

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 29.08.2017

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

O.P. No.206 of 2017

S.Ammasi

.. Petitioner

Versus

1.The Union of India,
rep. By the General Manager,
Southern Railway,
Park Town, Chennai-3.

2.The Senior Divisional Engineer (Co-ordination),
Tiruchirappalli Division, Southern Railway,
Tiruchy-620001.

.. Respondents

Prayer: Original Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 to appoint an independent Arbitrator to arbitrate all the claims and disputes between the petitioner and the respondents arising out of the Agreement No.TPJ.66/2004 dated 09.02.2004.

For Petitioner : Mr.Amalaraj S.Penikilapatti

For Respondents : Mr.P.T.Ramkumar

ORDER

This is a petition in terms of Section 11(6) of the Arbitration and Conciliation Act 1996 (in short 'the Act') praying for the appointment of

an Arbitrator to decide upon disputes that have arisen between parties arising out of Agreement No.TPJ.66/2004 dated 09.02.2004.

2.The petitioner was awarded the aforesaid contract for executing works in connection with 'collection and supply of machine crushed ballast and hard soil/red earth including dressing the slope at SE/P.Way/TJ Section'. Admittedly, the petitioner commenced work in 2004 but was unable to proceed with the same on account of various factors.

3.Mr.P.T.Ramkumar, learned counsel for Railways would state that the petitioner had abandoned the work though Mr.Amalraj would project the same as a shortclosure on account of genuine difficulties. Requests were made for releasing the final bill, security deposit and EMD held by the Railways. The parties appear to have exchanged correspondences over the years in this regard through the tenure of which the Railways periodically renewed the fixed deposit in its custody, till date.

4.In response to the letter of the petitioner dated 21.03.2013, the Railways, vide letter dated 05.04.2013, confirmed that the security deposit of an amount of Rs.3,69,295/-, earnest money deposit of an amount of Rs.50,000/- and the fifth and final bill of an amount of Rs.1,57,150/- remained to be reconciled.

5.The petitioner filed a Writ Petition in W.P. No.18869 of 2013 praying for a direction to the respondents to make payment of the final bill and release the security deposit and earnest money deposit. The stand of the respondent Railways in the writ petition was that the matter would have to be resolved only by way of arbitration, in the light of the clause to this effect in the contract. Consequently, the writ petition was closed as withdrawn vide order dated 19.12.2016.

6.The petitioner would also point out that he had immediately thereupon followed up on the resolution of the dispute by arbitration by letter dated 04.01.2017 in response to which the following internal communication of the Railways dated 10.01.2017 was received, copy marked to the petitioner herein:

'Please find enclosed a copy of the counsel to the claimant contractor's representation which is self-explanatory dated 04.01.2017, demanding arbitration by appointing arbitrator to settle the disputes that have arisen in the said Contract agreement. The counsel to the claimant contractor is requesting to appoint arbitrator as per the applicable contract provisions and in consonance with Sec-12(5) R/W provisos - 1 & 2 of the VII Schedule of Arbitration & Conciliation Act 1996 (amended)

Please examine the case in detail and address an interim reply to the claimant besides processing the case for arbitration as per the contract agreement conditions if decided.

The interim reply so made shall refer to the relevant

clauses in GCC/SCC/IRS conditions of Contract for settlement of disputes and should specify the time limit as provided in the Contract conditions. It may also be enquired whether they are willing to have appointment made as per agreement conditions which is binding between the parties and to have an rider agreement entered so that the applicability U/s 12(5) under the amended Act get waived.

This office may also be kept informed of the action taken at your end.'

7. It was thus apparent that the respondents were considering the request made by the petitioner subject to the petitioner agreeing to waive the condition under Section 12(5) of the Act as it now stands. This was followed up by communication dated 31.01.2017 issued to the petitioner to the following effect:

'The notice dated 04.01.2017 issued by your advocate M/s.Amalaraj S. Penikilapatti, Chennai-600 001 on your behalf, on the above subject, addressed to General Manager/S.Rly, has been examined. It is noted that you have requested the administration for appointment of independent arbitrator to settle the disputes in respect of the subject agreement.

In this connection, your attention is invited to clause 63 of GCC and 64(1) (i), (ii) (a) & (ii) (b) governing the contract agreement, which are reproduced below for your ready reference:-

"Clauses 63 – Matters finally determined by the Railway- All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the GM and the GM shall within 120 days after receipt of the Contractor's representation make and notify decision on all matters

referred to by the contractor in writing provided that matters for which provision has been made in clause 8, 18, 22(5), 39, 43(2), 45(a), 55, 55(A)(5), 57, 57A, 61(1), 61(2) and 62(1) to (xiii)(B) of General conditions of Contract or in any clause of the special conditions of the contract shall be deemed as 'excepted matters' (matters not arbitrable) and decisions of the Railway authority, thereon shall be final and binding on the contractor; provided further that 'excepted matters' shall stand specifically excluded from the purview of the arbitration clause.

Clause 64 (1)-Demand for Arbitration-

64.(1) (i): In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or as to the withholding by the Railway of any certificate to which the Contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the 'excepted matters' referred to in Clause 63 of these conditions, the Contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

64.(1) (ii) (a): The demand for arbitration shall specify the matters which are in question or subject of the dispute or difference as also the amount of claim itemwise. Only such dispute or difference, in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.

64.(1) (ii) (b): The parties may waive off the applicability of sub-section 12(5) of Arbitration and Conciliation (Amendment) Act 2015, if they agree for such waiver, in writing, after dispute having arisen between them, in the format given under Annexure XII of these conditions.

For waiving of the applicability of Sub-section 12(5) of the A & C (Amendment) Act, 2015, (i.e., nomination of Railway Officers as arbitrators), you have to execute an Agreement in the standard format of Annexure XII and submit the same to Sr.DEN/Co-ordn./Tiruchirapalli. The

copy of the standard format is enclosed herewith for filling and submitting the same to the Tiruchirapalli Division early.

In this connection, you are requested to advise whether you are interested in conducting arbitration proceedings as laid down in clauses 63 & 64 of GCC. Your reply in this regard may also please be sent to this office early, for taking further action in the matter."

8. In the light of the above facts, Mr. Amalraj would urge the Court to order the petition as prayed for.

9. Mr. Ramkumar would raise two objections. Firstly, that the matter was barred by limitation since it related to a contract executed as early as in 2004 and the notice invoking arbitration was itself issued beyond a period of three years from the date when the dispute arose and secondly, that this petition was itself pre-mature since the request for arbitration was on 31.01.2007 and the present petition filed on 01.03.2017 within the period of 60 days as per clause 64(3)(a)(i).

10. I do not agree on either count. As far as limitation is concerned, the cause of action in the matter has been kept alive by parties throughout - by exchange of initial correspondences, consistent renewal of the Fixed deposit given towards EMD, letters dated 16.04.2012, 31.05.2012, 26.09.2012 and 24.4.2012, filing of W.P No. 18869 of 2013 that was ordered on 19.12.2016 and subsequent letters dated 04.01.2017, 10.01.2017 and 31.01.2017.

11. In fact, to me, the objection by Mr. Ramkumar is contrary to the action on the part of the railways as can be seen from their letters dated 10.01.2017 and 31.01.2017 extracted above.

12. As I notice, the Railways seek to introduce a new contract condition as set out in clause 64(1)(ii)(b) above, which does not feature in the original contract relating to the waiver of section 12(5) of the Act. Thus, the Railways are, and have always been, willing to engage in arbitration, conditional upon the petitioner agreeing to waive the condition under Section 12(5) of the Act, which did not form part of the original contract. The objection raised by Mr. Ramkumar in this regard and at this juncture stands rejected.

13. Mr. Ramkumar would refer to a decision of this Court in *Nilakanthan and Sons Pvt. Ltd, represented by its Managing Director M. Jayachandran Vs. Southern Railway, represented by its General Manager* (1) MWN (Civil) 713 wherein this Court has held as follows:

9. As noticed above the contract was terminated on 24.11.2005. The petitioner-company thereafter did not take any further steps in this regard. Thereafter, the petitioner-company filed a petition under sub-sections (4) & (6) of Section 11 of the Arbitration and Conciliation Act, 1996 only on 20.10.2009 i.e. nearly four years from the date of termination of the contract by the respondent. Again it was re-presented on 08.02.2010 after complying with the defects pointed out by the registry. On the contrary the respondent made a counter demand for payment of damages for breach of the contract. It is well settled that the denial of claim itself will be a clause for

arbitration. Nothing has been stated by the petitioner-company as to why the petition seeking appointment of Arbitrator was filed with such inordinate delay. In the instant case the petitioner-company could have raised the dispute and sought it to be referred for arbitration in terms of the agreement at an earlier date. In the case of inordinate delay in invocation of arbitration clause with no justifiable reason the Court cannot come to the rescue of such parties seeking appointment of Arbitrator. The denial of arbitration from the side of the respondent was some time in October/November, 2005. But the instant petition for arbitration has been filed after a delay of nearly 4 years and that too without explaining the delay with justifiable reasons. Hence, in my considered opinion, such a belated petition cannot be entertained.

As noted earlier, there is no delay at all in the present case and as such the above case is distinguishable on facts.

14. Mr. Ramkumar would also make much of letter dated 15.07.2009 from the petitioner to the following effect:

Therefore, I would request you to please arrange to foreclose the agreement with quantum of the work done and I do hereby agree to foreclose the agreement with the qty. of work so far done without any liability on either side.

15. The above letter can hardly be held against the petitioner. All the petitioner confirms is that he was unable to complete the contract. This cannot, by any stretch of the imagination, be an embargo on either party to raise all and any valid claims that they may have against each other to be subject to the process of arbitration as agreed

contractually.

16. Yet another objection raised by Mr.Ramkumar is in relation to Clause No.64(3)(a)(i) of the Agreement reading thus:

64(3)(a)(i) Appointment of Arbitration Tribunal:-

In cases where the total value of all claims in question added together does not exceed Rs.10,00,000/- (Rupees ten lakhs only), the Arbitral Tribunal consist of a sole arbitrator who shall be either the General Manager or a gazetted officer of Railway not below the grade of JA grade nominated by the General Manager in that behalf. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by the Railway.

17. He would argue that the petition has been filed within the period of 60 days as stipulated in clause 64(3)(a)(i) and as such is liable to be rejected. This submission cannot be countenanced. Though the petition has been filed on 1.3.2017 and numbered on 7.3.2017, it came up for admission on 10.3.2017, by which time 63 days had elapsed from the date of invocation of the arbitration clause. The appointment of arbitrator was yet to be done. The respondents cannot reckon the date of filing or numbering of the petition to determine the period of 60 days as they were, admittedly, unaware of those circumstances. It is only the date when the matter came to their knowledge, on the date when the matter came up for admission and

the learned counsel took notice on behalf of the respondents that has to be reckoned to determine the period of 60 days. The appointment not having been done till then, the respondents forfeit their right to appoint an Arbitrator.

18.The parties would agree that Mr.C.Padmanabhan, Retired Judge, V.Vallipatty Village & Post, Sukkampatty Via, Salem District, Salem be appointed as Arbitrator.

19.I thus appoint Mr.C.Padmanabhan, Retired Judge, V.Vallipatty Village & Post, Sukkampatty Via, Salem District, Salem to act as Arbitrator in the matter. He shall enter upon reference and adjudicate upon the disputes between the parties arising out agreement No.TPJ.66/2004, dated 09.02.2004. The arbitrator may dispose the matter expeditiously and in any event within a period of six months from the date of first sitting. The proceedings may be conducted in accordance with the Madras High Court Arbitration Rules including fixation of remuneration to the learned Arbitrator. The learned Arbitrator is at liberty to claim the schedule of expenses and both parties shall bear the same equally.

20.This Original Petition is allowed in the above terms.

29.08.2017

vga/sl

Speaking order/Non speaking order

DR.ANITA SUMANTH,J.

vga/sl



O.P. No.206 of 2017

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