

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 13.08.2019

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.P.No.844 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 in the disputes arising out of the Agreement No.MDU/125/2003 dated 01.04.2003 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/125/2003 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 Section for proposed lifting of track and

packing at km.0/905-9/0 between Pollachi and Annamalai Road & Deep Screening the ballast and packing at km.48/0-53/1, Annamalai Road-Palghat Town Section, 103/0-110/0, 124/0-157/6-Udumalaipettai-Pollachi-Podanur Section. Thereafter, the Agreement No.MDU/125/2003 dated 01.04.2003 was entered into between the parties for the value of Rs.50,11,600/- with a period of completion of one year.

2.2. The petitioner has stated that the work of deep screening and packing of track is labour intensive work and he has completed 14kms. He further stated that he could not execute the work as planned due to the militant labour trade unions in Kerala, which had physically chased away all the labour organized by the petitioner. He also stated that 200% of the over and above contract rates for the labour charges were paid to the labour unions, which has resulted in a heavy loss and hence, he has preferred 9 claims on various heads for a sum of Rs.20,50,000/-, 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.1,00,000/-
3	Release of Final Bill	Rs.8,00,000/-
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/-

<i>No.</i>	<i>Description of Claims</i>	<i>Amount</i>
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.20,50,000/-

2.3. The Arbitral Tribunal has allowed the counter claim of the respondents to the tune of Rs.51,439/- towards the penalty for less work done. The main contention with regard to the claim nos.1 to 4 and also as against the counter claim.

2.4. The learned counsel for the petitioner would contend that the Arbitral Tribunal has awarded the forfeiture of both the Earnest Money Deposit of Rs.37,600/- and the Security Deposit of Rs.73,493/- and the Final Bill as per the Railway is Rs.3,41,027/-. The respondents had levied and recovered a penalty of Rs.32,805/- from the petitioner's first part-bill. Hence, the Final Bill for a sum Rs.3,41,027/- is due to the petitioner towards the Final Bill, which was admitted by the respondents in their counter.

2.5. Similarly, in claim no.3, it is admitted by the respondents

that a sum of Rs.3,06,999/- is due to the contractor. The Arbitral Tribunal having found that further work could not be done due to the sanctioning of the gauge conversion, no extra expenditure was incurred by the second respondent. 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 screened 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'.

2.6. 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 respondents did not impose/recover any penalty during the contract period. The respondents has raised its counter claim no.1 after 7 years after the termination of contract i.e. 20.08.2003. 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.

2.7. 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.

2.8. 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.

3. The Arbitral Tribunal having found that a sum of Rs.37,600/- available with the respondents towards Earnest Money Deposit and the same deposited by the petitioner may be forfeited. Admittedly, the Arbitral Tribunal has found that the work could not be done due to the sanctioning of gauge conversion and having found that a sum of Rs.73,493/- available with the respondents towards Security Deposit may be forfeited. In fact, the work could not been done due to sanctioning of gauge conversion, this fact has not been

disputed. As far as the release of final bill is concerned, the Arbitral Tribunal has admitted a sum of Rs.3,41,027/- ought to have been released by the respondents. Hence, the petitioner is entitled for a sum of Rs.4,52,120/- (Rs.37,600/- + Rs.3,41,027/-).

4. 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."

5. 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.

6. Admittedly, in this case, the counter claim has been raised after 7 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 to 4, in fact, when no damage whatsoever imposed to the respondents, the above claims ought not to have been claimed. 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 7 years of the termination of the contract will certainly liable to be interfered.

7. Accordingly, the claim nos.1 to 3 of the award dated 01.12.2011 made in Agreement No.MDU/125/2003 passed by the Arbitral Tribunal, is set aside. Further, claim no.4 is rejected, since the Arbitral Tribunal has found that Rs.32,805/- has been recovered by the respondent as per the condition of the contract, this Court does not find any illegality in the order. Similarly, the counter claim no.1, is set aside. Further, the claim shall carry 9% interest from the date of receipt of a copy of this order.

8. 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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