

**Pam Developments Private Ltd. Vs. Union of India and Ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/77665](http://sooperkanoon.com/77665)

**Court :** Kolkata

**Decided On :** Dec-08-2016

**Judge :** Soumen Sen

**Appellant :** Pam Developments Private Ltd.

**Respondent :** Union of India and Ors.

**Judgement :**

1 Order Sheet

ORDER

SHEET AP No.151 of 2016 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction ORIGINAL SIDE In the matter of: PAM DEVELOPMENTS PRIVATE LTD.VERSUS UNION OF INDIA & ORS.BEFORE: The Hon'ble JUSTICE SOUMEN SEN Date : 8th December, 2016.

Appearance: Mr.Sakya Sen, Adv.Mr.Priyankar Saha, Adv.Mr.Amritam Mandal, Adv.Ms.Aparna Banerjee, Adv.The Court: This is an application for setting aside of an award dated 30th December, 2015 passed by the sole arbitrator.

The petitioner was awarded a contract as a successful tenderer for development works for Building/Rehabilitation on the RCC Box Br.

No.262 (12 x 3.66 in Arch) Up and DN Line under AEN/Rampurhat. The estimated value of the contract was Rs.1,75,88,913.64.

The work was to be completed within 8 months from the date of issuance of the acceptance letter.

The letter of acceptance was issued on the 14th February, 2011.

The claimant in terms of the agreement also submitted a bank guarantee for a sum of Rs.8,79,446/-.

Before the arbitrator, the petitioner made a claim for a sum of Rs.60,52,369/-, particulars whereof are stated below:Particulars Amount 1.

Cost of various item executed as per you Instruction (Grouting related):  
Rs.8,75,000.00 2.

Cost of site establishment.

: Rs.2,00,000.00 3.

Cost of materials supplied but loss due to Lack of safety at railway land.

: Rs.2,50,000.00 4.

Refund of Earnest Money : Rs.2,30,140.00 5.

Refund of Performance Guarantee : Rs.8,79,446.00 6.

Cost of various mix design by B.E.S.U.: Rs.1,00,000.00 7.

Loss of business (assuming 20% profit on Contract value of Rs.1,75,88,913.64)

Total : Rs.35,17,783.00 : Rs.60,52,369.00 The claimant alleged that the Railway Authorities failed and neglected to issue the required drawings and documents which have considerably delayed the progress of the work.

The claimant alleged that although they have taken all steps for obtaining the required report of concrete mixed design received from Jadavpur University on 5th September, 2011 and forwarded the same on 31st October, 2011.

The respondent failed to perform its obligation by not approving drawings in time.

Only two drawings of the subway were approved on 22nd October, 2011 after 8 months time period have already expired.

The petitioner alleged that due to tremendous local problem in the site by the respondent, the claimant could not complete the job within the stipulated time and by reason thereof had prayed for extension of time for completion of the work but the same was wrongfully refused by the respondent.

The claimant also alleged that wrong site was given to the claimant initially and there have been various breaches on the part of the respondent for which the claimant could not complete the work on time.

The petitioner has also made a claim on account of idle men, machinery and loss of profit.

The respondent filed their counter-statement.

It was alleged that the mix design was submitted after much persuasion but the same could not be approved since the method of placing concrete taken in the design is manual while in the tender document, it is with concrete pump.

Degree of exposure is also not severe.

Quality control was not good and parameters taken in design are not matching with the specification of items as well as with the ground realities.

The respondent requested the claimant vide letter dated 3rd June, 2011 to contact SE(Works)/Rampurhat for approved drawing and to submit mix design for different grades of concrete, bar chart for completion of work and to submit mix design for different grades of concrete and to start the work.

The claimant did not follow the instruction of the Engineer as well as instruction of the tender documents mentioned herein above causing delay in execution of work and/or non-completion of work within date of completion, that is, 13th October, 2011.

It was alleged that no further information in respect of local problem in the site as mentioned in the letter dated 5th December, 2011 was received from the claimant previously.

Even all arrangement was made from the respondents side, the claimant did not take step to progress of work at site.

The Assistant Engineer/ Rampurhat vide letter dated 2nd January, 2012 requested the claimant to restart the work immediately and expedite the progress of work so that it can be completed within the stipulated period.

But all are in vain as it appears from the site register.

There was no breach on the part of the respondent.

The claimant deliberately and wilfully neglected to perform the work with an ulterior motive apart from all operation from the respondents side.

Since the work could not be completed due to latches, failures, negligence and breaches of the claimant all the claims except the amount of work executed as per tender schedule as demanded by the claimant legally not tenable in terms of the conditions of the contract.

The respondent in Paragraph 8 of the counter-statement has given their remarks item wise of the claim made by the claimant which reads:Item No.1.

2. 3.

Particulars of Claim Remarks of Respondents Cost of various item executed as It may be considered based on per instruction of Engineer measurement of actual work (Grouting related) done by him after deduction of Railways Counter-claim of Rs.4,00,000.00 Cost of site establishment As per schedule of items and terms & condition agreed rate is inclusive of site establishment.

So not maintainable as per GCC Clause 25.

Cost of materials supplied but As per GCC and Condition of loss due to lack of safety at Contract, Respondent is not in railway land.

any way answerable for any loss or damage of his materials.

The claimant himself is the 4.

5. 6.

7. custodian of material at site.

So, the claim is not maintainable.

Refund of Earnest Money As the Claimant did not complete the work wilfully and deliberately, the same is liable to be forfeited as per terms of the agreement.

Refund of Performance -DoGuarantee Cost of various mix design by Agreed rate of the items B.E.S.U.concerning of the cost of Mix Design.

So, not maintainable.

Loss of business As the Claimant failed to complete the work wilfully and deliberately the claim is not maintainable.

Moreover, as per Clause 17 of GCC, the same is also not maintainable.

The arbitrator, on the basis of the pleadings and as well as the documents disclosed, has awarded a sum of Rs.11,85,369/- inclusive of refund of Security Deposit in terms of Earnest Money amounting to Rs.2,30,140/- and Performance Guarantee of Rs.8,79,446/-.

In respect of the claim no.1 the Arbitrator has reduced the said claim to Rs.75,783/- on the basis of the available record and documents.

The Arbitrator found on examination of the record that for the executed work under the contract a sum of Rs.75,783/- was due and payable.

This finding of fact cannot be said to be perverse, in as much as there is a clear recording that the claimant could not produce any document or evidence to show that they have executed work of a value more than Rs.75,783/-.

The other claims excepting the claim on account of refund of security deposit and performance guarantee were disallowed.

The sole Arbitrator denied the claim on account of cost of establishment and cost of materials supplied but loss due to lack of safety at Railway land on the ground that such were amounts factored when the price was quoted by the claimant inasmuch as it is not a case of prolongation of work for which the claim on account of ideal labour could be charged.

Moreover, it was found that the remuneration of engineers and supervisor were calculated and included in the cost of site establishment.

The special conditions of the contract provides that rates should be inclusive of materialisation and dematerialization of site of work.

The petitioner is the custodian of the materials and the Railway Authorities cannot be held responsible for any alleged loss of material.

Moreover, there was nothing on record to show that there has been any contemporaneous complaint about loss of materials from the site.

In dealing with claim nos.4 and 5 which were allowed in full, the Arbitrator had arrived at a finding that the letter of acceptance was issued on 14th February, 2011 with stipulation that the work was to be completed within eight months from the date of issue of LOA, i.e, within 13th October, 2011.

From the record available it appears that the site was handed over to the contractor on 2nd July, 2011.

Therefore, there is a clear lapse of more than four months from the date of issue of LOA.

By the time the site was made available monsoon had set in and the contractor was left to complete the work within eight months.

The approved drawings were also not handed over to the claimant in time.

There has been a clear finding that the respondent authorities have delayed extensively in supplying the drawings for execution of the work.

The Arbitrator on the basis of the available record has concluded that the delay in execution of the work is not fully attributable to the claimant.

The respondent also did not impose any penalty nor granted extension of time to the claimant contractor although a prayer was made for such extension.

main reason for delay are The Arbitrator also found that the inconsistent instruction issued by Sr.DEN(IV)/HWH delay in providing the site plan, handing over the site, sanctioned work order and delayed submission of design.

Since the petitioner was not held responsible for the delay, the claim for refund and earnest money and performance guarantee was allowed.

With regard to the loss of business, a Nil award was passed on the ground that the claimant having failed to complete the work, the question of loss of business could not and does not arise.

The claim for interest was also rejected on the ground that the contract stipulation does not provide for payment of interest on security.

In so far as the counter-claim is concerned a Nil award was passed.

The respondent has not challenged the award.

Thus, it appears that the respondent had accepted the award passed by the arbitrator rejecting the counter-claim.

If the arbitrator is of the view that the contractor is not responsible for delay and it is attributable to the respondent then the respondent could not have refused to grant extension of time to complete the work.

The award does not show that the petitioner is in breach.

If the petitioner is not in breach and was not allowed extension, then the arbitrator is required to find out if it has caused any loss and damage to the petitioner.

The award is silent with regard to the evidence adduced by the petitioner with regard to the mobilization of resources.

The arbitrator does not say the time was the essence of the contract.

Moreover, the existence of the extension clause in the agreement shows that the parties only intended to have time as the essence of the contract.

Of the essence wording is sometimes used to overegg the pudding in relation to obviously inappropriate contractual obligations, and should not be accorded the same weight as when used in a more considered way in more appropriate settings.

It is often appropriate in building and engineering contracts to imply a term by law as a matter of business efficacy that the contractor would proceed with the reasonable diligence and expedition.

Even if time is not of the essence, it is theoretically possible for a party to show that another party's delay is so profound as to be repudiatory.

But what has to be shown is, not mere breach, but breach of such gravity as to deprive the other party of substantially the whole benefit which it was the intention of the parties that they should obtain from the contract. (Shawton Engineering LTD.versus DGP International Ltd.; (2006) B.L.R.1) The apportionment of risk between the parties as reflected in most standard form construction contracts was set out in clear terms by H.H.Judge Edgar Fay QC in Henry Boot Construction Ltd.V.Central Lancashire New Town Development Corp.; (1980) 15 B.L.R.1 as follows:There are cases where the loss should be shared, and there are cases where it should be wholly borne by the employer.

There are also cases which do not fall within either of these conditions and which are the fault of the contractor, where the loss of both parties is wholly borne by the

contractor.

But in the cases where the fault is not that of the contractor the scheme clearly is that in certain cases the loss is to be shared: the loss lies where it falls.

But in other cases the employer has to compensate the contractor in respect of the delay, and that category, where the employer has to compensate the contractor, should, one would think, clearly be composed of cases where there is fault upon the employer or fault for which the employer can be said to bear some responsibility. The arbitrator did not avert its mind at all to the aforesaid factors and thereby has completely misdirected its mind in adjudicating the claims relating to perversity.

In view of the aforesaid, the award insofar as it rejects the claim for a sum of Rs.35,17,783/- on account of loss of business is set aside as it appears that the Learned Arbitrator has not taken into consideration the materials on record and the rejection of the said claim is completely unreasoned.

The Railway Authorities shall appoint an Arbitrator following the procedure laid down in Clause 64 of GCC without requiring the petitioners to invoke afresh the Arbitration Clause.

The Railway Authorities while appointing the Arbitrator shall keep in mind the qualification of the person to be appointed and Schedule 7 of the Arbitration and Conciliation Act, 2015 within a period of thirty days from date, failing which the petitioner shall be entitled to approach this Court for appointment of an Arbitrator.

The Arbitrator to be appointed by the concerned authority shall dispose of the reference within a period of four months from the date of entering reference on the basis of the existing and available records.

The Railway Authorities shall pay the amount awarded within a period of four weeks from date.

The application is allowed in part.

(SOUMEN SEN, J.) sp/b.pal.

