

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.12.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

Original Petition No.295 of 2014

S.Vijayaragavan

... Petitioner

vs.

1. The Chief Engineer (Central)
Construction Department,
Southern Railway,
Egmore, Chennai 600 008.
2. The Deputy Chief Engineer (Gauge Conversion-I),
Construction Department,
Southern Railway,
Opposite Arun Hotel,
Tiruchirappalli.
3. Ma.Vignavelu (Presiding Arbitrator),
Deputy Chief Track Engineer (Track Procurement),
Headquarters Office,
Southern Railway,
Park Town, Chennai 600 003.
4. T.Velusamy (Arbitrator)
Senior Divisional Finance Manager,
Tiruchirappalli Division,
Southern Railway, Tiruchirappalli.
5. Gaurav Kumar Singh (Arbitrator)
Deputy Chief Mechanical Engineer (Designs)
Integral Coach Factory, Chennai.

... Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 07.05.2012 passed by the Arbitral Tribunal, comprising of the Respondents 3 to 5, in the disputes arising out of Agreement No.08/Dy.CE/GC/CUPJ/2004, dated 09.11.2004.

For Petitioner : M/s.Amalaraj S.Penikilapatti

For Respondents : Mr.P.T.Ramkumar

ORDER

This Petition is filed to set aside the Arbitral Award dated 07.05.2012 passed by the Arbitral Tribunal, comprising of Respondents 3 to 5 herein, in the disputes arising out of Agreement No.08/Dy.CE/GC/CUPJ/2004, dated 09.11.2004.

2. The Petitioner herein is the Contractor, who has been engaged by the Respondents 1 and 2/Southern Railways to execute the work 'Drainage arrangements in Cutting at km 63-64 between VRI-MKSP Railway Station' vide Letter of Acceptance (LoA) dated 28.06.2004, for execution within a period of six months.

3. Before the Arbitrators, it is the case of the Petitioner herein that work could not be commenced immediately, since block was arranged only after a lapse of a year during Mega Block and the delay in commencing the work was not on his account. After the lapse of a year from the date of Letter of Acceptance, the scenario was such that the scope of work did not match as that of the original

Agreement. The changes in the scope of work were duly brought to the notice of the Assistant Divisional Engineer and the Deputy Chief Engineer immediately for the due consideration, for making enhanced rate by operating suitable new items. Thereafter, as per the instructions and directions of the Officials to engage machineries, works were executed by employing machineries as required as per the site condition.

4. According to the Petitioner, the total quantity of cutting done as per the statement dated 19.10.2010 was 1001.435 cu.m. and the expenditure on this account worked out to Rs.39,98,000/-. For the execution of the said work, a Supervisor was engaged and the payment made to him is Rs.60,000/- and miscellaneous expenditure runs to the tune of Rs.60,000/-. In support of his claim, the Petitioner has submitted a copy of the letter dated 26.05.2008 along with the Graph sheet for calculation of earthwork quantity and the quantity works out to 3145.975 cu.m and the expenditure involved is to the tune of Rs.60,71,732/-.

5. While so, it is the case of the Respondents 1 and 2/Southern Railways that the Letter of Acceptance was issued to the Petitioner on 28.06.2004, but, the Petitioner neither turned up to commence the work nor requested the Deputy Chief Engineer for line block till the initial completion period of 27.12.2004. Further, no men were deployed at the site. However, the Department was ready to give line

block, since there were only two pair of trains running and in day time, only one train from Salem at 10.20 hours.

6. According to the Respondents 1 and 2/Southern Railways, Mega Block was imposed within six months from the date of issuance of Letter of Acceptance and not one year, as the Petitioner mentioned. Hence, there is no unproductive and wasteful lock of investment in Establishment and maintenance of site set up, etc. It is the further case of Respondents 1 and 2/Southern Railways that the scope of work has not been changed during Mega Block and that the Petitioner has not completed the entire work and that the value of the work done is only 14%.

7. After hearing both sides, the Arbitral Tribunal/Respondents 3 to 5 did not award any amount against the claim of the Petitioner herein and hence, aggrieved by the same, the Petitioner is before this Court.

8. With reference to the finding of the Arbitrators that the Respondents 1 and 2/Southern Railways have operated the extra work under BSR as new item, whereas the Petitioner has not submitted any request or proposal for operating the extra work under non-BSR item as per the record, learned counsel for the Petitioner contended that the Arbitrators ought not to have rejected the Petitioner's claim on the ground that there was no proposal for operating the extra work.

9. According to the learned counsel for the Petitioner, the factum of work executed is not in dispute. That being the case, when the work has been carried out on the instructions given by the Railway authorities, the Arbitrators ought not to have rejected the Petitioner's claim. He contended that the Arbitrators have deliberately disregarded the official proceedings of the Railways vide communication of the Assistant Executive Engineer/GC/VRI, dated 26.05.2018, as an intra-departmental proceedings. It is the contention of the learned counsel that the said intra-departmental proceeding is a clinching document reflecting the actual quantum of the executed works.

10. In reply, learned counsel appearing for the Respondents 1 and 2/Southern Railways submitted that there is delay in execution of work by the Petitioner and when the Petitioner has been asked to execute a particular work in a particular manner, the Railway authorities are not responsible for the usage of machinery by the Petitioner in completion of work. With reference to Clause Nos.39(1), 41 and 43(1) of the General Conditions of Contract, learned counsel for the Petitioner submitted that the Petitioner has not submitted any request or proposal for operating extra work under BSR as new item as per the record and in the absence of any proposal, the Petitioner is not entitled to the relief sought for.

11. For better appreciation of the case, relevant provisions of the General Conditions of Contract of the Southern Railways, are extracted hereunder:

"39(1) Rates for Extra Items of Works: Any item of work carried out by the Contractor on the instructions of the Engineer which is not included in the accepted Schedules of Rates shall be executed at the rates set forth in the "Schedule of Rates of Railway" modified by the tender percentage and such items are not contained in the latter, at the rate agreed upon between the Engineer and the Contractor before the execution of such items of work and the Contractors shall be bound to notify the Engineer at least seven days before the necessity arises for the execution of such items of works that the accepted Schedule of Rates does not include rate or rates for the extra work involved. The rates payable for such items shall be decided at the meeting to be held between the Engineer and Contractor, in as short a period as possible after the need for the special item has come to the notice. In case the Contractor fails to attend the meeting after being notified to do so or in the event of no settlement being arrived at, the Railway shall be entitled to execute the extra works by other means and the Contractor shall have no claim for loss or damage that may result from such procedure.

43(1) Monthly Statement of Claims: The Contractor shall prepare and furnish to the Engineer once in every month an account giving full and detailed particulars of all claims for any additional expenses to which the Contractor may consider himself entitled to and of all extra or additional works ordered by the Engineer which he has executed during the preceding month and no claim for payment for any such work will be considered which has not been included in such particulars.

12. Heard the learned counsel on either side and perused the material documents available on record.

13. It is not in dispute that the Petitioner, who is a Contractor, had entered into an Agreement with the Respondents 1 and 2/Southern Railways under the General Conditions of Contract and he was entrusted with a work vide Letter of Acceptance (LoA) dated 28.06.2004, to be completed within a period of six months. However, it is seen that the currency of the Agreement was extended seven times from 28.06.2004 to 30.06.2009. Even in the extended period of time, the Petitioner has completely approximately 14% of the work entrusted and the value of the work said to have been executed by the Petitioner is to an extent of Rs.5.5 lakhs only, when the value of the contract is over and above Rs.25 lakhs.

14. Though, it is stated by the Petitioner that for the additional work executed by him, no amount has been paid, it is seen that the Petitioner has not produced neither produced any notification nor made any request/proposal prior to the commencement of the work. As the Petitioner failed to act in terms of the agreed clause and has accepted the final measurement which was recorded, he would not be entitled to any relief, more particularly when the site order book submitted, contained only blank pages.

15. A reading of clause 39(1) of the General Conditions of Contract would make it very clear that any work carried out by the Contractor on the instructions of the Engineer which is not included in the accepted schedule of rates shall be executed at the rates set forth in the SOR. In the case on hand, the Petitioner has not produced any document to the Respondents 1 and 2/Southern Railways for operating new items. *Hence, this Court finds no reason to interfere with the finding of fact rendered by the Arbitrators.*

Accordingly, this Original Petition is dismissed. No costs.

04.12.2018

Index : Yes/No
Speaking order : Yes/No

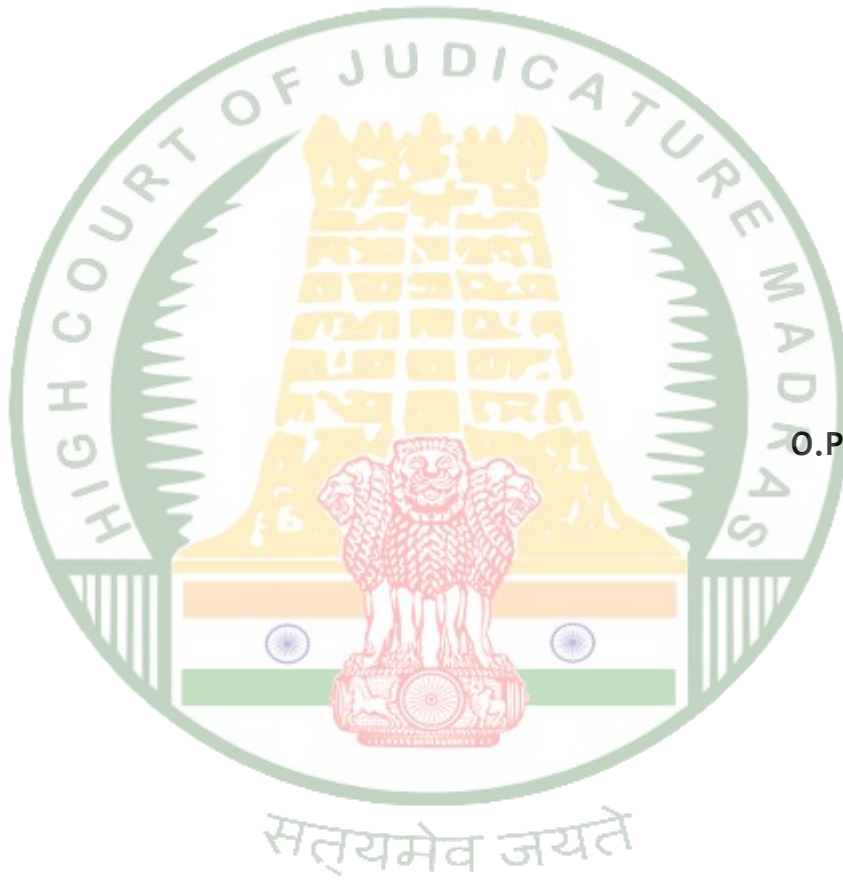
(aeb)

सत्यमेव जयते

WEB COPY

S.VAIDYANATHAN,J.

(aeb)



O.P.No.295 of 2014

WEB COPY

04.12.2018