

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:16.03.2018

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THE HONOURABLE MR.**JUSTICE M.M.SUNDRESH**

**O.P.No.659 of 2017
& Application No.4982 of 2017**

Shri T.N.Rajagopalan, Railway Contractor,
55, TNEB Colony, Menambedu,
Ambattur, Chennai-600 053. ... Petitioner

Vs.

Union of India,
Represented by Divisional Commercial Manager/I
Divisional Office, Southern Railway,
Chennai-600 003. ... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 07.08.2017 passed by the Sole Arbitrator and consequently, hold that the respondent is not entitled for the additional licence fee of Rs.12,11,952/- from the petitioner.

For Petitioner : Mr.Balan Haridas

For Respondent : Mr.P.T.Ramkumar for Railways

ORDER

The respondent called for tenders for manning the vehicle parking stand at Velacherry Railway Station in an area of 5300 sq. mts for a period of three years on payment of highest licence fees. The highest offer of Rs.1,16,75,003/- was made by the petitioner and thus, an agreement was entered into on 24.04.2012 duly fixing the period of contract from 03.02.2012 to 02.02.2015.

2. Having found that the petitioner was using extra area of 540 sq.mts., the licence fee was revised by the respondent vide letter dated 15.10.2013 from Rs.1,16,75,003/- to 1,28,86,955/-. However, the petitioner continued to pay the original fees. The contract came to an end on 02.05.2015 after granting extension for a period of three months. The respondent made a claim invoking arbitration clause seeking differential payment between the original fee fixed and the subsequent one occasioned due to the excess usage of land by the petitioner.

3. Before the Tribunal, it was contended by the respondent that the petitioner did agree the encroachment made. He did not challenge the enhancement made specifically. He made the fine imposed by letter dated

06.09.2012 apart from encroachment fine of Rs.20,000/-. As per Clause 7(c) of the Agreement, it is for the petitioner to erect a covered structure within the area allotted and therefore, the contention regarding water logging cannot be countenanced. Once, the fine amounts were remitted, there is no defence available to the petitioner.

4. The petitioner contended that the additional space was utilised as an alternative space and thus, it cannot be termed as an encroachment. The encroachment is also not a regular feature.

5. The Tribunal accepting the contention of the respondent and in the light of the specified stand taken by the petitioner that the occupation was of additional space cannot be termed as encroachment coupled with the payment of fine, passed an award being the differential amount between the licence fee fixed earlier and the subsequent one for the additional space.

6. The learned counsel appearing for the petitioner would submit that the award is a non speaking one. It has been passed based upon inspection conducted unilaterally and without furnishing the copies of the same. There is no material to hold that the petitioner was using it all

along. When the award is found to be unfair, arbitrary and irrational, the same is interfered with under Section 34 of the Arbitration and Conciliation Act, 1996. To buttress his submission, the learned counsel has relied on the celebrated judgment of the Apex Court in **ASSOCIATE BUILDERS V. DELHI DEVELOPMENT AUTHORITY ((2015) 3 Supreme Court Cases 49)**.

7. The learned counsel appearing for the respondent would submit that it is a case of admission by the petitioner that there is no need for quantification of the amount and what is sought for is only a differential amount. The petitioner having accepted the encroachment and paid the fine, cannot be permitted to contend to the contrary. Despite knowing the requirement of payment of enhancement, the petitioner has paid the old one. The Award having been passed on merit and on analysing the fact, no interference is required.

8. As rightly submitted by the learned counsel for the respondent, the petitioner admittedly was in possession of the lands than the one given to him as per the agreement. Even before the Tribunal, the very same stand has been taken vide letter dated 05.01.2017. The respondent has re-fixed the licence fee by an letter dated 15.10.2013. This was done by taking note of the excess land in possession of the petitioner. Thus,

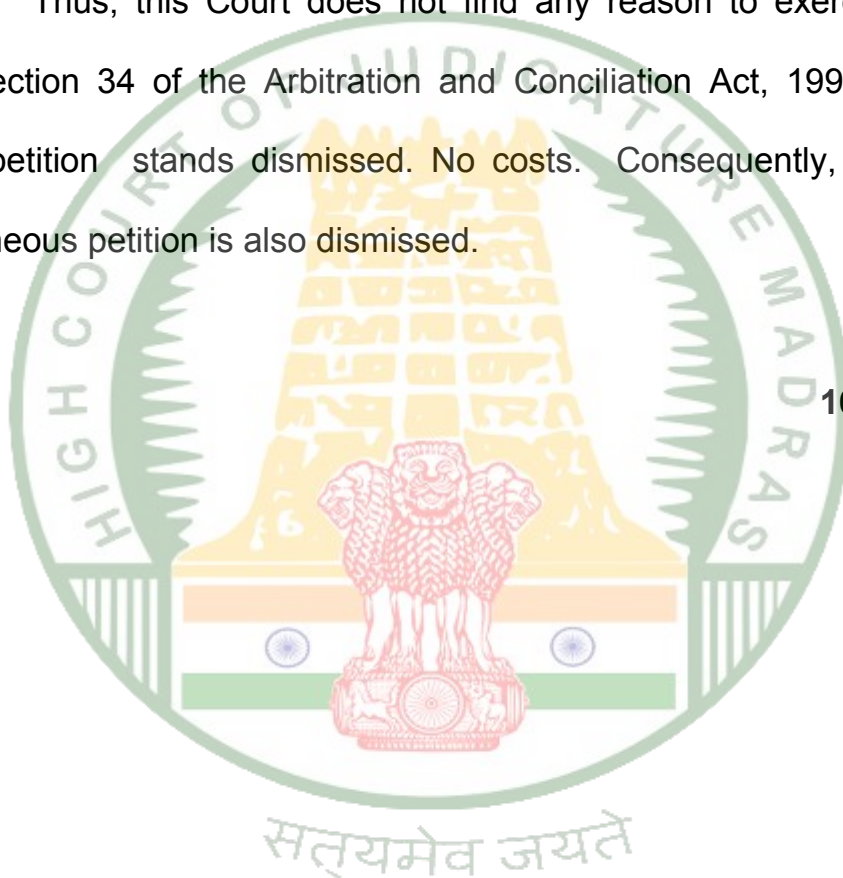
knowingly the petitioner has continued to occupy the excess land. Strangely, the petitioner, who did not even challenge the re-fixation of the licence fee vide letter dated 15.10.2013, asked for extension after completion of the contract by 02.05.2015. Merely because, the petitioner continued to pay the old licence fee, it cannot be construed, as if, the petitioner is not bound to pay the new one. It is also to be noted that the petitioner did not raise any claim before the Tribunal but the respondent did. Having accepted the encroachment, paid the fines and continued to be in possession, thereafter, it is not open to the petitioner to contend to the contrary. The petitioner did not produce any material to show that he was not in encroachment, except his own letter dated 05.01.2017 sent to the Tribunal. What was claimed was only a differential amount. This was based upon the subsequent fixation of licence fee. Therefore, there was nothing much for the Tribunal to do after upholding the decision to levy the enhanced licence fee. The petitioner, being a silence spectator, cannot challenge the factual findings rendered before this Court by exercising power under Section 34 of the Arbitration and Conciliation Act, 1996.

9. The award has been passed on a factual basis. This Court does not find any illegality, irrationality or lack of fairness in the award passed. The inspections done though in the presence of the petitioner are to be

taken as mere piece of evidence to be considered by the Tribunal. These materials will have to be seen in the context of the conduct of the petitioner, by which, he did remit the fine while accepting the encroachment. He was unable to prove anything contrary if there is anything. Thus, this Court does not find any reason to exercise power under Section 34 of the Arbitration and Conciliation Act, 1996, and the original petition stands dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

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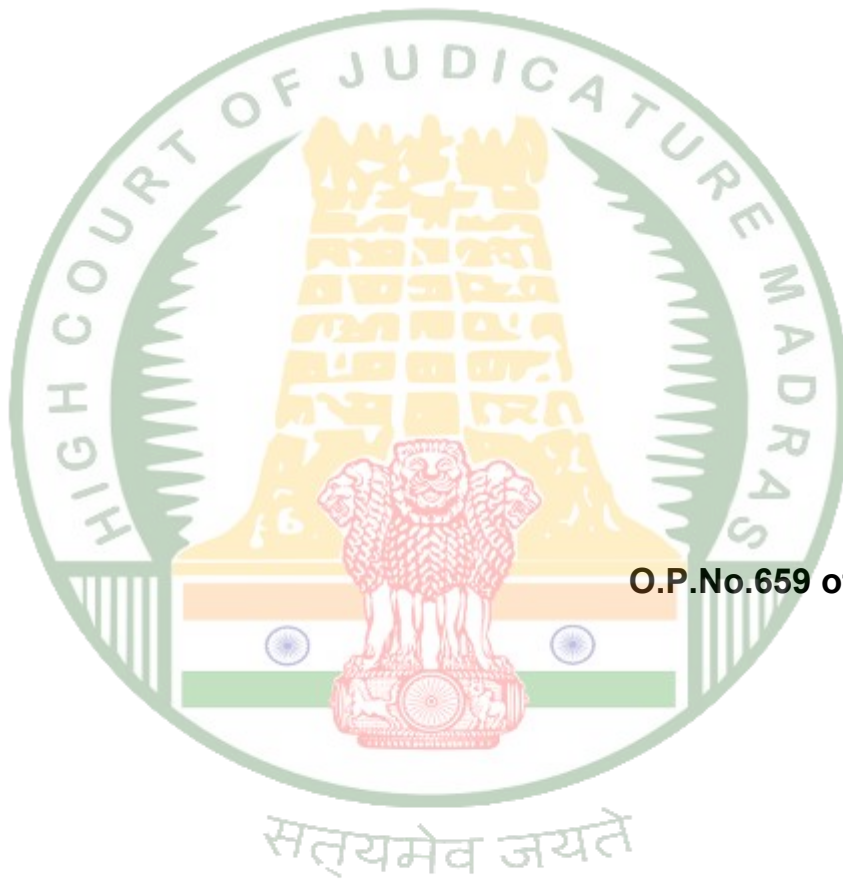
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M.M.SUNDRESH,J.

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