IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 13.08.2019

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.P.No.841 of 2013

M/s.SRA and Company,
Represented by its Power Agent
M.R.Palanivelu,
Residing at No.14,
Chennimalai Gounder Layout,
New No.30, Gandhi Pudur,
Uppli Palayam (Post),
Coimbatore - 641 015. ... Petitioner

versus

1.The Union of India,
Represented by the General Manager,
Southern Railway,
Chennai - 600 003.

2.The Divisional Railway Manager (Works),
Madurai Division, Southern Railway,
Madurai.

3.Shaji Zachariah (Presiding Arbitrator),
The Professor / Track Machines,
IRICEN, Pune, Maharashtra.

4.Dr.C.Suryalakshmi (Arbitrator),
The Deputy Financial Adviser and
Chief Accounts Officer (Systems),
Southern Railway, Park Town,
Chennai - 600 003.

5.Gaurav Singh Chadher (Arbitrator),
Dy. Chief Signal and Telecommunication
Engineer / Construction,
West Coast Railways, Hubli,
Karnataka. ... Respondents

PRAYER: Original Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 01.12.2011 passed by the Arbitral Tribunal, comprising of the respondents 3 to 5, in the disputes arising out of the contract bearing Letter of Acceptance No:U/W.496/I/1/2005/13L dated 29.07.2005 and pass a fresh award allowing all the claims of the petitioner.

For Petitioner : Mr.Amalaraj S.Penikilapatti
For Respondent No.1 : Mrs.T.P.Savitha
Standing Counsel

ORDER

This Original Petition has been filed by the petitioner to set aside the award dated 01.12.2011 made in Letter of Acceptance No:U/W.496/I/1/2005/13L passed by the Arbitral Tribunal.

2. The brief facts leading to file this Original Petition, is as follows;

2.1. The second respondent has invited Risk and Cost Tender for the balance work vide Tender Notice No.MDU/1/2005 dated 24.01.2005 and accepted the offer of the petitioner and issued Letter of Acceptance vide LOA

No.U/W.496/I/1/2005/13L dated 29.07.2005. The period of completion was 6 months and the value of the tender is Rs.39,78,657/-.

2.2. The petitioner has stated that the contract was failed due to (1) Railway's instruction to stop works due to intervention of vigilance in the instant contract for 'deep screening' and (2) Railway's failure to make the payment of the bills. He has stated that because of the above reasons, the contract was failed and hence, there is no justification for the second respondent to terminate this contract under risk and cost. He has also stated that because of the risk and cost termination, he suffered losses and hence, he has preferred 7 claims on various heads for a sum of Rs.12,50,000/-, which reads as follows;

No.	***Description of Claims***	***Amount***
1	Release of our Earnest Money Deposit	Rs.50,000/-
2	Release of our Security Deposit and Final Bill	Rs.2,00,000/-
3	Idling of Men and Materials	Rs.5,00,000/-
4	Idling of Machineries and Tools and Plants	Rs.5,00,000/-
5	Declaration that the Railway's Risk & Cost termination proceedings are invalid and illegal and that the contract has to be finalised without any liability on contractor.	Declaratory
6	Interest on all the claims	Not quantified
7	Cost of the Arbitration and Counsels Costs	Not quantified
	Total	**Rs.12,50,000/-**

2.3. The respondents had also raised counter claims. The Arbitral Tribunal has awarded a sum of Rs.34,000/- towards Earnest Money Deposit and allowed the counter claim of the respondents to the tune of Rs.30,000/- towards the penalty for collection of less ballast. The challenge has been made only with regard to the claim no.2 and counter claim no.1.

2.4. The main contention of the learned counsel for the petitioner is that the Arbitral Tribunal having found that the undisputed amount of Rs.40,399/- is liable to be paid to the petitioner towards the final bill, which is not awarded. Similarly, no penalty was imposed during the contract period, only for the first time the counter claim has raised more than 4.5 years after expiry of contract date. Therefore, allowing the counter claim is not according to law. Further, the Arbitral Tribunal having found that there is no damage whatsoever caused to the respondents.

2.5. Whereas the learned Standing Counsel for the first respondent would submit that as the petitioner did not make progress of the work as per the condition, as per the contract, the penalty has been levied.

3. Heard the learned counsel for the petitioner and the learned Standing Counsel for the first respondent. I have also perused the arbitral award passed by the learned Arbitrator.

4. The specific claim of the respondents in the counter that the respondents had not taken action for terminating the contract as per the condition of the contract. However, an administrative decision not to execute the balance portion of the work due to sanctioning of gauge conversion and as such there is no justification for preferring this claim of Rs.73,175/-.

5. In this aspect, the learned counsel for the petitioner has relied upon the judgment in ***FATEH CHAND vs. BALKISHAN DASS*** reported in ***AIR 1963 SC 1405***, wherein the Hon'ble Supreme Court has held as follows;

> *"10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of*

damages in the case of breach of a stipulation by way of penalty is by S.74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."

6. The above judgment makes it clear that merely dispenses with proof of "actual loss or damage", it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

7. In respect of claim no.2 is concerned, the respondents had admitted before the learned Arbitrator to the effect that they measured 112 cum of ballast supplied by the petitioner and the final bill amount was payable to the petitioner of Rs.40,399/-. Though it is the stand of the respondents that the petitioner has not remitted Security Deposit, the fact remains that a sum of Rs.40,399/- paid to the petitioner towards final bill for the supply of 112 cum of ballast. The Arbitral Tribunal has failed to consider the above aspect and rejected the entire claim of Rs.2,00,000/-. Therefore, this Court is of the view that in respect of claim no.2 is liable to be set aside and allowed the claim of the petitioner for a sum of Rs.40,399/-.

8. As far as the counter claim is concerned, it is admitted that the respondent did not impose any recovery or penalty during the currency of the contract, the penalty has been raised only for the first time on account of after 4.5 years expiry of the contract. Therefore, allowing the counter claim no.1, which is beyond the period of limitation will certainly liable to be interfered.

9. Accordingly, the claim no.2 of the award dated 01.12.2011 made in Letter of Acceptance No:U/W.496/I/1/2005/13L passed by the Arbitral Tribunal, is set aside. Similarly, the counter claim no.1 is also set aside. Further, the claim shall carry 9% interest from the date of receipt of a copy of this order.

10. With these observations, this Original Petition is partly allowed. However, there is no order as to costs.

13.08.2019

Speaking Order/Non Speaking Order
Index : Yes / No
Internet : Yes

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N.SATHISH KUMAR, J.,
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