

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 17.12.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH
AND
THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

O.S.A.No.203 of 2019

S.K.Selvam

...Appellant/Petitioner

vs

Union of India

Rep. by Sr. Divisional Mechanical Engineer,
Mechanical Branch,
Salem Divisional Office,
Southern Railway, Salem - 636 005.

...Respondent/Respondent

Prayer: Appeal filed under Clause 15 of Letters Patent r/w Section 2(1)(c)(xviii) and Order XXXXVI Rule 1 of O.S. Rules, 1956 against the order and decretal order dated 05.12.2018 made in O.P.No.1040 of 2017.

Prayer in O.P.No.1040/2017: Petition to set aside Petition under Section 34 of the Arbitration and Conciliation Act to set aside the arbitral award dated 02.06.2017 made in relation dispute arising out of agreement No. 2/SA/M.271/VII/clg/12764/12650 dated 08.04.2015 in so far the amount of Rs. 3,31,400/- towards claim No. 2 & 3 are concerned.

For Appellant : Mr.V.Subramanian
for Mr.S.P.Yuaraj

For Respondent : Mr.P.T.Ramkumar

JUDGMENT

(Delivered by M.M.SUNDRESH, J.)

This appeal has been preferred by the appellant, who was the Contractor, having entered into an agreement with the respondent on 08.04.2015. The agreement was with respect to the works of "Cleaning and complete Washing including Watering of coaches". The appellant has also deposited Earnest Money Deposit and provided Performance Guarantee. The work could not be continued after the award. Initially, the appellant was permitted to do the work manually without machines. This was the first occasion,

where the machines were sought to be used. There was no clarity with respect to the usage of the machines. Suffice it to say that the appellant was permitted to carry on the work manually.

2. Under those circumstances, the appellant sent a communication stating that he was not informed about the usage of the machines and though he secured them subsequently, there was no measures taken to provide electricity supply. He also further contended that for the work done, no amount has been paid. Accordingly, he informed the respondent that unless those aspects were looked into, he would not be in a position to proceed further. Thereafter, the respondent by invoking the Clause governing termination of agreement, and after issuing notices of 7 days and 48 hours, terminated the contract. The appellant raised the dispute before the learned Arbitrator.

3. The learned Arbitrator found that there are some mistakes on the part of both sides. Insofar as the respondent is concerned, the learned Arbitrator was pleased to hold that no proper supervision has taken place and the appellant was permitted to do the work manually as against mechanized cleaning. Accordingly, a sum of Rs.10,01,479/- has been fixed as against the claim of Rs.19,66,400/-.

4. The learned single Judge, was pleased to allow the petition filed under Section 34 of Arbitration and Conciliation Act,1996 (for short, 'the Act') on the premise that the Clauses governing provide for termination of the contract. As a consequence, the Earnest Money Deposit and Performance Guarantee are liable to be forfeited and invoked. It appears that the appellant has been paid money for the work done. Therefore, the subject matter of the appeal is with respect to a sum of Rs.95,700/- towards the Earnest Money Deposit and Rs.2,35,000/- towards the Performance Guarantee.

5. The learned counsel appearing for the appellant submitted that the learned Single Judge committed an error in going into the merits of the case. Secondly, the error has been committed by merely relying upon the terms of the agreement. What is important is breach of terms of the agreement at the hands of the respondent. This was taken note of by the learned Arbitrator. Thus, there is an error apparent in the order passed by the learned Single Judge under Section 34 of the Act and, therefore, the appeal will have to be allowed.

6. The learned counsel appearing for the respondent submitted that as rightly observed by the learned Single Judge, there is no error in the procedure followed. The learned Arbitrator has committed an error in holding that there is a procedural lacunae. The payment of the bills may not be

construed with respect to the order of termination and withholding of Earnest Money Deposit and invocation of Performance Guarantee. Therefore, the appeal will have to be dismissed.

7. We have perused the award passed by the learned Arbitrator and the order of the learned Single Judge. The learned Arbitrator has considered the facts in detail wherein it was held that the termination order cannot be sustained as the situation would not have arisen but for the lack of supervision on the part of the respondent. Furthermore, the respondent had allowed the appellant to do the work manually without raising any objection. The Supervisory Officers are not trained in the contract management. Thus, there is a failure on the part of the respondent. Even after number of years of coach maintenance, contract training has not been given to the SSEs suitably. It has been further found that the Supervisors available on duty are not coming forward for daily work in the scheduled time. On that basis, the learned Arbitrator came to the conclusion that the termination order and consequential withholding of the Earnest Money Deposit and invocation of Performance Guarantee, cannot be sustained.

8. As stated above, we are concerned with the two payments, namely, the Earnest Money Deposit and the Performance Guarantee. i.e., Rs.95,000/- and Rs.2,35,000/-, respectively. As the learned Arbitrator has given a factual finding, we do not find any perversity in it. This aspect has not been gone into by the learned Single Judge except by holding that the procedure has been followed. Following procedure is one thing and sustaining the termination order with the consequential action is another. As the case involved would not come within the purview of invocation of Section 34 of the Act, we are of the view that the learned Single Judge has wrongly exercised his jurisdiction.

9. In such view of the matter, the order passed by the learned Single Judge stands set aside and the award of the learned Arbitrator stands restored and the appeal stands allowed. No costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

ssm

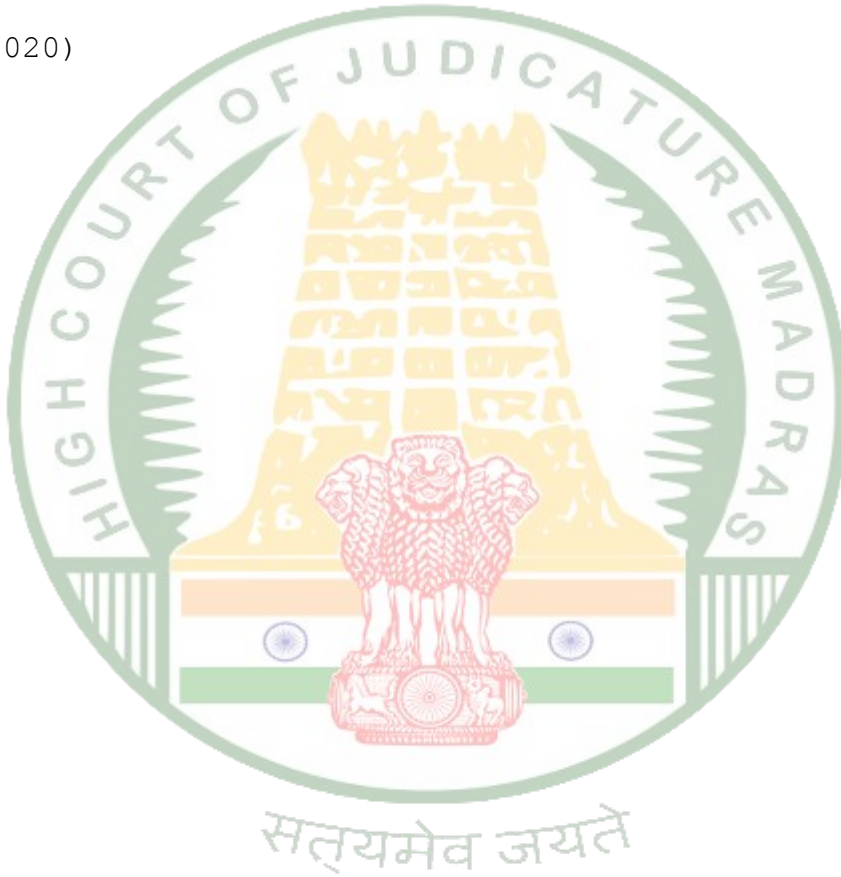
To

The Sub Assistant Registrar
Original Side,
High Court, Madras.

+1 CC to Mr.S.P. Yuvaraj, Advocate sr 104998
+1 CC to M/s.P.T. Ramkumar, Advocate sr 105562.

O.S.A.No.203 of 2019

CNR(CO)
SP(09/12/2020)



WEB COPY