IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 14TH DAY OF SEPTEMBER 2021

THE HON'BLE MR. JUSTICE N. SATHISH KUMAR

O.P. No.415 of 2021

in

A.No. 1946 of 2021

In the matter of Arbitration and Conciliation Act, 1996
AND
n the matter of Arbitration Agreement between Integral Coach Factory and Indian Institute of Technology Madras and in the matter of award dated 04.12.2020.

Integral Coach Factory, represented by
The General Manager,
Indian Railways,
Integral Coach Factory
Chennai 600 038.

. . . Petitioner

Versus

The Indian Institute of Technology Madras
represented by
Professor Ashok Jhunjhunwala,
Institute Professor, Department of Electrical Engineering,
IIT Madras, Chennai 600 036. . . . Respondent

O.P. No.415 of 2021

Original Petition praying that this Hon'ble Court be pleased to to set aside the Arbitration award dated 4th December 2020 made in respect of LOA No:MD/DSS/SPIC/US/109 B dated 07.01.2019 on the file of the Arbitral Tribunal by allowing this petition.

A. No.1946 of 2021

Application praying that this Hon'ble Court be pleased to Stay Arbitration award dated 4th December 2020 made in respect of LOA No:MD/DSS/SPIC/US/109 B dated 07.01.2019 on the file of the Arbitral Tribunal by allowing this petition.

This Original Petition alongwith application coming on this day before this court for hearing in the presence of Mr.M.T. Arunan assisted by Mr.M.A.Aruneshe and Ms.R.Nandhini Advocates for the petitioner/applicant herein and Mr.V.Prakash Senior Counsel for Mr.C. Seethaparthy, advocates for the respondent herein and upon reading the petition and the Award dated 04/12/2020 filed in O.P.No. 415 of 2021 and the judges summons and the affidavit of P.K.A NazeerIqbal filed in A.No. 1946 of 2021 and this court having observed that the Learned Arbitrator has considered the factual aspects and entire findings are based on the appreciation of evidence. accordingly, this court cannot re-appreciate the entire evidence, hence, even on merits which was recorded on the basis of the factual findings, this court did not find any infirmities and any of the

grounds, made out under section 34 of the act to interfere the well reasoned award passed by the Learned Arbitrator and **it is ordered as follows:-**

That the O.P. No. 415 of 2021 be and is hereby dismissed.

2. That there shall be no costs of this petition.

3. That the A.No. 1946 of 2021 do stand closed.

WITNESS, THE HON'BLE MR.JUSTICE SANJIB BANERJEE, CHIEF JUSTICE, HIGH COURT OF MADRAS AFORESAID, THIS THE 14TH DAY OF SEPTEMBER 2021.

Sd/-
ASSISTANT REGISTRAR (O.S.II)

//Certified to be true copy//
Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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NS
21.10.2021

O.P. No.415 of 2021

in

A.No. 1946 of 2021

ORDER
DATED 14/09/2021

THE HON'BLE MR. JUSTICE
N. SATHISH KUMAR

FOR APPROVAL: 28/10/2021

APPROVED ON:28/10/2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 14.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P No. 415 of 2021
and A.No.1946 of 2021

Integral Coach Factory, rep by
The General Manager,
Indian Railways,
Integral Coach Factory
Chennai 600 038. . . . Petitioner

Versus

The Indian Institute of Technology Madras
Rep by Professor Ashok Jhunjhunwala,
Institute Professor,
Department of Electrical Engineering,
IIT Madras, Chennai 600 036. . . . Respondent

PRAYER : Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitration award dated 4th December 2020 made in respect of LOA No:MD/DSS/SPIC/US/109 B dated 07.01.2019 on the file of the Arbitral Tribunal by allowing this petition.

For Petitioner : Mr.T. Arunan
Asst by Mr.M.A.Aruneshe and
Ms. R. Nandhini

For Respondent : Mr. V. Prakash
Senior Counsel for
Mr. C. Seethapathy

ORDER

This original petition has been filed to challenge the award made in respect of LOA No.MD/DSS/SPIC/US/109 B dated 07.01.2019 passed by the Arbitral Tribunal.

2. For the sake of convenience, the parties are referred to by the rank in the Arbitral proceedings.

3. The brief facts leading to the filing of this original petition is as follows:

(i). The Petitioner had decided to manufacture a Self-propelled Inspection Car (SPIC) and was desirous of converting its Diesel Alternator Set into an electrically driven vehicle with battery which is energy sufficient. Whereas a Single Tender was issued to the Claimant on 27.11.2018 for design, development and supply of one set of Smart Energy Storage System (SESS) consisting of Lithium-ion battery.

(ii). As per Clause 2(iv) of the Letter of acceptance (in short 'LOA'), it was set out that the claimant would supply the first prototype within a period of four(4) months from the date of Formal Agreement. Letter of acceptance dated 07.01.2019 was signed by both parties and the total value of the contract was fixed for a sum of Rs.2,95,00,000/- (Rupees Two Crores Ninety Five Lakhs Only). As the Respondent insisted for Bank

guarantee before releasing the advance amount, dispute arouse between the parties. Thereafter, the dispute has been referred to the Arbitral Tribunal and the claimant has raised the following claim:

Sl.No	Head of Losses/Damages	Claim Amount
1.	Reimbursement of expenditures incurred for the project	*Rs.1,55,20,189/- plus interest at 14% p.a. And GST as applicable.
2.	Over heads incurred for the project and facility	Rs.59,20,554/-
3.	Damages towards loss of profits at 20% of the project cost.	Rs.50,00,000/-
	TOTAL	**Rs.2,64,40,743/-**

*The Claimant has given the breakup for Rs.1,28,71,416/- only vide Annexure 14 against the claim no: 1 amount of Rs.1,55,20,189/-.

4. It is the contention of the learned counsel for the petitioner that the claimant had conducted several inspection and studies at the site and submitted Preliminary Report to the ICF and they have also performed a part of obligation as per LOA and they have also started to spend huge sums of money towards the above project. Hence, they made a claim as stated above and the respondent has not understood how the claimant has entered into the financial commitments without formal LOA.

5. On 04.03.2019, the Claimant signed the Formal Agreement, with all terms and conditions. There is reference of GCC-2018 in the agreement, signed by the Claimant. The Claimant has claimed that it has hired people, started to work on prototype without any formal agreement, advance as per LOA, specification of interface of motor from ICF.

Therefore, it is difficult to relate that prototype built by the Claimant is for ICF SPIC project. ICF cannot be held for any expenditure made by IIT-Madras on account of their poor planing and continuing expenditure beyond 07.05.2019, without even seeking extension to the date of completion of the work.

6. It is the contention of the learned counsel for the respondent that the Claimant has not sought any advance by way of formal letter for making expenditure. He further contented that within a period of four months as agreed in LOA entered into between the parties, first prototype has not been completed and expenses of other ongoing projects have also been shown in this project and a rejoinder was also filed by the claimant.

7. The learned Arbitrator after hearing the parties passed an award as follows:-

> " *15.0: Discussion of Claims:*
>
> *15.1: Claim No 1- Reimbursement of Expenditures incurred for the project:*
>
> *The Claimant has requested for the claim of Rs. 1,55,20,189/-(revised to Rs.1,56,65,091/- after first hearing on 17.11.2020 which includes Rs.27,93,675/- towards annual rent and maintenance expenses of IITM Research Park) along with interest at 14% per annum from the date*

of invoice plus GST. The details of Claims at Annexure 14(Colly) are as given below:

(A) Rs.1,28,71,416 having component of (i) Rs.62,37,880 towards Development staff salary (ii) Cell testing staff salary Rs.1182,257 (iii)Lab setting up Cost(interior work etc) Rs.29,21,584 (iv) Supply and installation of Crane Rs.9,24,000 and (v) Prototype battery for testing Rs.16,05,695. The Claimant vide letter dated 20.11.2020 clarified that the balance amount of Rs.27,93,675 was spent towards annual rent and maintenance charges for research park hired by them (Total Claim amount works out to Rs.1,56,65,091/- as against a total amount of Rs.1,55,20,189/- claimed by them earlier).

(B) Cost of overheads including efforts and time cost of senior faculty and senior staff – Rs.59,20,554/-, This claim includes Rs. 29,20,554/- towards lab rent expenses and maintenance charges which was already included in Claim No.1 @Rs.27,93,675 as shown in 15.1(A) above. The remaining amount of Rs. 30,00,000 is claimed towards efforts and the time of senior faculty and senior staff.

(C). Damage towards loss of profit, amounting to Rs.50,00,000/-.

15.1(A)(iii & iv): The Cost of interior work at Rs.

29,21,584 was ordered on 24/01/2019 (CD-52), and expenditure for supply and installation of 2-ton crane was ordered vide Procurement order dated 18.06.2019 (CD-53). There was no mention about these assets in the LOA and these would have been acquired by IITM for their internal use on various projects, which could have been redeployed for other uses and hence cannot be considered exclusively for the ICF project. Therefore, these two claims are not tenable.

15.1(A)(v): From the details given in CD-50, it is seen that Purchase Orders of Cells and other supplies are of 2018. So, these supplies must have been ordered for other projects and might have been used temporarily for the proposed work. In any case, material still remains with the Claimant. These cells were ordered much before the ICF project was envisaged, could have been redeployed for other uses and cannot be considered purchased for the ICF project. Hence, the claim of Rs.16,05,695 for prototype battery for testing is also not tenable.

15.1(A)(i & ii): Cost of 12 staff deployed for development is Rs.62,37,880. Eleven staff were deployed for 12 months and one staff at SN 12 was deployed for four months . In the testing team, total 8 staff were deployed, out of which 5 staff were deployed for six months, 1 staff for 9 months, 2 staff for 3 months each with expenditure for Rs. 11,82,257.

Completion period mutually agreed by both the parties for supply of prototype battery is only four months. The Claimant has not formally requested for any extension of completion period. The project has got delayed for some reason or other due to failures of both the parties. The Claimant also indicated that for some time staff was not utilized optimally for the proposed work and therefore it will be in natural justice to charge part of expenditure on staff to his work and balance may be charged to other projects in progress.

Considering the mutually agreed project completion period of four months and Claimant proceeding with the work pending receipt of formal agreement and advance payment in anticipation of payment of due funds from the Respondent, they are to be compensated for the actual money spent on the ICF project. Therefore, the AT feels it prudent to award four months salaries for 12 development staff and 8 testing staff to meet the end of justice. It works out to 4/12 x *59,97,060 (for 11 staff) + Rs.2,40,820 (for 1 staff)= Rs.22,39,840 for 12 development staff and 4/6 X 7,69,150 (for 5 staff)+ 4/9 X 2,35,845 (for 1 staff)+ Rs.90,615(for 1 staff +66,647(for 1 staff)=Rs.7,74,849 for 8 testing staff totalling to Rs.30,14,689. Interest is not admissible during the currency of contract and during the dispute period as per GCC. However, GST will be payable* *on this awarded amount.*

Therefore, an amount of Rs.30,14,689 + GST is awarded against Claim No.1

15.2: Claim Number 2: Overheads incurred for the Project and the facility Rs.59,20,554:

The Claimant has claimed a sum of Rs.30,00,000 towards efforts and time of senior faculty and senior staff and Rs.29,20,554 towards lab rent expenses, lab maintenance charges and other overhead costs. There is no doubt that senior faculty of IIT/Madras must have spent time and energy for the above project and are entitled for remuneration for 4 months work which is 4/12 X 30,00,000=Rs.10,00,000+ GST. However, interest is not payable during the currency of contract and dispute period as per GCC governing the said contract.

Therefore, an amount of Rs.10,00,000 + GST is awarded against Claim Number 2.

15.3: Damages toward loss of Profits – Rs.50,00,000

Since there were failures of both the parties, no amount is awarded against this claim.

Therefore, Nil amount is awarded against Claim number 3.

15.4: The Claimant has requested for an amount of Rs.27,93,675/- out of Claim no 1 amount of Rs. 1,56,65,091/- and an amount of Rs. 29,20,554/- out of

Claim No 2 amount of Rs. 59,20,554/- towards annual rent, maintenance charges, electricity and AC expenses for new CBEEV facility hired at IITM Research Park. Two different amounts were claimed for the same item in Claim No.1 & Claim No.2. This item was not covered under LOA and may be the internal facility developed by IITM for their projects including the present one. Therefore, the AT is of the opinion that the Claim against this item is not tenable and hence no amount is awarded against this item."

8. The only plank of attack to the Arbitral award is that there is no formal agreement signed between the parties. In other words, though the main contention that LOA does not contain any clause for referring the matter to arbitration. Therefore, without their being any Formal Agreement signed by the parties, there will not be any reference to arbitration. The learned Arbitrator should not have been passed an award without an agreement, whereas, the learned Senior Counsel for the respondent would submit that the very LOA itself clearly indicates that till Formal Agreement entered between the parties, LOA shall be treated as an agreement and the same also provides for dispute resolution for referring the dispute to arbitration. Therefore, it cannot be said that there is no contract at all. The learned Arbitrator has factually considered all the evidence and materials and found that the workers have been deputed specifically for this

project. When the Arbitrator has given such a finding and considered the factual aspects and documents, this Court while exercising jurisdiction under Section 34 cannot re-appreciate the entire evidence.

9. It is well settled that a challenge to any arbitral award can be by way of an application under Section 34 of the Act on the grounds mentioned under Section 34(2) and Section 34(2-A).

An arbitral award can be set aside only on the following limited grounds:-

i) *incapacity of the party*;

ii) *invalidity of the arbitration agreement*

iii) *absence of proper notice for appointment of arbitrator*

iv) *non- arbitrability of disputes*;

v) *composition of arbitral tribunal not being in accordance with the agreement*;

vi)subject-matter not capable of being settled by way of arbitration;

vii) award is in conflict with the public policy of India;

viii) award is vitiated by patient illegality.

10. Only on those grounds, an Arbitral award can be interfered with under Section 34 of the Act. The dispute has been raised by the Claimant when the Respondent has agreed for the Arbitration. Now, the dispute has been triggered on the basis of the LOA dated 07.01.2019.

Clause 6 of the LOA states as follows:-

" In addition, a Formal Agreement shall be entered into between IIT Madras and ICF with all the terms and conditions defined. This shall be preferably concluded (sic) within 15days from LOA. Once accepted LOA is received, ICF will issue the draft agreement to IITM. Till the formal agreement is entered into, this LOA will act as a Contract Agreement between IIT Madras and ICF, Chennai."

The above clause makes it very clear that in addition to the condition set out in the LOA, a Formal Agreement sought to be entered between parties. However, the same has not been materialised.

11. Clause 6 of LOA further indicates that till Formal Agreement is entered between the parties, LOA will act as a Contract Agreement between parties. Therefore, the very contention of the learned counsel for the petitioner that there is no agreement between parties and there is no Formal Contract entered between the parties cannot be countenanced.

12. It is to be noted that when the dispute is raised, the Petitioner

herein has agreed for reference to Arbitration. In such view of the matter, when the parties themselves agreed for referring the matter to Arbitration by way of correspondence, such correspondence itself could be construed as the contract governing the parties to refer the dispute for Arbitration. Therefore, the very contention of the Learned Counsel of the petitioner that there is no agreement between parties to refer the dispute to arbitration has no legs to stand.

13. Though various claims have been made for purchase of battery and investing infrastructure etc, the learned Arbitrator has factually considered all the evidence on record and finally, granted award only towards the salary of the staffs deputed for the special project envisaged under LOA. It is also to be noted that in para 11.6 and 11.7 of the award, it is held as follows:

> *" 11.6. There was an approved LOA and therefore the Claimant went ahead, whatever it could do, so that the first prototype could be completed at the earliest, after receiving advance and finalization of specification, and considering that both Parties are Government entities. In fact, Prof Ashok Jhunjhunwala had served as a Principal Advisor to Honorable Minister of Railways, Shri Piyush Goyal, till August 2019 and had loyalty to Railways. This was another reason to take extra effort to complete the work based on assurances. The Claimant had anticipated that this*

advance will be available in 15 days to a month, but this issue was dragged on. Neither the release of funds, nor the finalization of interface specification took place.

11.7. The Claimant also visited the Respondent on 31.10.2018, 22.12.2018, 30.04.2019, 04.07.2019 and 23.07.2019 and ICF team visited Claimant on 28.02.2019 and 09.10.2019. Even in a meeting on 06.12.2019 with Mr. CM Roa and other senior members of ICF, the respondent had stated that either ICF will try to use our work for something else as they are no longer going ahead with the project or IITM will be compensated for the money that they have spent.

During the visit of Dy. CME/ ICF on 09.10.2019, the Claimant gave details of the test results of the battery cells. The Claimant specifically chose these cells, which have not been used on any other project (even after the termination). Further, even in this meeting, the claimant insisted for the finalization of the interface specifications.

In reply, the Dy.CME, for the first time had told us that they were unable to finalize the motor supplier and in the absence of a motor supplier, the Claimant was not in a position to finalize interface specifications. He however

assured us that the expenditure made by us would be paid in the event of the project falling through. It is a fact that there was no negative feedback even after this visit. Further if the due date for the battery was in May 2019, why did they visit *us in October and not before? "*

In view of the above, the learned Arbitrator has recorded the factual findings that there are meeting between the parties and in fact, the claimant had sent a communication dated 13.12.2019 (Exhibit-CD) issued by the Respondent indicates that the claimant was advised not to spend more money. Having issued such communication, there was no objection whatsoever with regard to the quality of the work or dissatisfaction shown by the Petitioner herein with regard to the progress of the project.

14. The factual findings further indicate the fact that the claimant was advised not to spend more money, that the respondent/ICF was aware that the Claimant had spent money upto 13.12.2019. Only after such communication, the staffs have been given notice to leave by 31.12.2019.

15. All these facts have been factually recorded by the learned Arbitrator and finally the learned Arbitrator has calculated the salary of the staffs deputed only for this project and passed an award for a sum of **Rs.40,14,689/- + GST (Forty lakh fourteen thousand six hundred and eighty nine + GST)** as full and final award to the Claimant within 90 days

from the publication of award. In case of delay, additional simple interest at the rate of 7% per annum from 91st day of publication of award to date of payment will be payable.

16. Therefore, this Court is of the view that the learned Arbitrator has considered the factual aspects and entire findings are based on the appreciation of evidence. Accordingly, this Court cannot re-appreciate the entire evidence. Hence, even on merits which was recorded on the basis of the factual findings, this Court did not find any infirmities and any of the grounds made out under Section 34 of the Act to interfere the well reasoned award passed by the Learned Arbitrator.

17. Accordingly, the above original position is dismissed. No costs. Consequently, connected application is closed.

Sd/- N.S.K.J.
14/09/2021

//Certified to be true copy//
Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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