

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.04.2018

CORAM

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

O.P.No.82 of 2009

K.R.Subramaninan, Engineering Contractor,
F3, Sai Gardens, W-5, ICC Block, Anna Nagar,
Western Extension, Chennai-600 101. .. Petitioner

Vs.

1.The General Manager,
Southern Railway,
Chennai-600 003.

2.The Chief Engineer, MRTTP (Railways),
Poonamallee High Road, Egmore,
Chennai-600 008.

3.The Deputy Chief Engineer,(Construction),
M.R.T.P., Luz Corner, Thirumylai Railway Station,
Mylapore, Chennai-600 004.

4.Shri B.N.A. Murthy,
Chief Signal & Telecommunication Engineer/
Con/South, Southern Railway, 2nd Floor,
New Building, CAO/CN Complex,
EVR Periar Road, Egmore, Chennai-8.

5.Smt.Sujatha jayaraj,
Financial Advisor & CAO/Construction,
West Central Railway, Jabalpur,
(The then FA&CAO/Traffic),
Southern Railway, Park Town, Chennai-3.

6. Shri S.K. Gupta,
Additional Division Railway Manager,
Chennai Division, Southern Railway,
Park Town, Chennai-3.

.. Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the dissenting note of the Co Arbitrators on claim No.1(a), 1(b) and 1(c) for Rs.1,10,21,786/- and on claim No.6 for Rs.5,00,000/- and to direct the respondents to settle the awarded amount of claim No.1 and claim No.6 as awarded by the Presiding Arbitrator arising out of the agreement No.MTP/Civil/375/00 dated 15.11.2000 entered into between the petitioner and the second respondent.

For Petitioner : Ms.K.Aparna Devi

For Respondents : Dr.S.R.Sundaram for R1 to R3
No appearance for R4 to R6

ORDER

The petitioner and the respondents entered into a contract for executing earth work in forming bank and moorum blanketing between 16.808 and Km.20.216. The original date of agreement for the completion of work was 12 months. However, six extensions were granted.

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2. Clause 17(2) of the General Conditions of Contract reads as follows:

“If in the opinion of the Engineers, the progress of

work has any time been delayed by any act or neglect of Railway's employees or by other contractor employed by the Railway under Sub Clause (4) of Clause 20 of these Conditions or by strikes, lock-outs, fire, unusual delay in transportation, exceptionally inclement weather, unavoidable causalities beyond the Contractor's control as by the reasons of proceedings taken or threatened by or dispute with adjoining or neighbouring owners or public authority arising otherwise than through the Contractor's own default etc. or by delay authorized by the Engineer pending arbitration or in consequence of the contractor not having received in due time necessary instructions from the Railway for which he shall have specifically applied in writing to the Engineer or his authorized representatives or by any other cause which the Engineer shall decide to justify the delay, then the time of completion of the works may be extended for such reasonable time as the Engineer on behalf of the Railway may decide."

3. Thus extensions have been granted not due to the fault of the petitioner. It appears that the earth caving and sinking is to the knowledge of the respondent. The petitioner, for the extra work done, raised bills. For the initial bills, the petitioner did not raise this issue. As the earth bank progressed, the sinkage resulted in collapse of each bank and thus, the petitioner expressed his difficulty in continuing with the work and claimed losses. The respondent had consultations with various experts for obtaining solution for the problem. Thereafter, certain payments have been made for the sudden sinkage resulting in deep wide cracks which were rectified by the petitioner. As sinkage continued repeatedly, the petitioner was forced to stop the work.

4. Curiously, the agreement was neither terminated nor foreclosed by the respondent. The request for the petitioner to get the payment did not yield any result. Thereafter, the learned Arbitrator was appointed. The petitioner made several claims. The Presiding Officer awarded claim Nos.1, 2 and 6. Claim No.1 has been made for the value of earth work done towards sinkage and sudden collapse, value of moorum are supplied and the final bill value. Claim No.2 is for the release of the security deposit. Claim No.6 is meant for loss of profit. Under this caption,

a sum of Rs.5,00,000/- was sought for.

5. The Presiding Officer has granted claim No.2 after holding that the agreement was neither terminated or foreclosed. Even according to the respondent, 70% work was completed. The respondent itself had decided to abandon the earth work and erected elevated structure for running trains. Thus, there was no lapse on the part of the petitioner and accordingly, the security deposit was directed to be released for a sum of Rs.15,08,000/-.

6. Insofar as claim No.1 is concerned, it was awarded that the respondent did not take any steps to make the valuation. It did not arrange for the instrumentation by independent agency though it indicated that it could be done. The contract was neither terminated nor foreclosed. Mere claiming of bills will not take away the right of the petitioner. Accordingly, a sum of Rs.1,10,21,786/- was awarded. Similarly, claim No.6 was awarded on the very same grounds.

7. The two other learned Arbitrators while differing with the ultimate conclusion of the Presiding Officer have held that both the parties were responsible. There was absolutely no finding to hold that the petitioner was responsible. Thus, inspite of the fact that they concur with the Presiding

Officer, that extensions were granted as per Clause 17(2) of the General Conditions of Contract, which makes it clear that delay was not attributed to the petitioner. However, the petitioner was non-suited on the ground that he raised the claims belatedly after nine months.

8. The learned counsel appearing for the petitioner would submit that on a perusal of the findings rendered, the petition deserves to be allowed. The learned two Arbitrators, who dissented to the award of the Presiding Officer did not go into the merits of the case, in fact, they concur with the Presiding Officer, but on a technical ground rejected the claims.

9. The learned counsel appearing for the respondent would submit that the award having been passed on merit, no interference is required. It is further submitted that the petitioner was also equally responsible for the delay. That is the reason why he claimed for rejection.

10. This Court is of the view that original petition filed deserves to be allowed. When once Clause 17(2) of the General Conditions of Contract was invoked, it would only mean that no fault can be attributed against the petitioner. The petitioner did put up the additional work in order to cover up the sinkage and caving. The respondent itself abandoned the work even

after the petitioner declined to do the remaining work is not in issue.

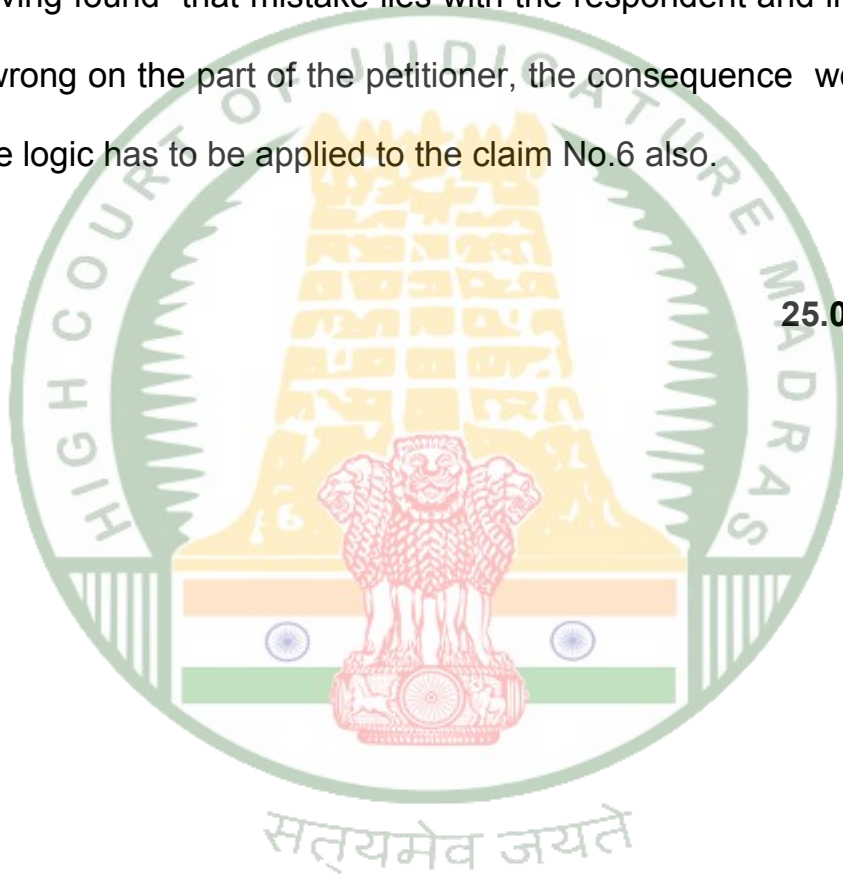
11. On the contrary, the respondent has decided to construct an elevated structure. This alone would be sufficient enough to allow this petition. This has not been looked into by the two other learned Arbitrators. Merely because, bills were not claimed for 11 months for the extra work done, the same will not prevent the petitioner in making it subsequently. When facts are not in dispute, a claim made cannot be rejected on a technical plea. There is absolutely no material to hold that the petitioner was responsible for not completing the work. Even according to the respondent, 70% work was completed. For the extra work done, some payment were, in fact, made. When the work could not be completed as cracks are developed again and again being factual is also not in dispute. The claims of the petitioner were for the work done apart from loss of the profit. The Presiding Officer has given a well merited award. In the dissenting Award, the reasons assigned by the Presiding Officer has not been found to be wrong on facts. Therefore, this Court is of the view that it is not a case where the Award passed by the two other learned Arbitrators, contrary to that of the Presiding Officer, will have to be set aside. Accordingly, the dissenting Award of the two learned Arbitrators has been set aside and that of the Presiding Officer will stand. Accordingly, the

Original Petition stands allowed.

12. Insofar as the claim No.2 is concerned, this Court is of the view that there is nothing wrong in the Award passed by the Presiding Officer. When having found that mistake lies with the respondent and in any case, nothing wrong on the part of the petitioner, the consequence would follow. The same logic has to be applied to the claim No.6 also.

25.04.2018

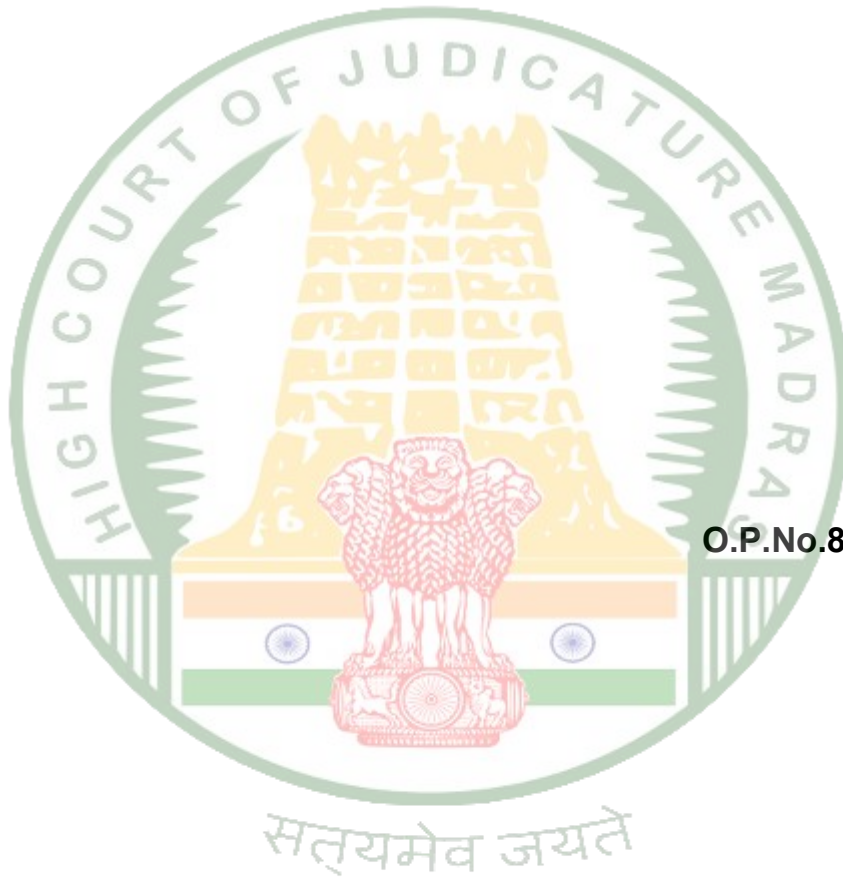
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M.M.SUNDRESH,J.

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