

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 13.08.2019

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.P.No.842 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.

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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 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 Agreement No.MDU/390/2002 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 tender for the work in Dindigul-Podanur-Pollachi-Palghat Town for 50mm machine crushed ballast from KM.103/0-110/0, 124/0-159/0 in Dindigul-Podanur Section and KM.0/9.5-

9/0 in Pollachi-Palghat Town Section vide Tender Notice No.MDU/07/2002 dated 06.06.2002. Thereafter, the Agreement No.MDU/390/2002 dated 09.10.2002 was entered into between the parties for the value of Rs.60,23,325/- with a period of completion of 10 months.

2.2. The petitioner has supplied about 7,500 cum out of the total contract quantity of about 16,390 cum. Further, the collection could not be done due to (1) lack of railway vacant land for collection of ballast alongside the track, (2) due to rains that rendered the sites unapproachable and the approach roads unfit for traffic, (3) complete inundation of all quarries, (4) non-grant of mining lease by State Government, (5) the sealing of claimant's crusher by Pollution Control Board, and (6) the complete ban of explosives.

2.3. The petitioner has stated that because of the above reasons, the work could not be completed within the prescribed time. He has also stated that because of the termination of contract, he suffered losses and hence, he has preferred 9 claims on various heads for a sum of Rs.19,50,000/-, 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.3,00,000/-
3	The release of the 15% value of bills for the collection work (retained for the dumping works)	Rs.5,00,000/-
4	Refund of the penalty amount recovered/withheld	Rs.1,00,000/-
5	Idling of Men and Materials	Rs.5,00,000/-
6	Idling of Machineries and Tools and Plants	Rs.5,00,000/-
7	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
8	Interest on all the claims	Not quantified
9	Cost of the Arbitration and Counsels Costs	Not quantified
	Total	Rs.19,50,000/-

2.4. As against the second claim, the Arbitral Tribunal has awarded a sum of Rs.56,915/- towards the release of Security Deposit and Final Bill, Rs.2,59,355/- towards the release of 15% value of bills for the collection work and also allowed the counter claim of the respondent to the tune of Rs.80,000/- towards penalty for less supply of ballast.

2.5. It is the case of the respondents that as the petitioner did not complete the balance work, 7 days notice was issued on 20.12.2003 and 48 hours notice was given on 13.01.2004 and the termination notice was issued on 23.01.2004. The currency was available upto 31.01.2004. At the time of termination of contract, the petitioner has collected 7113.142 cum of ballast

and dumped 2310.262 cum. Final bill for the work done has been prepared on 25.03.2010 for an amount of Rs.6,915/- and for the dumping quantity of 921.954 is kept pending for final disposal of the proceedings. It is his contention that out of 9 claims, the learned Arbitrator has awarded only 2 claims as stated above. Aggrieved over the same, the present Petition has been filed.

3. The learned counsel appearing for the petitioner submitted that the main challenge in this Petition with regard to claim nos.1, 2, 4 and counter claim no.1, in respect of other claims, there is no challenge made by the petitioner. It is his contention that the Arbitral Tribunal had recorded, 'since the second respondent has decided that the balance work is not required to be done as the section has been targeted for gauge conversion, no extra expenditure was incurred by the second respondent'. It is his further contention that such finding has been recorded by the Arbitral Tribunal in page nos.5, 6, 8 and 10 of the award. Having recorded such finding, the Arbitral Tribunal has failed to appreciate the very fundamental concept of the Earnest Money Deposit and the Security Deposit. If the petitioner had completed the entire contract works, the same would have been wasted due to 'Gauge Conversion' project in the section. Similarly, the ballast dumped on

the old 'Metre Gauge' Track would have been covered/dumped with the Soil/Earth/Gravel during the widening of the existing 'MG Formation' into the wider 'Formation for Broad Gauge Standard'.

4. The learned counsel for the petitioner further submitted that no extra expenditure or losses has occurred to the Railway. It is his contention that the second respondent did not impose/recover any penalty during the contract period. The second respondent has raised its counter claim no.1 after 6.5 years after the termination of contract i.e. 23.01.2004. In the counter claim also, no penalty has been imposed. Therefore, the Railway did not suffer any damages but only enjoyed substantial financial savings due to the non-completion of the contract works. Hence, the Railway is not entitled to 'forfeiture of SD' or to levy penalty.

5. Whereas the learned Standing Counsel for the first respondent contended that the contract stipulates for refund of the penalty amount recovered, the learned Arbitrator rightly found that he is entitled to refund of Earnest Money Deposit and Security Deposit and also they are entitled to withhold the penalty amount recovered. Hence, her contention is that the award cannot be interfered.

6. 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.

7. On a careful perusal of the entire award and the contract makes it clear that though the contract has been executed as early as for completion of the balance work, the second respondent has later decided that the balance work was not required to be done as the section has been targeted for gauge conversion and no extra expenditure was incurred by them, this factum has been recorded by the Arbitral Tribunal in its findings in claim nos.1 and 3. Similarly, the Arbitral Tribunal has also recorded that no penalty has been imposed for less collection. Having found factually that no penalty has been imposed, the Arbitral Tribunal has in fact awarded the counter claim, which raised after a period of 6.5 years after the termination of contract. Admittedly, the non-completion of the contract works did not lead to any loss or damages to the Railway. Since the work would not have been done due to the entire line is targeted for gauge conversion and in fact, Railway was not incurred any expenditure in that aspect.

8. 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."

9. 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.

10. Admittedly, in this case, the counter claim has been raised after 6.5 years, even there is a contract to levy penalty, he could have been levied only during the currency of contract and not after the termination of contract. Accordingly, the finding of the learned Arbitrator rejecting the claim nos.1 and 2, in fact, when no damage whatsoever imposed to the respondents, the above claims ought not to have been claimed. As far as the claim no.4 is concerned, as the Arbitral Tribunal has factually found that no penalty has been levied, the question of refunding of penalty under Claim no.4 does not arise and accordingly, the same is rejected. As far as the counter claim no.1 is concerned, the Arbitral Tribunal not levied penalty during the currency of contract. Such being the position awarding the counter claim, which was raised after 6.5 years of the termination of the contract will certainly liable to be interfered.

11. Accordingly, the counter claim no.1 of the award dated 01.12.2011 made in Agreement No.MDU/390/2002 passed by the Arbitral Tribunal, is set aside. Similarly, the refund of Earnest Money Deposit and the Security Deposit in claim nos.1 and 2 are allowed in favour of the petitioner. Further, the claim shall carry 9% interest from the date of receipt of a copy of this order.

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

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Speaking Order/Non Speaking Order

Index : Yes / No

Internet : Yes

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