

**In The Court of LXXXIV Additional City Civil and
Sessions Judge (CCH-85-Commercial Court) Bangalore**

Dated this the 5th day of March 2021

Present: Smt.H.R.Radha B.A.L., LL.M.
LXXXIV Addl.City Civil and Sessions Judge,
(CCH-85 - Commercial Court)
Bengaluru.

Com.A.S.No.113/2018

Plaintiff:	Ramakrishna Reddy K, S/o Late K.C Anki Reddy, Aged about 41 years, R/at Flat No.303, Sai Murali Comforts, site No.175/176, 3rd Cross, 3rd Floor, BEML Main road, Near Andhra Spice Hotel, R.R.Nagar, Channasandra, Bangalore-560098. (Rep. by Sri.D.Shankar., Advocate)
Vs	
Defendants:	1. The Union of India rep. by its General Manager, South Western Railway, Head Quarters, New Zonal Office, Gadag road, Hubli-580020. 2. The Chief Administrative Officer Construction, South Western Railway, 18 Milers road, Bangalore-560046. 3. Smt.Madhavi Presiding Arbitrator, Then Dy.CSTE/Construction/South Western Railway/ Bangalore, presently Group General Manager, Signal and Telecommunication Rail Vikas Nigam Limited, No.15, Vectra House, 4th Floor, 1st main, 6th Cross, Gandhi Nagar, Bangalore-560009. 4. Smt.Amita Darpan Jain Co Arbitrator, Then Dy.FA & CAO/CN/SBC, presently

	Sr.Divisional Finance Manager/SBC Division. South Western Railway, Bengaluru-560023. 5. B.Chandrashekar, Co Arbitrator, Then Dy.CE/Construction/ SBC Division/ South Western Railway, Presently Dy.Chief Vigilance Officer/Engineering/Gadag Road, New Head Quarters Zonal Office, Hubli- 580020. (R1 & 2 rep. by Sri.S.R.Reajesh, Advocate; R3 to R5 - Absent)		
Date of Institution of the application	01-06-2018		
Nature of the application	U/Sec.34 of the Arbitration and conciliation Act, 1996		
Date on which judgment was pronounced	05-03-2021		
Total Duration	Year/s 02	Month/s 09	Day/s 04

LXXXIV Addl.City Civil and Sessions Judge
 (C.C.H-85 Commercial Court) Bengaluru

JUDGMENT

This petition U/Sec.34 of the Arbitration and Conciliation Act, 1996 is filed for setting aside Arbitral award dated passed by respondents 3 to 5 19-03-2018 to the extent of rejecting the petitioner's claim at Sl.No.3, 4 and 6 and to allow the same.

2. Brief facts of the petitioner's case are that the his father was a contractor and successful bidder in respect of earth work in forming bank and cutting including minor bridges from Km 50/00 to Km 60/00 for Kottur - Harihar New BG line via Harapanahalli, of the value of Rs.3,92,29,176.93; and agreement dated 11-05-2004 was entered into in this behalf. The work had to be completed within 11 months from 09-02-2004. Even though his father made preparations for executing the work and started the same, the respondents 1 and 2 extended time due to their own latches. When his father requested to foreclose the work by letter dated 05-03-2005 and sought extension of time from 08-01-2005 to 09-05-2005 to fulfill contractual formalities, extension was granted without liquidated damages. On the dispute being referred to the Arbitral Tribunal and during the pendency of arbitration proceedings, his father died. The Arbitral Tribunal, by impugned award dated 19-03-2018 partly allowed the claim and rejected the counter claim in entirety. The award in so far as it relates to rejection of the claims at Sl.No.3, 4 and 6 is opposed to public policy and interest is denied erroneously placing reliance on clauses GCC16(3) and 64(5), which is applicable only during the currency of the agreement and not in case of breach of

contract. Having coming to the conclusion that that first respondent had illegally withheld the security deposit, the arbitral tribunal ought to have awarded interest. Likewise the Arbitral Tribunal is not justified in rejecting claim No.4 towards loss of earning on claims 1 and 2, in view of Sec.28 of Arbitration and Conciliation Act. The Tribunal also committed serious error in rejecting claim No.6 relating to other cost and consequences due delayed payment including legal expenditure. His application U/Sec.33 of the Arbitration and Conciliation Act ('the Act' for short) dated 24-03-2018 is pending and he has issued mandatory notice U/Sec.34(5) of the Act and the petition is in time.

3. The respondents 3 to 5 are the arbitrators constituting the arbitral Tribunal that passed the award impugned herein.

4. The respondents 1 and 2 have filed common objections contending that the petition is not maintainable, as the ground invoked are not covered by Sec.34 of the Act. The arbitral award passed on 19-03-2018 and the the petition filed on 01-06-2018 is therefore is time barred. Even otherwise, when application U/Sec.33 of the Act is pending, this petition U/Sec.34 cannot be entertained. The

petitioner's father did not start the work immediately after receiving the acceptance letter, but started complaining about non availability of land, though the same was at his disposal. In spite of extending the period for completion of the work, upto 31-06-2006 under clause 17A (ii) of General Conditions of Contract, (GCC for the short), the petitioner's father failed to deploy enough men and machinery to speed up the work. Besides addressing a letter in this behalf on 18-05-2004, the amount due under bills No.CC1 to CC4 was settled.

3(a). Even at the time of making a request for foreclosure of contract, the petitioner's father did not submit no claims certificate as per the terms of GCC and insisted for taking final measurements. The disputes raised by him was referred to Arbitral tribunal and award dated 22-02-2007 was passed. This was challenged in A.S. 65/2007 U/Sec.34 of the Act and came to be dismissed on 31-10-2015. In so far as the dispute raised for termination of contract, same was referred to Arbitral Tribunal consisting of respondents 3 to 5. It was paid for Rs.1,92,61 towards settling the payment in respect of to Claim no.1 after deducting applicable taxes and the petitioner has accepted the same.

3(b). With regard to claim No.3 for granting interest, the same is specifically barred under clause 16(3) r/w Sec.64(5) of GCC; and claim No.5 for compensation from 01-05-2005 till the date of award and claim No.6 are concerned they are rightly rejected by the tribunal taking into consideration clause 64(6) of GCC which provides that the costs should be borne equally by the respective parties and also Sec.28(3) of the Act. Since the contract was terminated due to failure of the petitioner's father to complete the work, the respondents 1 and 2 were entitled to forfeit the security deposit. The government will invest the amount only in projects involving public interest and therefore, the claim for interest at 24% per annum is illegal. That apart, Sec. 31(7) of the Act prohibits payment of interest, if the terms of contract do not provide for the same; and the same is upheld in the following decisions:

(i) **Sayed Ahmed and Company Vs State of UP and Ors** reported in **(2009) 12 SCC 26**

(ii) **M/S Kamakshi Amman Constructions Vs Divisional Railway Manager/works/Palghat** reported in **(2010) 7 SCC 767** and

(iii) **Union of India Vs Saraswat Trading Agency** reported in **(2009) 16 SCC 504**

(iv) Union of India Vs M/s Concrete Railways reported in **AIR 2014 SC 1914**,

(v) Chittaranjan Maity Vs Union of India reported in **AIR 2017 SC 4588**

4. The petitioner and the respondents 1 and 2 have filed written arguments.

5. Heard arguments.

6. Since, the learned counsel for the petitioner restricted his oral arguments only to the arbitral tribunal not awarding pendete lite interest and fairly submitted that the findings of tribunal on other issues are very reasonable and the learned counsel for respondents 1 and 2 seeks to support the said findings based on clauses 16(3) and 64(5) of GCC, the points that arise for my consideration in this petition are:

1. Whether Clauses 16(3) and 64(5) of GCC apply to pendete lite interest on the security deposit?

2. Whether rejection of the claim for interest by the Arbitral tribunal is opposed to public policy as canvassed by the petitioner?

3. What order?

7. My findings on the above points are -

Point No.1: In the Affirmative

Point No.2: In the Negative

Point No.3: As per the final order for the following

REASONS

8. Points 1 and 2: These points are interrelated and therefore taken up together for consideration for the sake of convenience.

9. It is not in dispute that the petitioner's father was a contractor and successful bidder in respect of the earthwork in forming bank and cutting including minor bridges from Km 50/00 to Km 60/00 for Kottur-Harihar New BD line via Harapanahalli. He was required to complete the work within 11 months from 09-02-2004 and agreement dated 11-05-2004 came to be entered in this behalf with the 2nd Respondent. The time was extended without LD from 09-01-2005 to 09-05-2005 and once again from 10-05-2005 to 31-03-2006. The petitioner's father's request for foreclosure of the contract was not accepted by respondents 1 and 2 and the dispute was referred to Arbitral Tribunal. The award dated 22-02-2007 was challenged by the petitioner's father

in A.S.No.65/2007 U/Sec.34 of the Act and it was dismissed on 31-10-2015.

10. It is also not in dispute that after the Respondents 1 and 2 terminated the contract, the claims made by the Petitioner's father was referred to the Arbitral Tribunal consisting of respondents 3 to 5 and the Respondent railways to raised counter claim. During the pendency of the proceeding the Petitioner's father died. Subsequently, the Arbitral Tribunal partly allowed the Petitioner claim and rejected claim at Sl. No. 3 to 6 as well as the counter claim vide the impugned award.

11. The Petitioner has not chosen challenge rejection of his claim at Sl. No. 5. Likewise, the Respondent 1 & 2 have not challenged the rejection of their counter claim by the Arbitral Tribunal. Further, the petitioner having challenged rejection of his claims at Sl. No. 3, 4 and 6, has confined the same to not granting interest on the security deposit.

12. The placing reliance on clause 16(3) of GCC, it was argued by the learned Counsel for the respondent's that no interest can be awarded on the earnest money for security deposit. Per contra the learned counsel for the Petitioner

argues that the petitioner argues that such a provision defeats the very purpose of Arbitration and renders performance of duties by the Arbitrators, impossible. As such Clause 16(3) is apposed to the law of the land and public policy.

13. As per Sec.37(1) of the Act, interest cannot be awarded by the arbitrator unless the terms of contract between the parties provides for the same. However, the arbitrator has power to grant pre-reference interest under the Interest Act 1978 as well as pendente lite and future interest. Since, interest is compensatory in nature and is parasitic upon principal sum not having been paid in time, the Hon'ble Apex Court has often frowned upon clauses that bar payment of interest.

14. In the case of ***M/S Kamakshi Amman Constructions Vs Divisional Railway Manager/works/Palghat*** reported in ***(2010) 7 SCC 767*** by considering Clause 16 of GCC upheld the order of the Arbitral Tribunal refusing to award interest. In *M/s Raveechee and Co Vs Union of India* reported in (2018) 7 SCC 664, the Hon'ble supreme court while considering the question whether clause 16(3) of GCC puts an embargo on

the power of arbitrator to award pendente lite interest has held that :

“ The clause bars interest upon earnest money and security deposits or amounts payable to the contractor under the contract and not any amount which is awarded on losses determined in the course of arbitration. Such damages could attract interest pendente lite for the period from commencement of arbitration to the date of award.'

15. In a subsequent decision between **Jayprakash Associates Ltd., (JAL) Vs Tehri Hydro Development Corporation India Ltd.,** in Civil Appeal No.1539/2019 dated 07-02-2019 the Hon'ble Apex Court has reiterated the said position holding that when the clauses in an agreement put a bar on the arbitral tribunal to award interest, the tribunal did not have any jurisdiction to award the same.\

16. For the forgoing reasons, I am of the opinion that Clause 16(3) of GCC applies even to security deposit and when the terms of the contract expressly bar awarding interest, the award passed by the arbitral tribunal declining to grant the same cannot be termed as illegal, arbitrary or opposed to law of land or the public policy as sought to be

canvassed by the learned counsel for the petitioner. Accordingly, the points for consideration are answered.

17. Point No.3: The award was passed on 19-03-2018. As per Sec.34(3) of the Act an application for setting aside the award may not be made after lapse of three months from the date of receiving the arbitral award by the party making such application or has made a request U/Sec.33 of the Act.

18. As could be gathered from the petition averments, the petitioner's request U/Sec.33 of the Act sent through speed post on 24-03-2018 was still pending as on the date of filing this petition. Thus viewed from any angle the petitioner is not entitled for the relief as prayed.

19. In the result, I pass the following

ORDER

The petition U/Sec.34 of the Arbitration and Conciliation Act is hereby dismissed.

Having regard to facts and circumstances of the case, there is no order as to cost.

Issue copy of the judgment to the
parties through e-mail as provided U/o XX
Rule 1 of CPC, if mail ID is furnished.

(Dictated to the stenographer, transcribed and typed by her,
corrected and then pronounced by me in the open court on
this the **5th** day of **March 2021**)

(H.R.Radha)

LXXXIV Addl. City Civil and Sessions Judge,
(CCH-85 Commercial Court) Bengaluru

**Judgment pronounced in the open court vide
separate**

ORDER

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