

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED : 28.07.2021

CORAM:

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

**O.P.No.638 of 2019**

1. The Chief Project Manager,  
Railway Electrification,  
Egmore, Chennai – 600 008.

2. Central Organisation for  
Railway Electrification  
No.1, Nawab Yusuf Road,  
Civil Lines, Allahabad- 211 001.  
Uttar Pradesh State.

Petitioners

.Vs.

Trimurthi Hi-Tech Company Pvt. Ltd.,  
Rep. by its Director,  
Old No.56, New No.88,  
1<sup>st</sup> Floor, Maddox Road,  
Choolai, Chennai – 600 112.

Respondent

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**Prayer:** Petition filed under Section 34 (2) (a) (iv), (b) (ii) of the Arbitration and Conciliation Act, 1996 praying to set aside the Arbitral Award passed by the learned Arbitrator herein dated 29.07.2019 made in relation to disputes arising out of Letter of Acceptance No.ELCORE/T/OHE/Gr.126(R&C)-1 dated 09.03.2009.

\* \* \*

For Petitioners : Mr.P.T.Ramkumar

For Respondent : Mr.S.Raghavan

### **ORDER**

This Petition has been filed challenging the Award dated 29.07.2019 passed by the learned Sole Arbitrator in respect of the dispute that arose between the 1<sup>st</sup> respondent and claimant with regard to agreement dated 15.05.2009. The letter of Acceptance (LOA) relating to Design, Supply, Erection, Testing and Commissioning of 25 KV single Phase AC 50 Hz Traction Overhead Equipments, Switching Stations, Booster Transformer Stations and LT Supply Transformer Stations in Two chords between Bangalore-Chennasandra loop via Hebbal Section and Yeshwantpur Chikbanavar Section along with bypass line between Lottergollahalli and Chikbanavar Section of S.W.Railway Group.126 (R&C) – 1.

2. Though the work had to be completed within six months, due to delay in the project, the work could not be completed and therefore, several extensions were granted. These extensions were granted under Clause 17 (B) of the General Conditions of Contract. Hence, it is the contention of the claimant that the levy of liquidated damages and also the penalty as per the contract is not correct and

hence sought refund of a sum of Rs.47,26,310/- levied by the respondent.

3. The respondent filed a counter stated that the entire delay had to be attributed to the contractor and despite several extensions having been granted, nearly 11 extensions, finally, the work came to be concluded only on 18.07.2011. While granting extensions under General Conditions of Contract as per the contract, the claimant was ordered notice with regard to the penalty that could be imposed as per the contract and these extensions were granted invoking the Clause 17 (A) of General Conditions of Contract without imposing any penalty and these extensions have been sought by the respondent. The learned Sole Arbitrator framed the issues and finally passed the award directing the respondent to return a sum of Rs.47,26,310/- on the ground that delay was not entirely due to fault of the claimant. Further no evidence was let in by the applicant to prove loss. Challenging the same present application filed.

4. Mr.P.T. Ramkumar, learned counsel appearing for the petitioners would mainly canvass that though the General Conditions of Contract provides for levying Liquidated Damages, there is no evidence available on record to prove the

loss of damages. As far as the penalty imposed in this regard, the contract clearly provides for the imposition of such penalty. The learned Arbitrator ignored the contractual terms agreed between the parties while passing award. Therefore, he prays to set aside the award.

5. The learned counsel relied upon the judgment of the Hon'ble Supreme Court reported in **AIR 2003 SC 2629 (Oil & Natural Gas Corporation Ltd., Vs. Saw Pipes Ltd.,)** and contended that the terms clearly and unambiguously stipulate the liquidated damages in case of breach of the contract. The employer is entitled to recover from the contractor the penalty as agreed.

6. The learned counsel for the respondent submitted that the learned Arbitrator has considered the entire aspect and also the evidence and found that there is no evidence for legal injury or damages sustained by the Railways on account of delay. The learned Arbitrator has recorded the factual findings. This Court exercising its powers under Section 34 of the Arbitration and Conciliation Act cannot interfere with the award by re-appreciating the entire evidence. Hence, submitted the award cannot be interfered with and relied upon the judgment of the

Hon'ble Apex Court reported in *AIR 1963 SC 1405 (Fateh Chand Vs. Balkishan Das)* and *2005 (4) MLJ 86 (Ennore Port Limited (Successor of Chennai Port Trust with regard to the Ennore Port Project) Vs. Hindustan Construction Company Limited and Ors)*. It is not disputed by both sides that though the original contract stipulates the period of six months to complete, the work on account of various factors, the work came to be completed only on 18.07.2011. In the mean while, 11 extensions were granted by the Railways and six extensions were granted under Clause 17 (a) of General Conditions of Contract. It is relevant to extract Clause 1.2.45 which reads as follows:

“Extension of Time 1.2.45:

*If such a failure as aforesaid shall have from any cause which the Purchaser may admit as being a reasonable ground for extension of time, the General Manager/ Chief Electrical Engineer or his successor (s) / nominee shall allow such additional time as he may in his absolute discretion consider to be reasonably justified by the circumstances of the case. Such extension shall be granted by the Purchaser in the Form No.18 (Part – V). The Contractor will apply for extension at least two months before the expiry of the period of completion.*

*The Competent Authority while granting extension to the currency of the contract under Clause 17 (B) of the GCC may also consider levy of token penalty as deemed fit based on the merit of the case”*

Clause 1.2.44 which reads as follows:

*If the Contractor fails to execute and complete the work within the time specified in the Agreement or within the period of extension granted under Para 1.2.45 except, in so far as the delay is on the Purchaser's account, the Contractor shall accept reduction in the total amount payable to him by the Purchaser upto the maximum rate of Rs.4,000/- per day for the actual delay occasioned beyond the appointed time by which the work shall have been completed under the contract. Such reduction shall be accepted by the Purchaser in full satisfaction of the Contractor's liability arising from delay only. This recovery for delay in completion will be applicable separately for each stage of completion of overhead equipment, switching stations or booster transformer stations when two or more stages of completion are specified in the contract. The General Manager or his successor shall at his sole discretion specify a time limit within which the unfinished portion of the work shall be completed after serving on contractor a notice of the Purchase's intention to effect the said recovery in*

*the Form 17 (Part-IV). In the event of failure of the Contractor, the Purchaser shall be at liberty to take action in accordance with provisions in Para 1.2.29 and 1.2.30.*

7. The above Clause stipulates that total amount payable by the purchaser as a penalty at the maximum rate of 4,000/- per day for the actual delay of 61 days. The power of the competent authority while granting the extensions under Clause 17 (b) of the General Conditions of Contract, is not absolute. Only on taking into consideration of the facts and circumstances, the competent authority can levy a token penalty, on the basis of the merit of every case. The learned Arbitrator has also taken note of Performance Certificate issued by the Railways and has observed that “the work was stopped intermittently on Railway's account and not on Contractor's account due to abnormal increase in quantities of work in certain cases and subsequent delay in approval of assessment. Further, there were cases where works could not be progressed for want of Tower Wagon and blocks from the Railway's side. On the whole performance to do the OHE works at the rate of 3 Kms per month on an average is hereby acknowledged” by Railways.

8. The learned Arbitrator finally on the basis of the evidence found that there is no legal injury or loss sustained by the Railways. Though, the General Conditions of Contract provides the penalty as well as damages, the learned Arbitrator took note of law declared in the case of ***Fateh Chand Vs. Balkrishnan Das reported in AIR 1963 SC 1405*** which reads as follows:

*.... It does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.*

*.... The Court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach. There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant save as to the loss suffered by him by being kept out of possession of the property.*

*... The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant, and we are unable to find any principle on which compensation equal to ten percent of the agreed price could be awarded to the plaintiff”*

9. In the Judgment reported in **2005(4) MLJ 86 (Ennore Port Limited, (Successor of Chennai Port Trust with regard to the Ennore Port Project) Vs. Hindustan Construction Company Limited and Ors.)** Hon'ble Division Bench of this Court found that invoking the Clause under General Conditions of Contract and Clause as well as penalty without proving the legal injury or loss by the Railways is not sustainable under law and passed an award.

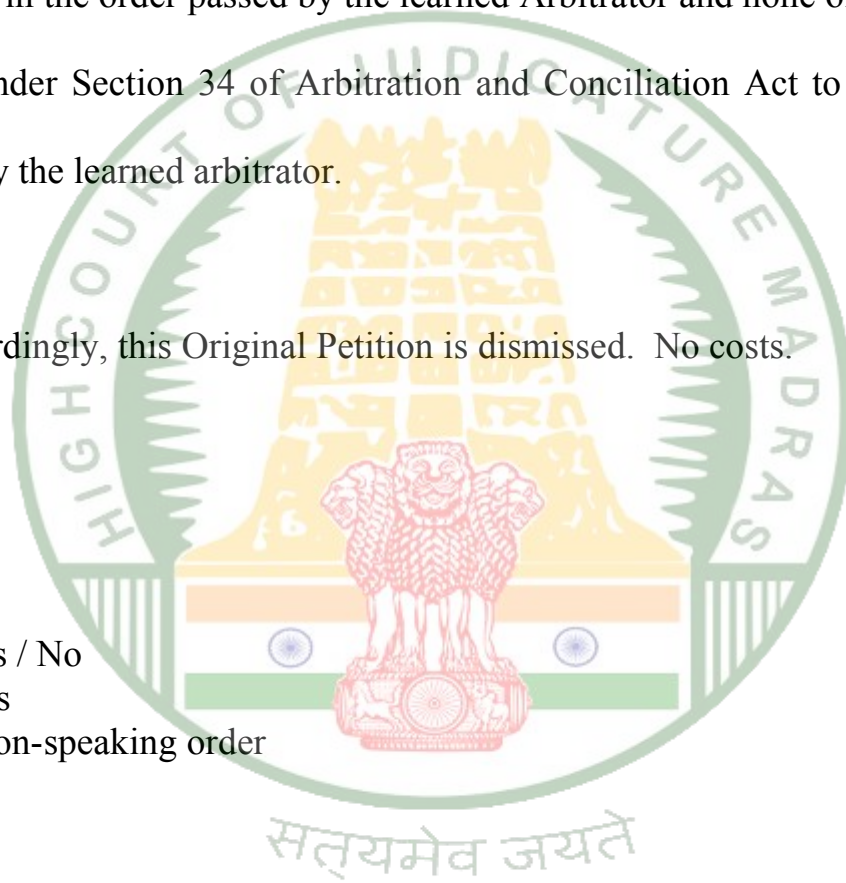
10. Though the learned counsel appearing for the Railway has placed much emphasis on the ONGC & Sawpipes and the same is not applicable to the facts of the present case. It is to be noted that in the above case, nature of legal injuries suffered by ONGC was clearly established on record and the Hon'ble Apex Court taking note of the contractual terms, allowed the imposition of the penalty as per the contract. Whereas, in this case as noted by the learned Arbitrator, no evidence was let in by the respondent at any point of time that there was any legal injury or

loss. In such view of this matter, when the law in this aspect is very clear that without establishing legal injury or loss, liquidated damages is not permissible and the liquidated damages by way of penalty is also not permissible. This Court finds no infirmity in the order passed by the learned Arbitrator and none of the ground is made out under Section 34 of Arbitration and Conciliation Act to interfere with the award by the learned arbitrator.

Accordingly, this Original Petition is dismissed. No costs.

**28.07.2021**

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Internet: Yes  
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**N. SATHISH KUMAR, J.**  
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