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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.08.2021

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH
and
THE HON'BLE MRS.JUSTICE S.KANNAMMAL

O.S.A.No.270 of 2021
and C.M.P.Nos.12680 & 12681 of 2021

General Manager, CORE, Allahabad,
Rep. By Deputy Chief Engineer,
Railway Electrification,
Egmore, Chennai.

.. Appellant

Vs

M/s.JV Engineering Associate
Civil Engineering Contractors,
17,Kuttakattu Valasu,
Elumathur (PO), Modakurichi (via),
Erode - 638 014 (Tamil Nadu)
Rep. By its Partner,
S.Jaikumar

.. Respondent

Appeal filed under Order XXXVI Rule 1 of O.S. Rules read with Section 37 of Arbitration and Conciliation Act, 1996 amended act 2015 against the judgment and decree dated 10.2.2020 made in O.P.No.446 of 2019.

O.P No.446 of 2019 : Original Petition is filed under Section 34 (2) (b) (iii) of the Arbitration and Conciliation Act, 1996 to set aside the award dated 07.11.2018 passed by Shri V.K.Manoharan, the Sole Arbitrator.

For Appellant : Mr.P.Thiruppathi Ramkumar

For Respondent : Mr.Sri Ganesh

JUDGMENT

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

The issue involved in the appeal is no longer res integra. Between the same parties, the application filed invoking Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') were allowed in O.P.Nos. 447 and 449 of 2019. The appeals



have been filed by the appellant in O.S.A (CAD) Nos. 43 & 44 of 2021.

2. The respondent is the Contractor of the appellant. Pursuant to the work allotted, the dispute arose leading to the appointment of an Arbitrator. The consent was given by the respondent to proceed with the matter before the learned Arbitrator. The learned Arbitrator decided the matter on merit.

3. In the applications filed under Section 34 of the Act, a contention has been raised by the respondent that the learned Arbitrator was ineligible to act in the said capacity, which found favoured with the learned Single Judge. Aggrieved over the same, the present appeal has been filed.

4. The very same issue was raised and dealt in O.P.Nos.447 and 449 of 2019. In the appeal referred supra, the Division Bench of this Court after taking note of the relevant provisions coupled with the respondent has given consent to the conclusion of the proceedings by the learned Arbitrator, was pleased to allow the appeals. The following are the relevant paragraphs of the order passed:-

"15. In the present case, upon the respondent invoking the arbitration agreement and demanding the appointment of an arbitrator, the respondent was advised by the appellant of the 2015 amendment and of original Clause 64 of the 2014 general conditions having been modified. To boot, Annexure XII, a form of waiver, was appended to the letter dated September 13, 2017 issued in reply to the respondent's demand for an arbitral reference.

16. Again, the respondent's reply thereto was clear and unequivocal. The respondent referred to Clause 64 of GCC-2104 and spurned Annexure XII as it was unnecessary in the context of what was asserted by the respondent in such letter. So that the letter is not misread and what the respondent sought to communicate to the railways is not misinterpreted, the exact words of the respondent have been quoted above.

17. In such circumstances, when the respondent was made aware of the amendment to the statute, and even his right to come out of the appointment procedure as recognised in old



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Clause 64 of GCC-2014, the respondent's clear acceptance of GCC-2014 in response and his reference to Annexure XII being unnecessary would amount to an express agreement in writing of the kind contemplated in the Proviso to Section 12(5) of the Act. All three conditions are met.

18. An implied waiver would be when the surrounding circumstances indicate that the person waiving a right was generally aware or ought to have been aware or may be reasonably seen to be aware and consciously take a decision in such regard. Express waiver, on the other hand, would arise when the right is specifically brought to the notice of the person, he responds thereto and such response reveals his awareness of his right; and, finally, the conscious relinquishment of the known right.

19. The expression, "express agreement in writing" cannot be confined to only a legal document which would be signed by two parties and the person waiving the right would include words "as I hereby expressly waive ..." or the like. Just as an agreement - including an arbitration agreement, no less - can be culled out from a series of correspondence or letters exchanged between the parties, an express agreement in writing within the meaning of the relevant expression in the Proviso may also be found from a series of letters exchanged between the parties to the arbitration agreement. As long as the three conditions germane to the relevant Proviso are complied with and a conscious decision on the part of the party waiving the right is evident, it suffices.

20. For the reasons aforesaid, the specious ground carried in the petition under Section 34 of the Act pertaining to the disqualification of the arbitrator in his very appointment, was not available to the respondent herein as the respondent had waived the applicability of Section 12(5) of the Act in course of the correspondence exchanged between the parties in September, 2017, subsequent to the demand for an arbitral



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reference and prior to the appointment of the sole arbitrator being made.

21. In the light of the above, the judgment and order impugned dated February 10, 2020 cannot be sustained since it dwelt only on the ground of disqualification of the arbitrator to be appointed. As such, the impugned judgment and order are set aside. However, since the challenge on the merits of the arbitral award, to the extent permissible, was not addressed in the judgment and order impugned, the matter is remanded for a fresh consideration limited to other permissible grounds, except any ground pertaining to the disqualification of the sole arbitrator in terms of Section 12(5) of the Act."

5. Thus, the issue involved in the appeal is squarely covered by the aforesaid order passed by the Division Bench which we are in respectable agreement with.

6. In such view of the matter, the order passed by the learned single Judge stands set aside and the original side appeal stands allowed and the matter is remitted to the learned single Judge for fresh consideration as the other issues raised by the respondent have not been considered. Since the issues are interconnected, O.P.No.446 of 2019 be tried along with O.P.Nos.447 & 449 of 2019. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-I)

//True copy//

Sub Assistant Registrar

mmi/ssm

To

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



2. Shri V.K.Manoharan,
Sole Arbitrator,
Deputy Chief Electrical Engineer (P)
Railway Electrification,
1st Floor, Parcel Office Building,
Railway Station,
Kannur-670 001 (Kerala)

+1cc to Mr.PT.Ramkumar, Advocate SR.No.41530

O.S.A.No.270 of 2021

PA (CO)
GMY (25/10/2021)