

**D. Shivashankar Vs. Union of India (Uoi) Rep. by the General Manager, Southern Railway and ors.**

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**Court :** Chennai

**Decided On :** Jun-05-2007

**Reported in :** 2007(4)ARBLR23(Madras)

**Judge :** S. Rajeswaran, J.

**Acts :** [Arbitration and Conciliation Act, 1996](#) - Sections 11(4) and 34

**Appeal No. :** OP No. 22 of 2004

**Appellant :** D. Shivashankar

**Respondent :** Union of India (Uoi) Rep. by the General Manager, Southern Railway and ors.

**Advocate for Def. :** V.G. Suresh Kumar, Adv. for Respondent Nos. 1 and 2

**Advocate for Pet/Ap. :** Penikilapatti, Adv. for Amalraj, Adv.

**Judgement :**

**S. Rajeswaran, J.**

1. This original petition has been filed under Section 34 of the [Arbitration and Conciliation Act, 1996](#), hereinafter called 'the Act, 1996', to set aside the award

dated 10.09.2003 passed by arbitral tribunal, comprising of respondents 3 to 5 and pass a fresh award allowing all the claims of the petitioner.

2. The brief facts as culled out from the petition averments are as under:

The respondents 1 and 2 called for tenders for the following work:

Gauge Conversion from Madras Beach to Tiruchirappalli-Villupuram-Tiruchirappalli Section-Transportation of PSC Sleepers by Road from factories at various places, unloading and stacking the same in the midsections at stations between Tindivanam and Ariyalur stations.

The petitioner submitted his tender and the same was accepted and subsequently an agreement was entered into between the parties on 10.09.1997. The petitioner could not complete the work within the stipulated contract period due to shortcomings and breaches of contract by respondents 1 and 2. Respondents 1 and 2 initiated termination proceedings of contract under risk and cost basis. An amount of Rs. 6 lakhs was available with the railways by way of Earnest Money Deposit (EMD) and Security Deposit (SD) deposited by the petitioner. Respondents 1 and 2 deducted a sum of Rs. 4,23,333.92 from the bill dated 21.03.1998 under the other agreement dated 16.09.1997 and they proposed to recover a further sum of Rs. 6,731 towards advertisement charges of the fresh risk and cost tender. This resulted in enormous loss to the petitioner and by letter dated 12.06.2000 the petitioner sought for reference of the dispute to arbitration in accordance with Clauses 62 and 63 of the General Conditions of the Contract (GCC). As respondents 1 and 2 failed to constitute the arbitral tribunal, the petitioner approached this Court in OP No. 857 of 2000 under Section 11(4) of the Act, 1996 and this Court directed the 1st respondent to act in accordance with Clauses 62 and 63 of GCC. Thereafter, the tribunal was constituted consisting of respondents 3 to 5. The tribunal passed an award on 10.09.2003 directing respondents 1 and 2 to pay a sum of Rs. 6,28,766.80 only and aggrieved by the inadequacy of the amount, the petitioner filed the above OP, under Section 34 of the Act, 1996.

3. Heard the learned Counsel for the petitioner and the learned Counsel for respondents 1 and 2. I have also gone through the documents and the judgments referred to by them in support of their submissions.

4. The petitioner in his claim petition filed before the tribunal claimed a sum of Rs. 50,66,061 excluding damages suffered due to non-payment of the claim amount which is to be quantified during payment at 24%. There were 7 claims in the claim petition under the following headings namely - (i) final bill amount due for more than 2 years amounting to a sum of Rs. 1,94,034; (ii) deduction towards risk action to be refunded calculated at Rs. 4,30,061; (iii) refund of security deposit for a sum of Rs. 50,000; (iv) loss sustained by keeping the establishment idle, calculated at Rs. 16,43,000; (v) loss due to reduced profitability due to illegal termination quantified at Rs. 27,44,500; (vi) damages suffered to be calculated later at 24%; and (vii) cost and fees towards technical/legal counsel amounting to Rs. 18,500.

5. A perusal of the award under challenge will show that each of the 7 claims was properly considered by the tribunal and separate findings were given.

6. For the first claim the following is the finding of the tribunal:

There is no dispute regarding the number of sleepers transported and the rate of transportation of sleepers under the disputed agreement. As far as lead is concerned, claimant and respondent have submitted the lead diagram and it was perused. As per the lead distance furnished by the claimant, the distance between Bangalore to Tiruvanamalai via Hosur, Krishnagiri, is shown as 256 kms which appears to be incorrect. As per the break-up distance given by the respondent, the distance comes to 198 kms following the same route as mentioned by the claimant.

The total distance from Yeswantpur to Villupuram station is 258 kms as per the distance guide map given by the respondent which is shortest possible route. As recorded in the Measurement Book, the road vehicle carrying 100 sleepers which is normally 28 tonnes could not come through the shortest route due to bad condition and narrow road, hence the road vehicles were diverted via Tindivanam and distance recorded was 387 kms. In the break-up of this, distance from

Bangalore to Tindivanam as shown was 337 kms. It is verified with the map submitted by the both the claimant and respondent and found that the distance from Bangalore to Tindivanam comes to 265 kms only against 337 kms.

The tribunal, therefore, is of the opinion that total distance from Yeswantpur to Villupuram via Tindivanam is 310 kms should be considered for payment as the shortest possible route was not motorable.

Considering the distance of 310 kms at the rate of Rs. 265 per sleeper per km for 1892 sleepers the amount comes to Rs. 1,55,427.80.

Hence, the tribunal awards an amount of Rs. 1,55,427.80 for this claim. Amount claimed Rs. 1,94,034.06 Amount awarded Rs. 1,55,427.80

7. For the second claim, the tribunal discussed and awarded a sum of Rs. 4,23,339:

The transportation of sleepers was depending on the allotment and availability of sleepers at various factors. Acceptance letter was issued in the month of March but no sleepers were transported under this contract till 09.11.1997. From the record furnished during the adjudication it is noticed that no release order was given from March 1997 to July 1997. Release orders were issued for 5,000 sleepers on 29.09.1997 from Gangaikondan, 5,000 sleepers on 03.10.1997 from Tiruvalam and 10,000 sleepers on 15.10.1997 from Yeswantpur.

There was one more contract (No. 334/CN/97 of 16.09.1997) running parallel to this contract, which was awarded to the same contractor (claimant). The rate in other contract (No. 334/CN/97 of 16.09.1997) was favourable to claimant for transportation of sleepers.

In the reach, which was common to both the contract agreements 325 and 334, more than 45,000 sleepers were transported and payment was made against Agreement No. 334/CN/97 of 16.09.1997, which was favourable to the claimant. Neither the respondent nor the claimant had any objection regarding payment under Agreement No. 334/CN/97 of 16.09.1997 instead of Agreement No. 325/CN/97. Respondent could have made payment for sleepers transported in the

common reach under Agreement No. 325/ CN/97, the rate of which was favourable to them.

It is seen that the seven days' notice under Clause 62 was issued on 12.11.1997 but as per office record, it was dispatched on 14.11.1997, the 48 hours notice was issued on 19.11.1997, dispatched on 20.11.1997 and termination notice was issued on 24.11.1997 and dispatched on 25.11.1997. It is also observed that risk tender was called for the balance quantity of sleepers to be transported vide Tender Notice No. 68/CE/CN/97 dated 24.11.1997. The tribunal has observed that there is procedural lapse, as sufficient time was not given to the contractor and the risk tender was called even before the dispatch of the termination letter.

The transportation of sleepers started under the disputed agreement only on 09.11.1997 and continued up to 04.12.1997, as per record maintained by the respondent. The tribunal found that the contract was severely mismanaged and there are procedural lapses in the termination of the agreement. Hence, the risk and cost is not enforceable.

Hence, the tribunal considers that the amount recovered from the claimant towards risk and cost may be refunded to the claimant. Tribunal awards the refund of an amount of Rs. 4,23,339 which was recovered from the CC bill of Agreement No. 334/CN/97 of 16.09.1997. Amount claimed Rs. 4,30,061 Amount awarded Rs. 4,23,339

8. For the 3rd claim of refund of security deposit the arbitral tribunal accepted the case of the petitioner and ordered the refund of the entire amount of Rs. 50,000.

9. For the 4th claim, the tribunal rejected the same by giving its reasons as under:

Although the contractor was supposed to transport 1,75,000 sleepers in 12 months, but it is noted that contractor was having one more contract of transportation of sleepers to the adjacent reach. There was a common reach also which was covered under both the contract agreements. The rate of transportation of sleepers under other agreement was also higher than the disputed agreement. It is noted that the contractor has completed the work of transportation

satisfactorily under the other contract as they found it convenient and favourable to them.

It is already recorded earlier that the claimant has transported about 45,000 sleepers in the common reach and it was paid under the other agreement where the rate was higher than the disputed agreement, claimant had also not raised any objection or shown interest to transport sleepers under disputed agreement during the execution and currency of the agreement.

Tribunal feels that there is no question of sustaining any loss by the contractor on account of hiring or keeping the establishment idle. The tribunal awards NIL amount under this claim.

10. Insofar as the 5th claim is concerned, as the same was not included in the original terms of reference the tribunal did not consider it at all.

11. For the Claim No. 6, claiming damages, the same was rejected by the tribunal on the ground that it has no jurisdiction to grant interest in view of Clause 16.2 of GCC.

12. The tribunal did not accept the Claim No. 7 and awarded 'nil' amount.

13. From the above, it is very clear that the tribunal considered the entire issue in the proper perspective and passed a very reasoned award and there are no grounds as made out in Section 34 of the Act, 1996 to interfere with the same.

14. But the learned Counsel for the petitioner submitted that Claim No. 6 has been wrongly rejected under Clause No. 16.2 of GCC. The learned Counsel submitted that Clause 16.2 of GCC is not prohibiting for awarding interest by the tribunal.

15. A perusal of GCC especially Clause 16(3) would make it very clear that no interest will be payable upon the earnest money, security deposit or amounts payable to the contractor under the contract, but government securities deposited will be payable with the interest accrued thereon.

16. I find force in the submission of the learned Counsel for the petitioner that this clause will not prohibit the arbitral tribunal from awarding interest to the contractor

for the amount payable under the contract.

17. But the learned Counsel appearing for the railways relying on an unreported decision of the Gauhati High Court submitted that Clause 16(3) of GCC is a prohibition to grant any interest to the contractor.

18. With respect to the learned judges of the Gauhati High Court, I am of the considered view that the prohibition contained in Sub-clause (3) of Clause 16 of GCC will apply only to the Railway Administration and not to arbitral tribunal. That is why the railways brought an amendment to GCC and introduced Clause 64.5, according to which, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made. This amendment introducing Clause 64.5 was brought in with effect from February 1998, which will not apply to the case in hand in which the agreement was executed on 10.09.1997.

19. Therefore, I am inclined to interfere with the award insofar as the Claim No. 6 alone is concerned. Considering the fact that respondents 1 and 2 are central government establishment, they are liable to pay an interest at 14% on the awarded amount from 24.11.1997, the date of termination of the contract, till the amount is paid by respondents 1 and 2 to the petitioner.

20. In the result, the OP is disposed of in the above terms. No costs.