

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION PETITION NO. 820 OF 2018****ALONGWITH****NOTICE OF MOTION NO. 2381 OF 2018**

Union of India

... Petitioner

V/s.

Tankrete India Ltd.

...Respondent

Mr. T. J. Pandian for Petitioner.

Ms. Kainaz Irani i/b Mohanty and Associates for Respondent.

CORAM : K.R.SHRIRAM, J.**DATED : 15th FEBRUARY 2021.****P.C. :**

1. Heard Mr. Pandian and Ms. Irani and also consider the award impugned and the documents relied upon by petitioner at Exh.B to the petition.

2. Petitioner is the Union of India through Deputy Chief Engineer (TS) Western Railway, Churchgate, Mumbai – 400 020. Petitioner had issued a work order dated 9th March, 2000 under which respondent was to manufacture, supply and stack 160 mm thick shallow PSC Sleepers to RDSO Drawing No.T-4852 for broad gauge. Respondent was to supply 55,000 Nos. of these Sleepers at Rs.332/- per Sleeper. Petitioner was to supply SGCI Inserts and HTS Wires. Schedule of supply was also provided for and

respondent performed its obligations under the contract. Dispute arose between them and respondent gave notice of arbitration. The General Manager, Western Railway appointed Sole Arbitrator whose award is impugned in this petition. Respondent lodged 12 heads of claim as under :

Claim No.	Particulars of Claim	Amount Claimed
1.	Payment of cost difference on purchase of inserts	Rs.1,99,456/-
2.	Interest on cost of Inserts purchased	Rs.1,65,600/-
3.	Extra cost of Polymer compound	Rs.12,99,437.57
4.	Additional cost of Transportation	Rs.31,59,200/-
5.	Mumbai division rates (Difference of rates)	Rs.31,60,000/-
6.	Extra expenses on Bank Guarantee	Rs.63,000/-
7.	Under utilization of over heads	Rs.1,52,76,762/-
8.	Under utilization of Machinery	Rs.2,03,69,030/-
9.	Under utilization of labour force	Rs.1,52,76,762/-
10.	Loss of business opportunities	Rs.1,01,84,495/-
11.	Interest	Rs.24% per annum on above claimed amounts from dates of receipt of claims letter to date of release/decreed whichever is earlier.
12.	Cost of Litigation	Rs.50,000/-

3. The arbitrator after hearing parties has published an award dated 27th February, 2018 under which he has partly allowed Claim No.1 and Claim No.4. For Claim No.1, the arbitrator has awarded Rs.97,428/- against claim of Rs.1,99,456/-. For Claim No.4, the arbitrator has awarded Rs.6,31,361.50 against claim of Rs.31,59,200/-. Rest of the claims have

been rejected. Respondent has accepted the award but petitioner is unhappy with the Claim No.1 and Claim No.4 being partially allowed.

4. Claim No.1 is payment of cost difference on purchase of SGCI-MCI Inserts. As per the agreement, petitioner was to supply these inserts free of cost to respondent. Petitioner, however, did not supply and therefore they have breached the contract. To complete the work under contract, respondent brought the same from open market and the cost was intimated to petitioner by claimant from time to time. Petitioner paid respondent lesser than the rate at which respondent had purchased from the market. Respondent therefore claimed a sum of Rs.1,99,456/- which was modified to Rs.1,19,653/-. According to petitioner, respondent was supposed to purchase these inserts from approved sources and therefore respondent was only entitled to payment as per the rate fixed by the railway board.

5. The arbitrator after considering the correspondence has come to a conclusion that petitioner was guilty of short supply of Inserts during March 2000 which led respondent to procure this from market to maintain continuity of production of PSC Shallow Sleepers and supply. Therefore, if respondent had waited for petitioner to supply these Inserts it would have stopped production and led to idling of resources. Moreover, the arbitrator has concluded that rates had been approved by petitioner for bulk quantity whereas respondent had procured on piecemeal basis and hence there will be rate difference. Nothing prevented petitioner from procuring it from its

source and supplying it to respondent. Nothing prevented petitioner from directing its sources to supply the material to respondent at the rates approved by railway board and instruct those suppliers to raise the invoice on petitioner but supply these Inserts to respondent.

6. Petitioner could have make these arrangements, but due to their breach respondent was compelled to purchase it from market on piecemeal basis at a higher rates. Considering these facts and circumstances, the arbitrator rightly came to a conclusion that claim of respondent was justified and awarded Rs.97, 428/-.

7. As regards Claim No.4 under the contract respondent was required to deliver Sleepers at Bhayander depot. According to respondent for reasons attributed to petitioner, they had to deliver the Sleepers at Jogeshwari depot which was almost 25 kms., farther from Bhayander. Respondent has therefore claimed a sum of Rs.31,59,200/- as additional cost of transportation. It is petitioner's case and as can be seen from Exh.B-2 annexed to the petition (5 letters exchanged between petitioner and respondent), respondent has agreed not to claim any extra freight charges for this additional transportation and also had agreed not to raise any disputes for the extra cost of freight charges. Three out of these five communications which form part of Exh.B-2 are from respondent to petitioner whereby respondent has agreed to supply at Jogeshwari depot instead of Bhayander depot and not claim any extra freight charges or raise

any dispute for the cost of freight charges.

Despite this, the arbitrator has allowed part of the claim as per the calculation given in the award and has granted a sum of Rs.6,31,361.50/-. The reason given by the arbitrator in his conclusion is as per the contract the Sleepers were to be delivered and stacked at Bhayander but due to certain problems at Bhayander and it is not clear what are these problems, Sleepers had been transported to Jogeshwari by respondent instead of Bhayander. The arbitrator has concluded that there were partial breach of contract by petitioner in failing to provide clear space at Bhayander. The arbitrator has also quite justifiably felt as to why would respondent incur extra expenditure on its own to transport longer distance upto Jogeshwari when he was required to deliver Sleepers at Bhayander. The arbitrator, therefore, accepted respondent's statement that respondent was forced to deliver at Jogeshwari because respondent had no option but to mitigate its loss. But the arbitrator has totally ignored the five letters at Exh.B-2 to the petition and has not dealt with the undertaking by respondent not to claim any extra or additional transportation cost and not to raise this claim subsequently. The arbitrator has also not given importance to the fact that claim was lodged for additional transportation two years after completion of contract notwithstanding a very clear undertaking to not claim any extra freight charges or raise any dispute for the cost of additional freight charges. To that extent in my prima facie view, the grievance of petitioner cannot be brushed aside. Therefore, petition is admitted.

8. Affidavit in reply to be filed within two weeks from today.
9. Rejoinder, if any, within two weeks thereafter.
10. Within three weeks from today parties to file their respective compilations. So also the arbitrator.
11. To the extent of excess of Claim No.4, the award is stayed. Since the Claim No.1 amount is not much, it is also made clear that Claim No.1 shall be paid by petitioner to respondent within four weeks from today. If this amount is not paid, petition will stand dismissed without further reference to this court.
12. Notice of Motion No.2381 of 2018 stands disposed.
13. Petition be listed for final hearing on 5th April, 2021.

(K.R. SHRIRAM, J.)