses contained in the contract. Therefore, I am inclined to set aside the grant of 12% interest on the total sum awarded, which accrued from 14.12.2004 till 23.6.2006. Hence, this grant of interest is set aside. In so far as the future interest granted at the rate of 18% per annum is to be upheld because clause 64(5) does not prohibit grant of future interest. But, the future interest would not be given to the EMD and SD

as clause 16(7) GCC prohibits the same. It is made very clear that no interest whether past or future can be given with regard to the EMD and SD.

30. In fact, Section 31(7)(a) of the Act 1996 will also prohibit granting of any interest if otherwise agreed to by the parties. In this case, clauses 16(3) and 64(5) of the General Conditions of Contract do not contemplate payment of any interest and therefore no interest could be granted by ignoring these clauses.

31. Issue No. 17 is with regard to cost and I do not find any ground to interfere with the findings of the Arbitrator in this regard.

32. Issue No. 18 has been decided against the petitioners, which involved questions of facts only and this Court cannot go into those factual aspect u/s 34 of the act.

1. In *Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager/ Works, Palghat Division, Southern Railway*, Mr. Pancham [Presiding Arbitrator], Chief Engineer, Construction III, Southern Railway, Mr. T.P.R. Narayana Rao [Arbitrator], Financial Advisor and Chief Accounts Officer, Metropolitan Transport Project, Southern Railway and Mr. M. Jayachandran [Arbitrator], Financial Advisor and Chief Accounts Officer, Metropolitan Transport Project, Southern Railway, , a Division Bench of this Court held that arbitral tribunal shall decide the dispute in accordance with the terms of the contract and it shall also take into account the usage of trade applicable to the transaction. The arbitral tribunal cannot ignore the Express Terms of the contract between the contract and Railways. It further observed that Section 31(7)(b) of the Act 1996 could not be applied in that case as clause 16.2 of the General Conditions of Contract provided that no interest shall be payable upon EMD or SD, or amounts payable to the contractor under the contract.

2. In 2001(2) SCC 721 (cited supra), the Hon'ble Supreme Court held that the jurisdiction of the Arbitrator to award interest in respect of periods including pre-reference period is subject to the conditions of the arbitration agreement.

3. In the un-reported judgment dated 29.08.2007, made in O.P. No. 756 of 2006 (cited supra), this Court while considering a challenge made by the Railways against an award of Rs. 1,39,750/- granted by the Arbitrator for damages suffered by the claimant on the ground that no proper evidence and materials are available to give such an award. Similarly, this Court set aside the award granted by the Arbitrator for the idling of the claimant's men and machinery on the ground that there is no enough materials to give a sum of Rs. 8,40,000/- under that head. Similarly, this Court set aside the award of the Arbitrator in that case with regard to the damages suffered by the claimant for the loss of anticipated profits on the ground that the same is totally barred by the contract especially under clause 62(2)(a) of the General Conditions of Contract. Similarly, after going through clauses 16(3) and 64(5) of the General conditions of Contract, this Court set aside the award of interest by the Arbitrator in that case.

33. The above said un-reported judgment will certainly apply to the facts of the present case and on that basis also, I am inclined to interfere with the award to that extent already indicated by me.

34. In so far as the compensation granted by the Arbitrator for anticipated profits under Issue No. 13 was already rejected by me on the ground that there was no adequate material before the tribunal to grant the same. Now, I also find the same is also barred in view of clause 62(2)(a) of the General Conditions of Contract and on that ground also, the claim granted by the Arbitrator is set aside.

35. The plethora of judgments relied on by the learned Counsel for the respondents are not useful to the case of the petitioners and there is no quarrel with regard to the settled legal principles enunciated thereon. Hence, I have not referred to them, as I am satisfied that the award is to be interfered with to that extent indicated by me and accordingly, the Original petition is disposed of in the above terms.

36. In the result, the Original petition is disposed of in the above terms. No costs.