

In the High Court of Judicature at Madras

Dated : 18.09.2015

Coram :

The Hon'ble Mr.Sanjay Kishan Kaul, Chief Justice

O.P.No.352 of 2014

R.Chinnasamy .. Petitioner

-vs-

1.Union of India,
Rep. by the General Manager,
Southern Railway, Park Town,
Chennai.

2.Divisional Railway Manager (Works),
Madurai Division, Southern Railway,
Madurai. .. Respondents

Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996, to appoint an Arbitrator and refer all claims arising out of the Contract bearing the Agreement No.MDU/27/2011 dated 28/1/2011 to Arbitration.

For Petitioner : Mr.Amalaraj S.Penikilapatti

For Respondents : Mr.V.G.Suresh Kumar

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O R D E R

The petitioner participated in a tender floated by the respondents for awarding the work - Madurai Division- proposed collection and supply of 50 mm machine crushed Stone ballast at Vilangudi depot including loading to Railway wagons, unloading and spreading in connection with

through recoupment ballast. The petitioner was successful in the tender, which resulted in execution of Agreement No.MDU/27/2011 dated 28.01.2011.

2.It is the case of the petitioner that during the execution of the contract, the respondents failed to comply with various obligations. However, that is not a matter for this Court to consider but for the forum adjudicating the disputes to examine. Suffice to say, the agreement was terminated by the respondents on 09.05.2012 and the petitioner, thus, issued a notice dated 27.12.2013 invoking the arbitration clause and setting out 18 items for reference for adjudication.

3.The respondents acknowledged the receipt of the letter of the petitioner dated 06.04.2014, but failed to appoint any Arbitrator in terms of Clause 64 of the General Conditions of Railway Contract resulting in filing of the present petition.

4.It is only thereafter that the respondents woke up to the situation and vide letter dated 22.07.2014, after even issuing of notice in the present petition, furnished a panel of Serving Officers and advised the petitioner to nominate two officers from the said panel to enable them to constitute the Arbitral Tribunal. This was despite the fact that as per the settled legal position, the respondents had lost the right to appoint the Arbitrators

Switchgears Ltd. vs. Tata Finance Ltd., 2000 (8) SCC 151,
followed subsequently in **National Insurance Co. Ltd. vs. Mastan, 2006 (2) SCC 641)**

5. In order to have an early resolution of dispute, the petitioner did select two officers vide his letter dated 07.08.2014, but with condition of all the 18 claims of the petitioner being referred for arbitration and without prejudice to his rights and contentions in the present petition. It was clearly stipulated in the letter that if any of the claims were left out, then the petitioner would only press and pray for appointment of an independent Arbitrator.

6. Despite the clarity of the petitioner on the aforesaid, the respondents constituted an Arbitral Tribunal vide order dated 11.09.2014, but failed to refer all the claims to arbitration as per the terms of reference. The following claims were not referred to arbitration:

No.	Description of the Left Out Claims	Amount
1	Declaration that the Railways order of termination is inequitable and unwarranted.	Declaration
10	Direction to the Railway to refund the Performance Guarantee amount to the contractor.	Rs.11,37,300/-
11	Direction to the Railway to refund the EMD and SD recovered from the part-bills to the contractor.	Direction

excepted matters.

7.The respondents have not filed any reply but have filed a typed set of documents, which include the terms of reference and the letters issued by the Tribunal and thereafter by the petitioner refusing to participate in the Tribunal.

8.Learned counsel for the parties have been heard and the following aspects emanate from the same:

- a) The respondents have undisputedly lost the right to constitute the Arbitral Tribunal as per the arbitration clause not having constituted the same within time;
- b) The belated attempt of the respondents to constitute the Arbitral Tribunal was accepted by the petitioner but subject to the condition that a reference would be made of all the claims, something which the respondents failed to adhere to;
- c) As informed on date, the Presiding Officer of the Arbitral Tribunal has proceeded on long leave and thus, the Arbitral Tribunal in any case has to be re-constituted;
- d) The plea of excepted matters.

9.I am unequivocally of the view that in view of the conditional acceptance of the petitioner, he is well within his means to press for adjudication by this Court for appointment of an Arbitrator, the respondents having lost

the right to appoint the Arbitrators and thus, an Arbitrator would have to be appointed by this Court.

10. It may also be noticed that the claims sought to be excluded, to say the least, is surprising, as they relate to refund of Performance Guarantee amount by the respondents, as also refund of EMD and SD recovered based on the plea that the respondents had wrongfully terminated the contract. If one may say, the termination itself is a subject matter of arbitration and depending on who is to blame, the question of refund of Performance Guarantee or EMD and SD would arise. These aspects would have to be gone into by the Arbitrator.

11. I have, thus, no doubt that in view of the agreement entered into inter se the parties, disputes have arisen for adjudication, which are liable to be referred to arbitration and the jurisdiction of this Court is not in issue. The respondents having failed to constitute the Arbitral Tribunal, this Court would have to exercise the power to appoint an Arbitrator.

12. Thus, as proposed and agreed by learned counsel for the parties, I appoint **Mr. Justice I. David Christian**, a retired Judge of this Court, as the Sole Arbitrator to enter upon the reference and adjudicate the dispute inter se the parties. As requested by the learned counsel for parties, the arbitration proceedings will be conducted

and the parties will be governed by the Rules of the Centre.

13.The original petition is, accordingly, allowed, leaving the parties to bear their own costs.

Sd/ (S.K.K., CJ.)
18.09.2015

//Certified to be a true copy//

Dated this the day of 2015.

R.s/29.12.2015

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.



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