

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.01.2019

CORAM:
THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

Original Petition No.710 of 2017

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1. The Union of India,
rep. by the General Manager,
South Western Railway,
Club Road, Hubli,
Successor of the GM,
Southern Railway,
Chennai.
2. The Chief Administrative Officer (Construction),
South Western Railway,
Construction Branch,
No.18, Millers Road,
Cantonment, Bangalore. ... Petitioners
- Vs.
1. A.Chockalingam,
rep. By Power Agent, Soundararajan
2. Justice K.P.Sivasubramaniam (Retd.),
No.46, Pulla Avenue, Shenoy Nagar, Chennai 600 030. ... Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 19.07.2016 passed by the Sole Arbitrator in relation to Agreement No.77/CE/GC/BNC/93-94, dated 14.07.1993.

For Petitioners : Mr.C.V.Ramachandramurthy

For 1st Respondent : Mr.Amalaraj S.Penikilapatti

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ORDER

This Petition has been filed seeking to set aside the Award dated 19.07.2016 passed by the Sole Arbitrator in relation to Agreement No.77/CE/GC/BNC/93-94, dated 14.07.1993.

2. The Claimant before the Arbitrator is the 1st Respondent herein. It is the case of the 1st Respondent/Claimant that he was awarded the contract work relating to Yeshwantpur - Ariskikera conversion of MG to BG, proposed strengthening/reconstruction/widening of existing bridges and culverts, both major and minor, starting from Bridge No.214 to 192.D (excluding 197 and 188) in Mysore Division.

3. It is further stated by the 1st Respondent/Claimant that in the course of execution of the work, Petitioners/Southern Railways committed serious breaches resulting in heavy loss to him and hence, he was constrained to demand damages from the Petitioners/Southern Railways, which were in vain. Hence, the 1st Respondent/Claimant filed O.P.No.911 of 2010 under Section 11 of the Arbitration and Conciliation Act, 1996. Due to the inaction of the Arbitrators subsequent to the order dated 26.08.2004 passed by this Court, the 1st Respondent/Claimant was constrained to request the Petitioners/Southern Railways to ensure commencement of the Arbitral proceedings. Since the

former Arbitrators failed and neglected to enter into reference, the 1st Respondent/Claimant filed O.P.No.827 of 2007, which has resulted in the present Arbitral proceedings. Before the Arbitrator, the 1st Respondent/Claimant raised a claim for a sum of Rs.13,52,735/- under different heads.

4. The stand taken by the Petitioners/Southern Railways before the Arbitrator is that, the value of the work awarded to the 1st Respondent/Claimant was Rs.45,60,940/- with a completion period of 8 months from the date of issuance of Acceptance letter. During the said period, the value of the total work executed by the 1st Respondent/Claimant was Rs.8,04,570/-.

5. According to the Petitioners/Southern Railways, the work performance of the 1st Respondent/Claimant was very bad and part of the work was handed over to the other Contractors to ensure completion of work. The 1st Respondent/Claimant completed the work on 15.09.1993 and the final Bill after measurement was signed by him without any protest on 27.10.1995 and he also submitted a 'No Claim Certificate'. After a period of four years, the 1st Respondent/Claimant raised certain claims on 24.12.1999, for the first time.

6. On the side of the 1st Respondent/Claimant, Exhibits C1 to C26 were marked and C.W.1, who is the son-in-law of the 1st Respondent/Claimant, who is also a Power of Attorney for the Claimant, was examined. On behalf of the Petitioners/Southern Railways, Exhibits R1 to R14 were marked and no oral evidence was tendered.

7. Taking into account the entire oral and documentary evidence and on consideration of the facts and circumstances of the case, the Arbitrator awarded a total sum of Rs.11,97,735/-, which is inclusive of interest at 18% per annum and costs.

8. Learned counsel for the Petitioners/Southern Railways contended that oral and documentary evidence on the side of the 1st Respondent/Claimant has been wrongly interpreted and that while deciding the point of limitation, the Arbitrator did not take into account the fact that the final bill was signed by the 1st Respondent/Claimant without any protest on 27.10.1995 and that he also submitted a 'No Claim Certificate'. But, the Arbitrator decided the issue on the basis of Ex.C-26, Letter of the Presiding Arbitrator to the Chief Engineer of the Southern Railways, dated 18.04.2005, which, as an afterthought, was relied upon by the 1st Respondent/Claimant, only at the time of arguments and it does not say that limitation was extended from the year 2003 and it also does not

indicate as to when the Security Deposit was adjusted. It is his further contention that the 1st Respondent/Claimant is not entitled to any relief due to non-performance of the contract in its entirety and as no contract was in existence on the date of initiation of Arbitration proceedings.

9. In support of his stand, learned counsel for the Petitioners/Southern Railways relied on a decision rendered by the Apex Court in the case of **ONGC Mangalore Petrochemicals Limited vs. ANS Constructions Limited**, reported in (2018) 3 SCC 373, wherein, it is held that when the contractee accepted the final payment in full and final satisfaction of all its claims, there was no point in raising the claim for losses incurred during the execution of the contract at a belated stage. For better appreciation, relevant portion of the said decision is extracted hereunder:

“31. Admittedly, no-dues Certificate was submitted by the contractee Company on 21.09.2012 and on their request, Completion Certificate was issued by the appellant contractor. The contractee, after a gap of one month, that is, on 24.10.2012, withdrew the no-dues certificate on the grounds of coercion and duress and the claim for losses incurred during execution of the contract site was made vide letter dated 12.01.2013, i.e. after a gap of 3 ½ (three-and-a-half) months, whereas the final bill was settled on 10.10.2012. When the contractee accepted the final payment in full and final satisfaction of

all its claims, there is no point in raising the claim for losses incurred during the execution of the contract at a belated stage which creates an iota of doubt as to why such claim was not settled at the time of submitting final bills that too in the absence of exercising duress or coercion on the contractee by the appellant contractor. In our considered view, the plea raised by the contractee company is bereft of any details and particulars, and cannot be anything but a bald assertion. In the circumstances, there was full and final settlement of the claim and there was really accord and satisfaction and in our view, no arbitrable dispute existed so as to exercise power under Section 11 of the Act. The High Court was not, therefore, justified in exercising power under Section 11 of the Act.”

10. Learned counsel for the Petitioners/Railways relied on yet another decision of the Apex Court in the case of **Union of India vs. Onkar Nath Bhalla and Sons**, reported in (2009) 7 SCC 350, whereby, the Appeal was allowed, taking note of the fact that the Appellants/Union of India have made the full and final payment of the final bill, to which the Respondent/Contractor had certified by signing the Bill without any protest or reservation. For better appreciation, relevant paragraphs are extracted hereunder:

“8. In the present case, the appellants made the full and final payment of the final bill and to which the

respondent certified by signing the bill without any protest or reservation. The respondent with the intention of receiving further payments, after two years, raised yet another claim and tried to bring up a dispute. And when the claim was denied by the appellants, the respondent requested to appoint an Arbitrator.

9. Condition 65 of the General Conditions of Contract (IAFW 2249) states that no further claim shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Also, Condition 70 states that, all disputes between the parties to the contract shall after written notice by either party to the contract, be referred to the sole arbitration of a serving officer having degree in Engineering or equivalent.”

11. In reply, learned counsel appearing for the 1st Respondent/Claimant submitted that without calling for tender, the 1st Respondent/Claimant was awarded the contract on 03.03.1993, based on his integrity. He further submitted that the total value of the contract was over Rs.45,00,000/- and it is no doubt true that the 1st Respondent/Claimant has executed the work only to the tune of Rs.8,50,000/-, which is not due to his fault. The Petitioners/Southern Railways, without allotting the main work, for which the 1st Respondent/Claimant has been engaged, had asked him to proceed with other works and ultimately, the 1st Respondent/Claimant could not go through the work that has been allotted to him, which is due to the failure on

the part of the Petitioners/Southern Railways in not providing the required 'Drawings' for the Major Bridge No.194. Taking note of the same, the Arbitrator has rendered a finding in favour of the 1st Respondent/Claimant, which, according to the learned counsel, cannot be found fault with.

12. According to the learned counsel for the 1st Respondent/Claimant, the 1st Respondent/Claimant has executed the remaining work in spite of his severe losses, i.e. loss of profit, irrecoverable advance paid to suppliers, loss due to idling and underutilisation of labour and machinery, etc. He further stated that the Arbitrator has considered the question of limitation and other issues more particularly taking into account Ex.C-26 and rendered a detailed finding that there was no delay at all. The 1st Respondent/Claimant had approached this Court by filing O.P.No.911 of 2000 and O.P.No.827 of 2007, for the purpose of appointment of an Arbitrator and that the Award of the Arbitrator is based not only on the materials on record, but also on the finding of fact, after taking into account the evidence let in before him. Hence, the learned counsel submitted that the Arbitral Award need not be interfered with.

13. Heard the learned counsel on either side and perused the material documents available on record.

14. It is not in dispute that contract has been awarded to the 1st

Respondent/Claimant without calling for any tender. Admittedly, the 1st Respondent/Claimant has executed certain works for the Petitioners/Southern Railways and non-completion of the entire work is not due to the fault of the 1st Respondent/Claimant, as, the Petitioners/Southern Railways did not provide him the required Drawings for the Major Bridge No.194. That apart, the main issue with regard to the delay in approaching the Arbitrator has been dealt with by the Arbitrator/2nd Respondent herein, in the Award under challenge and taking note of Ex.C-26 marked by the 1st Respondent/Claimant, the Arbitrator has come to the conclusion that there is no delay at all.

15. The reason assigned by the learned Arbitrator is a finding of fact and a detailed reasoning has been given in the Award as to how the proceedings initiated by the 1st Respondent/Claimant is well within time. Also, the decisions relied on by the learned counsel for the Petitioners/Southern Railways, as cited supra, cannot be disputed at all. But, the said decisions will not be applicable to the case on hand.

16. In the decision rendered by the Apex Court in the case of **ONGC Mangalore Petrochemicals Limited** (cited supra), no-dues Certificate was submitted by the Contractee Company on 21.09.2012 and on their request, Completion Certificate was issued by the Appellant-Contractor. The

Contractee, after a gap of one month, that is, on 24.10.2012, withdrew the no-dues certificate on the grounds of coercion and duress and the claim for losses incurred during execution of the contract site was made vide letter dated 12.01.2013, i.e. after a gap of 3 ½ (three-and-a-half) months, whereas the final bill was settled on 10.10.2012. But, the Apex Court did not accept the contention of the Contractee therein and held that there is no point in raising the claim for losses incurred during the execution of the contract at a belated stage. In the case on hand, the 1st Respondent/Claimant has signed the 'No Dues Certificate', reserving his right to dispute the act of the Petitioners/Southern Railways.

17. As regards *placing reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed*, the Apex Court in the case of **Padma Sundara Rao Vs. State of Tamil Nadu**, reported in **2002 (3) SCC 533**, has held as under:

"9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington Vs. British*

Railways Board (1972 (2) WLR 537 = 1972 AC 877 (HL)).
Circumstantial flexibility, one additional or different fact
may make a world of difference between conclusions in two
cases."

18. Even the slightest fact would make a difference and the decisions of the Apex Court relied on in the case on hand cannot be taken as a precedent. Hence, I am of the view that the decisions quoted by the learned counsel for the Petitioners/Southern Railways are not applicable to the facts of this case.

19. The contention of the Petitioners/Southern Railways with regard to determination of contract, which, according to them, is a matter of right and that the entire issue has to be decided in terms of clause 61 of the General Conditions of Contract, cannot be accepted.

20. At this juncture, it is worth referring to the Apex Court decision in the case of **W.M.Agnani vs. Badri Das** reported in (1963) 1 LLJ 684, wherein, the Industrial Tribunal put one interpretation upon the resolution of the Management and the High Court thought it better to put another. The Apex Court held that it cannot be said to introduce an error apparent on the face of the record in the order of the Industrial Tribunal and it can be said that the view taken by the Tribunal is not even reasonably possible, perhaps an argument

can be urged that the error is apparent on the face of the record. In the said case, the High Court exceeded in its writ jurisdiction in interfering with the finding of the Industrial Tribunal based on the construction put by it upon the resolution of the Management.

21. Since the Arbitral Award is a finding of fact and there is no error apparent on the face of record, the Petitioners/Southern Railways cannot try to draw a different analogy to the facts of this case, as the same is not permissible in terms of Section 34 of the Arbitration and Conciliation Act, 1996.

In view of the above, this Court finds no merits in the Original Petition and the same is dismissed. No costs.

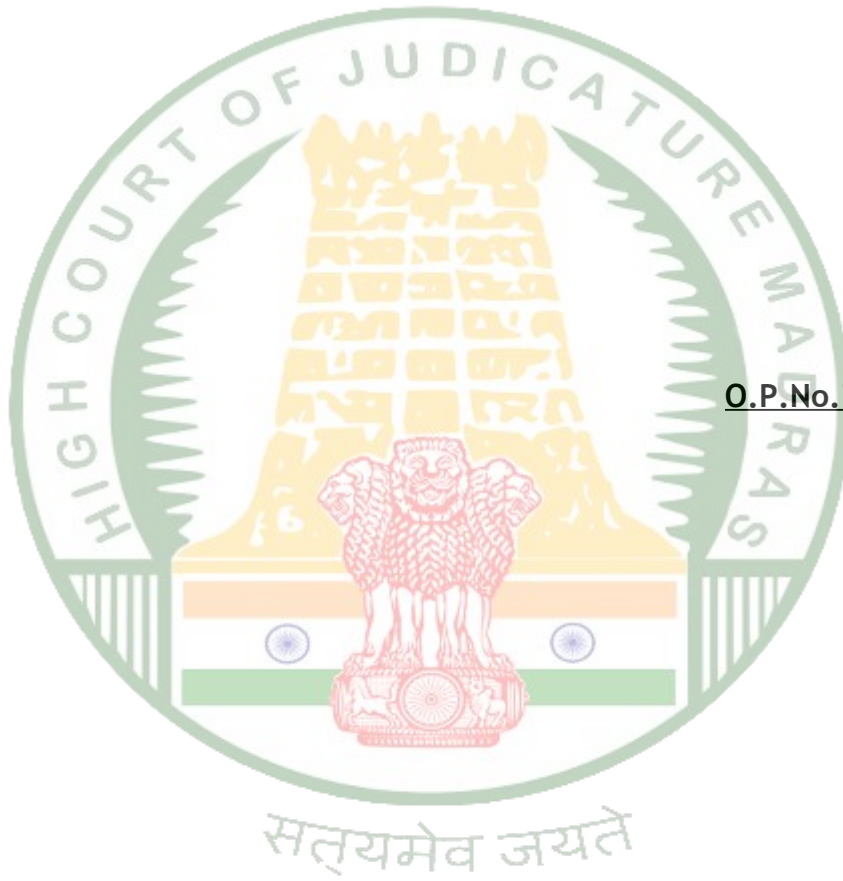
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S.VAIDYANATHAN,J.

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O.P.No.710 of 2017

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