

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.11.2017

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THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

O.P.No.544 of 2017

Sree Ganesh Constructions,
Railway Contractor,
Door No.3-281, Lakshmipuram,
Stonehousepet, Nellore-524 002.
Andhra Pradesh.

.. Petitioner

Vs.

The Divisional Railway Manager/Works,
DRM Complex, Southern Railway,
Palghat Division, Palakkad-678 002.
Kerala State.

... Respondent

Original Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996, to set aside the Award of the Arbitrator dated 24.02.2017 arising out of the Agreement No.J/41 dated 13.03.2014 to the effect of allowing the counter claim of the respondent and consequently, to allow the claim of the petitioner in toto i.e., allowing awarding a sum of Rs.7,96,415/- to the petitioner herein.

For Petitioner : Mr.P.Subba Reddy

For Respondent : Mr.P.T.Ramkumar (Railways)

ORDER

On 20.12.2013, a letter of acceptance was given by the respondent in favour of the petitioner accepting the tender for the work of laying the railway track for 23 kms. The said acceptance letter also says that the period of completion is six months from the date of its issuance. Thereafter, on 13.03.2014, an agreement for work was executed between the parties. The petitioner deposited the Earnest Money and made the security deposit as well. Clause 16 of the General conditions of contract speaks about the security deposit being forfeited when work was not done. Clause 17-A speaks about extension of time. Clause 62 speaks about notice to be served on the petitioner in the event of its failure to make good its default, followed a notice of termination.

2. The period of contract expired on 19.06.2014. This factum is not in dispute. The petitioner has also not started the work except clearing of the bushes. Accordingly, by letter dated 27.07.2014, the contract was terminated though the period itself was over.

3. The petitioner approached the Tribunal. It raised three claims, which are as under.

Sl.No.	Description of Claims	Claim Amount Rs.
1.	Finalization of Contract and Settlement of Account	Rs.4,50,000/-
2.	Damages for non execution of Contract @ 10% in the unexecuted Value	Rs.5,16,309/-
3.	Cost of Arbitration including technical and legal	Rs. 50,000/-
	Total	Rs.10,16,309/-

4. A counter claim was also made on behalf of the respondent for the failure of the petitioner to complete the contract.

5. The learned Arbitrator, awarded claim No.1 of the petitioner in part insofar as unilateral deduction made from the bills emanated from other contracts. Thus, the other claims made by the petitioner was rejected. Consequently, the remaining part of the Earnest Money Deposit and Security Deposit, other than the part of claim allowed, were permitted to be forfeited. Challenging the same, the present petition has been filed.

6. The learned counsel appearing for the petitioner had made only one submission. This is with respect to the standing Teak Trees available in the site. It is submitted that giving clearance after obtaining a No Objection Certificate from various departments was the duty of the respondent. It is only because the respondent did not comply with the

same, the work could not be started, though the bushes have been cleared.

7. The learned counsel appearing for the respondent would submit that no such request has been made and therefore, it is only an after thought. Even otherwise, the petitioner could have asked for explanation. Therefore, no interference is required.

8. By way of a reply, the learned counsel appearing for the petitioner would submit that as per Section 62(5) of the New Act, the very appointment of the arbitrator itself is not correct being a departmental man. The learned counsel for the respondent would submit that admittedly, the Arbitrator was appointed much prior to the coming into force the new Act, whereas it came into force on 23.10.2015. Further more, the petitioner has not raised any objection at the time of appointment or before the Tribunal.

9. This Court is quite conscious about the scope of Section 34 of the Arbitration and Conciliation Act, 1996. The petitioner has not raised the issue of the No Objection Certificate to be obtained by the respondent from the authorised department. On the contrary, it has been raised only for the

first time before the Arbitration Tribunal. Therefore, this Court is of the view that the contentions raised cannot be accepted. Even assuming the operation of the petitioner is due with respect to the standing trees, at the request being made, the respondent would have been in a position to get the No Objection Certificate. The question as to whether the petitioner could not complete the work only because of the No Objection Certificate or otherwise is in the realm of speculation. It may also be a disputed question of fact. When the petitioner has not even made a request to the respondent, an adjudication cannot be made by this Court in exercise of the power under Section 34 of the Arbitration and Conciliation Act. One fact is clear that the petitioner did not actually start the work till the completion of the period of the contract, which is a time bound one. Thus, as rightly observed by the learned Arbitrator, nothing prevented the petitioner from making a request and therefore, there cannot be any presumption that the work could not be started for the above said reason.

10. A contention has been raised that the termination order was passed after expiry of the period of agreement. The said contention cannot be countenanced. Admittedly, the petitioner did not start the work except the clearing the bushes.

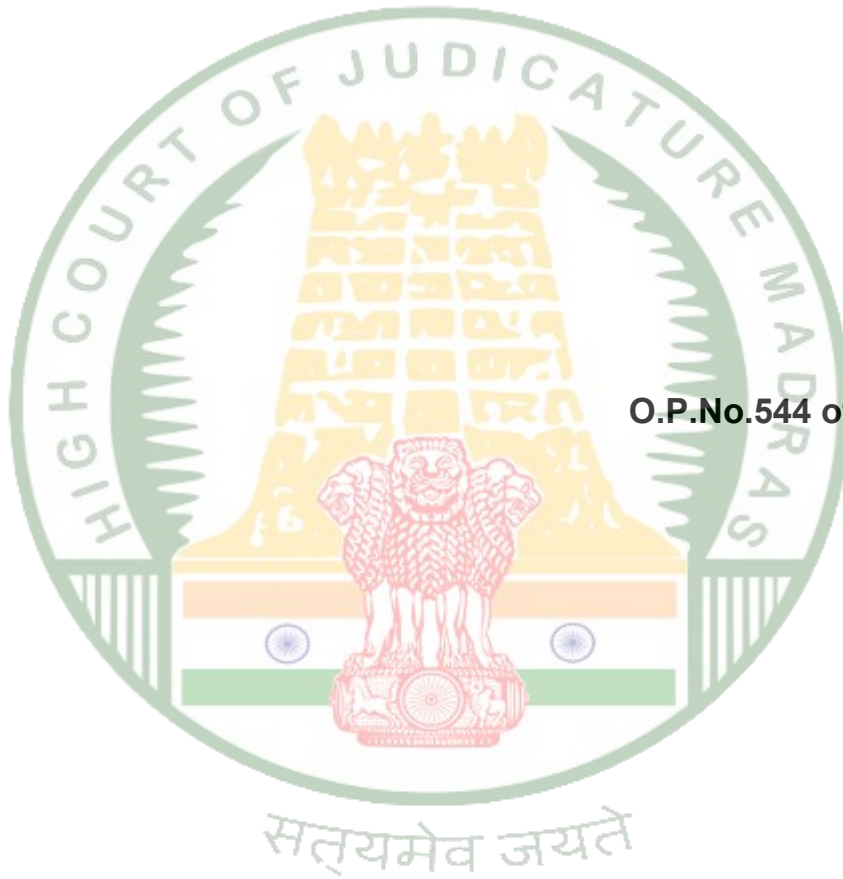
Clause 62 though mentioned in the termination notice, is some thing during the currency of the contract and in a case, where there is a deficiency on the part of the contractor, we are dealing with the case of non- starting the work. It is the petitioner, who made the claim. There was no serious challenge to the termination notice. There are three distinct claims. Therefore, the contention raised in this regard is also rejected.

11. The third contention with respect of the appointment of the Arbitrator also cannot be countenanced. As rightly submitted by the learned counsel for the respondent, the appointment was made much prior to the coming into the effect of the new provision. Even otherwise, the petitioner did not make any objection being the claimant. This Court does not find any bias as such being involved as there is no statutory body at the relevant point of time. The learned Arbitrator took into consideration the relevant materials, including the provisions governing and the nature of the contract. Therefore, this Court does not find any illegality in the award passed by the learned Arbitrator. Accordingly, the original petition stands dismissed. No costs.

27.11.2017

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M.M.SUNDRESH,J.
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