

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 13.08.2019

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.P.No.843 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, in the disputes arising out of the contract bearing Letter of Acceptance No:U/W.496/I/20/2003/2L dated 15.12.2004 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/20/2003/2L passed by the Arbitral Tribunal.

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

2.1. The second respondent called for risk-tenders for the balance works under the earlier contract in Agreement No.MDU/125/2003 dated 01.04.2003. By Letter of Acceptance dated 15.12.2004, the contract was awarded to the petitioner. The contract period was one year, must be

completed on or before 14.12.2005 and the value of the tender was Rs.37,06,600/-.

2.2. The petitioner has stated that the contract could not be completed due to (1) Railway's inability to arrange to impose caution order, (2) Railway's instruction to stop works due to intervention of vigilance and (3) Railway's failure to make the payment of this bills. He further stated that he is not at fault and hence, the termination of the contract is not correct. He has also stated that because of the termination of contract, 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;

<i>No.</i>	<i>Description of Claims</i>	<i>Amount</i>
1	Release of our Earnest Money Deposit	Rs.50,000/-
2	Release of our Security Deposit and Final Bill	Rs.3,00,000/-
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.13,50,000/-

2.3. The respondents had also raised counter claims. The Arbitral Tribunal has awarded a sum of Rs.35,000/- towards Earnest Money Deposit and allowed the counter claim of the respondents to the tune of Rs.1,69,213/- towards the penalty for less progress for deed screening.

2.4. The main ground raised by the learned counsel for the petitioner before this Court with regard to the award of the learned arbitrator in claim no.2 and counter claim no.1, in other aspects, there is no challenge. The main contention of the learned counsel for the petitioner that the works could not be executed, as the entire section was handed over for the gauge conversion project. The Arbitral Tribunal having found that a sum of Rs.73,541/- (i.e. 634.30 metres x Rs.115.93 as per the contract rate) payable towards the value of the work and failed to award the same. Similarly, the counter claim has been awarded despite the fact that the respondents did not impose the penalty during the contract period and the counter claim has been raised after 5 years of contract.

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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. Though several claims have been rejected by the learned Arbitrator, the main challenge has been made only with regard to claim no.2 i.e. release of Security Deposit and final bill and also the counter claim no.1. In fact, in claim no.1, the Arbitral Tribunal found that the contract has not been terminated by the respondents during the currency of contract and the respondents had taken an administrative decision not to execute the balance portion of the work due to sanctioning of gauge conversion. Therefore, the Arbitral Tribunal awarded to refund Earnest Money Deposit of Rs.35,000/-. As far as the claim no.2 is concerned, the Arbitral Tribunal having found that the work was not terminated during the currency of contract and an administrative decision was taken not to execute the work and there is no justification in forfeiting the Security Deposit. Since no Security Deposit has been withheld and the Earnest Money Deposit has been awarded in respect of claim no.1 only.

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 the counter filed by the respondents, they admitted that the petitioner has executed deep screening of 634.30m only against the agreement quantity of 31970m. When the above work is calculated at the rate of Rs.115.93 as per the contract rate, the Arbitral Tribunal ought to have been released the award of Rs.73,541/- to the petitioner. Since the Arbitral Tribunal factually found that the contract has not been terminated in the

administrative reasons, the decision was taken not to execute the work. As the administrative decision has been taken during the currency of period not to continue the work, all the works done by the petitioner ought to have been awarded by the Arbitral Tribunal. Hence, this Court is of the view that the rejection of the entire claim under claim no.2 by the Arbitral Tribunal is liable to be set aside and the petitioner is awarded Rs.73,541/- @ 9% interest from the date of receipt of a copy of this order.

8. As far as the counter claim no.1 is concerned, it is admitted fact that no penalty whatsoever imposed during the contract period and for the first time the respondents has raised in its counter claim after the contract period of 5 years. Hence, no penalty whatsoever imposed after the termination period of 5 years and awarding of the amount towards the penalty for less work is liable to be set aside.

9. Accordingly, the counter claim no.1 of the award dated 01.12.2011 made in Letter of Acceptance No:U/W.496/I/20/2003/2L passed by the Arbitral Tribunal, is set aside. Similarly, the claim no.2 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

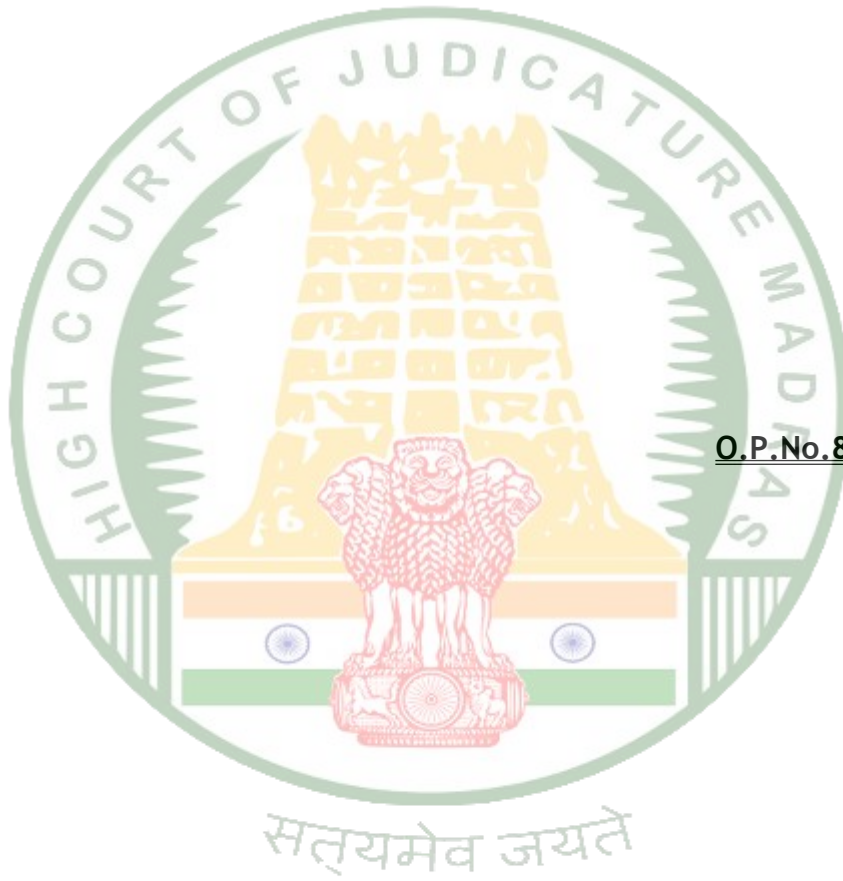
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