

In the High Court of Judicature at Madras

Dated : 09.09.2016

Coram :

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

O.P.No.418 of 2016

G.A.Sridhar ... Petitioner

-vs-

- 1.The Union of India,
rep. by the General Manager,
Southern Railway, Chennai-600 003.
 - 2.The Chief Engineer (Construction),
Southern Railway, Construction Branch,
Egmore, Chennai-600 008.
 - 3.The Deputy Chief Engineer (Construction-MAS),
Southern Railway, Near My Lady's Garden,
Park Town, Chennai-600 003.
 - 4.Mr.P.K.Mishra (Presiding Arbitrator),
The Chief Administrative Officer (Construction),
Southern Railway,
Ernakulam Junction,
Kerala-682 016.
 - 5.Mrs.Usha Venugopal (Arbitrator),
The Financial Advisor & Chief Accounts Officer
(Construction),
Southern Railway, Egmore,
Chennai-600 008.
 - 6.Mr.R.Mukund (Arbitrator),
The General Manager (CRIS),
Integral Coach Factory,
Chennai-38.
- ..

Respondents

Petition filed under Sections 14 and 15 read with Section 11 of the Arbitration and Conciliation Act, 1996, to terminate the mandate of the present Arbitral Tribunal (comprising of the Fourth, Fifth and Sixth Respondents) and appoint an independent Arbitrator to arbitrate all the disputes and claims arising out of the Agreement No.17/Dy.CE/CN/MAS/06 dt. 18.05.2006.

For Petitioner : Mr.Amalaraj

For Respondents : Mr.A.P.Srinivas

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ORDER

The respondent-Southern Railway called for a tender for the work in Chennai-Gudur Section as part of Third Line between Korukkupet and Athipattu Stations.

2. The petitioner submitted the tender, which was accepted by the respondent-Southern Railway vide Letter of Acceptance dated 15.12.2005 and subsequently, an agreement was executed on 18.05.2006 for the value of the contract at Rs.4,11,70,610/-.

3. It is the case of the petitioner that the contract was delayed and frustrated due to various

factors. But on the other hand, the Contract Operating Authority, treated it as "contract mismanagement" by the petitioner and issued the termination order dated 12.02.2008. The petitioner, thus, approached this Court by filing Application No.3222 of 2008 under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to "the said Act"), where all the proceedings vis-a-vis by the respondent-railways were stayed and that the order was directed to be continued till the disposal of the arbitration proceedings.

4. It is the say of the petitioner that the balance unexecuted work valued at Rs.249.67 lakhs (or about Rs.2.50 Crores) was awarded to another new contractor for more than Rs.21.00 Crores. It is sought to be pleaded that the Railway Officer and the risk-contractor were arrested by the CBI pertaining to the mismanagement of the risk-contract and the petitioner was also called and he assisted the CBI in its investigations.

5. The petitioner finally issued a notice dated 09.02.2009 calling upon the respondents to appoint Arbitrators and for reference of all the disputes to arbitration in terms of Clause 64 of the General Conditions of Contract providing for arbitration for resolution of the disputes. But since there was no response, the petitioner filed O.P.No.381 of 2009 before this Court. During pendency of that O.P., the respondent-railways claimed more than Rs.5.40 Crores towards their risk and cost, apart from the other aspects. In the said petition, the matter was disposed of and the Arbitral Tribunal consisting of respondent Nos.4 to 6 was constituted by respondent No.1 vide order dated 15.05.2013 with a direction to the Arbitral Tribunal to enter upon the reference and to publish the award within six months from the date of receipt of the memorandum.

6. Though not directly relevant, the petitioner pleads that CBI Court vide its judgment in C.C.No.31 of 2009 convicted the railway's the then

Deputy Chief Engineer and the risk-contractor, vide the judgment pronounced on 23.12.2014 and was sentenced to two years' rigorous imprisonment.

7. The petitioner filed claims vide covering letter dated 12.8.2015 and requested the Tribunal to expeditiously conduct the arbitration proceedings. However, the arbitration has not progressed an inch and even the respondent-railways has not filed the counter-affidavit. The Arbitrators are stated to have also been transferred atleast three times after being appointed as Arbitrators and practically unable to conduct the arbitration proceedings. It is, thus, the say of the petitioner that the mandate of the Tribunal of respondent Nos.4 to 6 is terminated as per Section 14 (1) (a) of the said Act and thus, the petitioner seeks appointment of an Arbitrator by this Court by filing the petition under Sections 14 & 15 of the said Act.

8. The counter-affidavit filed by the respondent-railways really says nothing much, otherwise than broadly admitting the sequence of

facts, though denying the allegations of the petitioner. In fact, the conviction by the CBI is stated to be irrelevant, even though, it is in respect of the same contract and the subsequent risk purchase.

9. This Court had faced repeatedly matters on account of the failure to conduct the arbitration proceedings by the railways. It is this which persuaded the Court to record on 29.7.2016 that the Railway Board should have a re-look on the cumbersome arbitration clause and the repeated failure of setting in motion the arbitration process. To the Court query, again there is no response and all that is stated it is the matter to be looked by the Railway Board.

10. The orders made by this Court in such cases may usefully be referred to. In **O.P.No.426 of 2015 (between M/s.Unique Builders vs. Union of India, Rep. by General Manager, Southern Railway and Others)** decided on 09.10.2015, this Court held as under:

'8.As aforesiad, this court has been faced with the similar position of inaction of the Tribunal in O.P.No.414 of 2012 decided on 30.01.2015 (between **A.Chockalingam vs. Union of India, Rep. by the General Manager, Integral Coach Factory and Others**), O.P.No.313 of 2015 decided on 18.06.2015 (between **M/s.Nellai Concrete Products & Construction Co.(P) Ltd. vs. Union of India, Rep. by its Managing Director, Ministry of Railway and Others**) and O.P.No.808 of 2014 decided on 03.07.2014 (between **M/s.Y.Chinna Reddy vs. Union of India, Rep. by the General Manager, Southern Railway**). The prevalent position is reflected in the order dated 03.07.2014 in OP.No.808 of 2014 in the following terms:

'4.If it may be said, the respondents have done it again ! There are numerous cases which have come up before this Court where the Arbitral Tribunal constituted by the respondents completely neglected to perform their duties. It may possibly be because the serving officers are appointed as Arbitrators and they find little time for arbitration process. Possibly the fallacy lies in appointing serving officers as Arbitral Tribunal members.

6.This Court, inter alia, has dealt with this issue in O.P.No.313 of 2015 (**between M/s.Nellai Concrete Products & Construction Co. (P) Ltd., Rep. by its Managing Director, vs. Union of India, Rep. by its Secretary, Ministry of Railway and Ors.**) decided on 18.06.2015, albeit slightly on different aspect. The fact

remains, the said case is also one of gross neglect of Arbitral Tribunal proceeding in the context of the letter appointing them stipulating a period of six months to conclude the arbitration proceedings. This is not so in the present case. There is yet another case similar to the case on hand, being O.P.No.414 of 2012 (**between A.Chockalingam vs. Union of India, Rep. by the General Manager, Integral Coach Factory and Ors.**) decided on 30.01.2015. The very same issue of re-constitution of Arbitral Tribunal was dealt with in that case and the attention of this Court was drawn to different proceedings qua the Railways itself. The present case is also one of gross neglect of the Tribunal, having failed to perform its functions right from the year 2010 till date. Five years have elapsed with only pleadings being completed. This defeats the very purpose of arbitration.

9.The tragedy of arbitration proceedings in our country permeates the present matter with disputes seeing no light of the day. If one may say, there is hardly any beginning, as only pleadings have been exchanged in the present matter. On account of the inordinate and inexplicable delay coupled with now even the transfer of one of the officers constituting the Tribunal, it is a fit case where the mandate of the present Tribunal should be terminated and an Arbitrator be appointed by this Court.

11. Thus, the only conclusion to reach is that the whole concept of the arbitration ought not to fail and the Arbitrator has to be appointed by this Court.

12. On the Court query, both sides state that the claim and the counter-claim are really not technical in nature and thus, a retired High Court Judge may be appointed as the Sole Arbitrator.

13. I, thus, appoint **Mr. Justice I. David Christian**, a retired Judge of this Court as the Sole Arbitrator, to enter upon the reference and adjudicate the disputes *inter se* the parties. The arbitration proceedings will be conducted under the aegis of the Madras High Court Arbitration Centre and the parties will be governed by the Rules of the Centre.

14. The Original Petition is allowed with costs quantified at Rs.5,000/- (Rupees Five Thousand only) to be paid to the petitioner.

15. In so far as the issue of the Railway Board in reviewing the arbitration clause is concerned, since there is no information, this Court is inclined to seek the personal presence of the General Manager, Southern Railway. However, the learned counsel for the railways states that he will obtain requisite instructions from the Railway Board in this behalf and it is made clear that it is for this purpose alone the matter has been listed and in the failure to do so, there is little option but to call for the presence of the General Manager, Southern Railway or someone from the Railway Board for appropriate information. The respondent-railways are granted eight weeks' time to obtain the requisite instructions.

16. List for compliance on 18.11.2016 for the last aspect.

Sd/.S.K.K.CJ.,

09.09.2016

//Certified to be a true copy//
Dated this the day of 2016.

S.s/24.10.2016

COURT OFFICER

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