



W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 25.01.2023

PRONOUNCED ON : 22.02.2023

CORAM

THE HONOURABLE MR.JUSTICE **K.KUMARESH BABU**

W.P.(MD) Nos.8542 of 2012 and 4360 of 2014
and
M.P.(MD) Nos.1 of 2012 and 1 and 2 of 2014

K.A.Suresh

... Petitioner in both W.Ps.,

/vs./

1.The Deputy Chief Engineer,
Construction III Southern Railway,
Madurai.

2.The Manager,
Canara Bank,
Tenkasi,
Tirunelveli District.

... Respondents in W.P.(MD) No.8542 of 2012

1.Southern Railway,
S.Rly.Head Quarters,
Chennai.

2.The Chief Administrative Officer,
Construction,



W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

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Southern Railway,
Egmore, Chennai 600 008.

3.The Deputy Chief Engineer,
Construction III Wing,
Southern Railway,
Arasaredi, Madurai 625 010.

... Respondents in W.P.(MD) No.4360 of 2014

PRAYER in W.P.(MD) No.8542 of 2012 : Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, calling for the records pertaining to the impugned termination notice No.W.148/CN/III MDU/Addl.Facil @ Ten issued by the first respondent dated 14.06.2012 and quash the same.

PRAYER in W.P.(MD) No.4360 of 2014: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Mandamus, to direct the respondents to refund a sum of Rs.9,85,802.00 with 12% interest from the date of tender dated 21.01.2011 till repayment.

For Petitioner
in both W.Ps.,

: Mr.T.S.R.Venkatramana Senior Counsel
for Mr.M.A.Parameswaran

In W.P.(MD) No.8542 of 2012:-

For R1

: Mr.S.Manohar
Standing Counsel



W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

In W.P.(MD) No.4360 of 2014:-

For R1 to R3

: Mr.A.Haja Mohideen

Standing Counsel

COMMON ORDER

W.P.(MD) No.8542 of 2012 is seeking for a certiorari to call for the records pertaining to the impugned termination notice No.W.148/CN/III MDU/Addl.Facil @ Ten issued by the first respondent dated 14.06.2012 and to quash the same.

2.W.P.(MD) No.4360 of 2014 is seeking for a Mandamus to direct the respondents to refund a sum of Rs.9,85,802/- with 12% interest from the date of tender till repayment.

3.Heard Mr.T.S.R.Venkatramana, learned Senior Counsel for Mr.M.A.Parameswaran, learned counsel for the petitioner, Mr.S.Manohar, learned Standing Counsel for the first respondent in W.P.(MD) No.8542 of 2012 and Mr.A.Haja Mohideen, learned Standing Counsel for the respondents 1 to 3 in W.P. (MD) No.4360 of 2014.

4.Mr.T.S.R.Venkatramana, learned Senior Counsel for Mr.M.A.Parameswaran, learned counsel for the petitioner would submit that the



W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

petitioner is a partnership firm and is a registered class-I contractor with the respondents/railway. The respondents had issued a tender notice on 22.10.2010 for construction of a goods train platform at Tirunelveli junction. As per the tender documents, the tender was opened on 21.01.2011 and that the petitioner was declared as the successful bidder. On the same day, the petitioner had deposited the earnest money deposit of Rs.2,30,190/-.

5.On 12.05.2011, a letter of formal acceptance was issued by the respondents and called upon the petitioner to execute a performance guarantee. On 02.09.2011, the petitioner had executed a performance guarantee for a sum of Rs.7,55,612/-. In spite of the petitioner having executed the performance guarantee, the respondents did not execute any contract as per the tender documents. The petitioner had been repeatedly requesting the respondents to hand over the site to him and supply the drawings and plans of the site so as to prepare itself to execute the contract. In spite of the repeated representations, the respondents had neither supplied the drawings nor handed over the site for the petitioner to perform its part of the contract.



WEB COPY

W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

6.On 07.01.2012, a communication was received from the respondents calling upon the petitioner to sign the contract. On 23.04.2012, the notice invoking Clause 62 of the general conditions of the contract was issued to the petitioner, for which a suitable reply was given stating that the petitioner was not able to commence the work, as the site has not been handed over to it. But however, without any further notice, the respondents had issued notice of termination on 14.06.2012.

7.Challenging the order of termination, W.P.(MD) No.8542 of 2012 has been filed. Pending the writ petition, the respondents have kept the earnest money deposit of the petitioner and also the performance guarantee, totally a sum of Rs.9,85,802/- and that they were trying to invoke the performance guarantee given by the petitioner. Hence, he was forced to file another writ petition in W.P.No.4360 of 2014 seeking for a direction to direct the respondents to refund the said amount along with interest at the rate of 12% from the date of tender till repayment.



W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

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8.The learned Senior Counsel for the petitioner would submit that the respondents have not performed their part of the contract. They have neither provided with drawings nor handed over the site for the petitioner to commence the work. He would further submit that without the side tracks being removed, the platform could not be laid. This work even after the order of cancellation has not been carried on. The petitioner's representations on various dates have not been answered upon by the respondents and now suddenly terminating the contract without proper notice is in violation of the basic principles of natural justice. Hence, he would submit that the termination of contract is wholly illegal, arbitrary and is a colorable exercise of power.

9.He would submit that the earnest money deposit and the performance guarantee are still with the respondents. Hence, they should be directed to refund the same with interest from the date of tender. He would also submit that to carry on the civil work below, the line traction wires running above would endanger the lives of workers during the performance of the contract. He would further submit that a re-tender was also issued by the respondents on 01.03.2013 and that the



W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

successful bidder had also not completed the work, as the site was not handed over to him. Hence, he would submit that the respondents are now trying to enrich itself by forfeiting the earnest money deposit paid by the petitioner and also the performance guarantee issued by the petitioner.

10.Mr.S.Manohar, learned Standing Counsel for the respondents/Railways would submit that it is true that the tender notice was issued on 22.12.2010 for various works. Additional facilities for improving the line facility, providing of goods etc at Tirunelveli Junction were also included in the tender as item No.1 and that the petitioner was awarded with the contract for a total value of Rs.1,51,12,148/-. It is also true that the petitioner had made an earnest money deposit and also submitted the performance guarantee as claimed by him. The delay in execution of the agreement was due to the reason that the petitioner had belatedly given the performance guarantee and the petitioner has been trying to delay even the execution of the agreement.

11.He would further submit that the allegation that the drawings were not given is wholly made up for the purpose of the case. He would also submit that



W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

the drawings were part of the tender document and only based on such drawings, the petitioner had submitted its bid. It is only the petitioner, who has been the reason for the cause of the cancellation/termination of the contract. A notice was issued calling upon the petitioner invoking Clause 62 of the contract. As the explanation submitted by the petitioner was not satisfactory, a notice of termination of contract was issued on 14.06.2012. In spite of various oral instructions issued to the petitioner to make preparatory works, the petitioner had not for the reasons best known to him initiated any preparatory works. Only on their preparatory works, further facilities would be made.

12.He would submit that it is false to say that the site was never handed over. He would also submit that the Tirunelveli Railway Station is a live and kicking railway station and there is no question of handing over the site to the petitioner. He has to carry on the work allotted to him while other operations have to carried on. Stopping of such operations will not only affect the railways but also the general public. He would further submit that the conduct of the petitioner would amount to abandoning the contract and therefore, there is no other avenue available to the respondents except to terminate the contract.



W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

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13.He would submit that the writ petitions are not maintainable as the same arise out of a civil contract that had been entered into between the petitioner and the respondents. Any dispute arising out of such contract could only be redressed either by invoking the provisions of the arbitrations or by filing appropriate civil suit. He would further submit that due to the non-performance of the contract, the respondents are liable to invoke the performance guarantee and also forfeit the earnest money deposit. He would further submit that severe loss has been caused due to the action of the petitioner in not performing its part of the contract, apart from the respondents having been incurred further expenditure in calling for a new tender. Contending so, he would seek this Court to dismiss both the writ petitions.

14.I have considered the rival submissions made by the learned counsels on either side.

15.These writ petitions arise out of a tender called for by the respondents. As per the tender, the work should be completed within a period of six months. It



W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

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is an admitted case on either side that the letter of acceptance was issued by the respondents in the month of May, 2011 calling upon the petitioner to execute the performance guarantee. The performance guarantee was executed by the petitioner only in the month of September, 2011. Even thereafter, in spite of the draft contract having been made ready as early as on 31.09.2011, the petitioner had not signed the contract. When a question was put to the respondents as to what was the reply given by them for handing over the site for starting the work, the learned Standing Counsel appearing for the respondents/railways, on instructions, would submit that the file relating to tender is missing.

16.The respondents have categorically stated in their counter affidavit that the station being fully functional, the petitioner cannot be handed over the site by shunning down the existing operations. The petitioner has to work side by side without hampering the operations that is being carried out. The claim of the petitioner is that he has been a long standing contractor for the respondents and that he had performed such contracts in an existing operational stations. But however, the learned counsel for the petitioner had not produced any materials to state as to what are the difficulties faced by the petitioner. Even in the affidavit



W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

filed in support of the writ petitions, there is no clear pleadings as to how the petitioner was restrained from beginning the works awarded to him except for a bald statement that the site has not been handed over to him to finish the work.

17.I am not inclined to appreciate the said argument or the statement made by the learned Senior Counsel for the petitioner. The reason is that the petitioner himself had not been diligent in performing his part of the contract. Two instances would support the same. Firstly, The petitioner in spite of the receipt of the acceptance of the contract had taken four months to execute the performance guarantee. Secondly, even after the draft agreement was made ready, the petitioner had not executed the contract. Even though there was a delay on the part of the petitioner, the reason assigned by the petitioner that the delay had been caused because of the inaction of the respondents has not been substantially assailed by the petitioner by producing any documentary evidences.

18.According to me, these are all the disputed question of facts that cannot be gone into in these writ petitions and the appropriate forum is to approach the civil Court for the petitioner to redress his grievance. I do not propose to relegate



W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

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the petitioner for arbitration under the contract, as the contract had not come into effect, since the petitioner had not executed the same. Even though I had an inclination of directing the respondents to deposit the amount claimed by the petitioner, I am not inclined to issue such directions, as the respondents are not a flyby operator. It is a Central Government undertaking and if the petitioner proposes to initiate any civil proceedings to redress his grievance, it is always open to him to take out an appropriate application for recovery of the said amount. In view of the aforesaid findings, I am not inclined to grant the reliefs as prayed for in these writ petitions.

19. In fine, the Writ Petitions are dismissed. However, the petitioner is at liberty to approach the appropriate civil Court for redressal of his grievance. When the petitioner approaches the civil Court seeking redressal of his grievance, the question of limitation shall not be put against the petitioner in view of Section 14 of the Limitation Act and the period of pendency of these writ petitions, namely the date of filing of these writ petitions till the date of this order shall be excluded by the appropriate forum while calculating the period of limitation.



W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

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However, there shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

Speaking : Yes / No
Internet : Yes / No
Index : Yes / No
NCC : Yes / No
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22.02.2023



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W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

K.KUMARESH BABU, J.

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order made in
W.P.(MD) Nos.8542 of 2012 and 4360 of 2014

22.02.2023