



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 11.12.2024

Pronounced on: 21.12.2024

CORAM

THE HONOURABLE **MR.JUSTICE P.B.BALAJI**

O.P. No.1002 of 2017

RPN Engineers Chennai Private Limited,
Represented by its Managing Director,
M-60, 9th Street, Anna Nagar East, Chennai-102.

... Petitioner

vs.

1. The Union of India,
Represented by the General Manager,
Southern Railway, Park Town, Chennai-3.
2. The Deputy Chief Engineer-1 (Construction),
Southern Railway, Near My Lady's Garden,
Southern Railway, Park Town, Chennai-3.
3. Mr. K.Ramasubramonia Pillai (Presiding Arbitrator),
The Deputy Financial Adviser & Chief Accounts Officer,
Southern Railway, Head-Quarters, Chennai-3.
4. Mr.P.Mani (Arbitrator),
Deputy Chief Electrical Engineer/G/CN,
Southern Railway (Construction), Egmore, Chennai-8.
5. Mr.R.Amalraj (Arbitrator),
The Deputy Chief Engineer (Works),
Southern Railway (Construction),
Egmore, Chennai-8.

... Respondents



PRAYER: The Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to Set-aside the Award dated 20/2/2017 passed in the disputes arising out of the Agreement dated 21/03/2012 by the Tribunal, comprising of the Respondents-3 to 5 and to pass a fresh Award awarding all the claims of the petitioner.

For Applicant : Mrs.K.Aparnadevi

For Respondents : Mr.P.T.Ramkumar,
Standing Counsel

ORDER

The Claimant before the Arbitral Tribunal, aggrieved by the rejection of the claim has preferred the above petition under Section 34 of the Arbitration and Conciliation Act, 1996.

2. I have heard Mrs.K.Aparnadevi, Learned Counsel for the Petitioner, and Mr. P.T. Ramkumar, Learned Standing Counsel for the Respondent.

3. Brief facts of the case for proper appreciation of the challenge to the Award are as herein:

The Respondent Railways (in short 'Respondent') in and by Com. No. L.O.A.MTP/W.496/CN/584/ROB/LC38/CN/MAS dated 25.11.2011,



accepted that the offer proposed by the Claimant/Petitioner herein for the construction of Road Over Bridge (ROB) with substructure being pile foundation and superstructure with composite girder in lieu of L.C. No. 38 at K.M.52/10-12 between Elavur and Arambakkam stations and also the conditions were set out in the said Letter of Acceptance issued by the Respondent Railways.

4. In pursuance of the award of tender, a works contract, viz., a contract agreement was entered into on 21.03.2012, with General Conditions of Contract (“GCC”) agreed to between the parties. According to the Claimant, the Respondent Railways could not complete the work as contemplated within 12 months from 25.11.2011, in view of the inability of the Respondent to provide the centre pile portion, without which the Claimant could not complete the project. Further, it was also contended by the Claimant that the delay in completing the project on 24.04.2015, was not because of the Claimant, but only because of the conduct of the Respondent.

5. According to the Claimant, even though about seven extensions were given for completion of the work, only two of them recognised that it was not the fault of the Claimant and the Respondent erroneously



extended time on other occasions as if it was delay or default on the part of the Claimant. The primordial contention of the Claimant is that the site was not clear for close to a period of two years, in between two portions of the ROB, and hence the Claimant cannot be found fault with. However, since the Respondent disallowed the amounts claimed by the Claimant and also did not come forward to pay due compensation to be paid, the Claimant initiated arbitration proceedings.

6. Pending the arbitration proceedings, the Claimant expanded the claim which was projected originally in Section 11 petition before this Court and the total claims made were 21 claims in all. In fact, the amendment of the claim was in accordance with the order of this Court in O.P. No. 595 of 2015. The Respondent resisted the claims on the ground that the delay was only on account of the Claimant and while agreeing for the extensions, excepting two instances, the Claimant himself had agreed for Clause 17(B) being invoked, which was a Clause warranting extension where delay was caused because of the contractor, i.e., the Claimant. Therefore, according to the Respondent, the Petitioner was not entitled to any of the claims.

7. The Arbitral Tribunal after elaborately discussing the ground claims, found that the Claimant was entitled only to certain



claims/portions of the claims made and in all awarded a sum of Rs.19,71,824/- towards Claims 12, 13 and 15, while also directing refund of the liquidated damages recovered by the Respondent to the tune of Rs.18,99,047/-; and price variation to a tune of Rs.28,748/-; directing release of the bank guarantee bond by the Respondent for a value of Rs.32,69,047; and a sum of Rs.42,217/- towards dues on account of the final bill value. The Arbitral Tribunal dismissed the claims in and whereby, by various reliefs of declaration and damages were sought for by the Claimant.

8. Aggrieved by the said Award, the Claimant is before this Court. The learned Counsel Mrs.Aparnadevi, would confine her arguments challenging the Award on two main grounds. Firstly, one of the Arbitrators forming part of the Tribunal was a person interested since he was privy to the execution of the contract by the Petitioner and therefore the constitution of the Arbitral Tribunal itself was not proper and serious prejudice had been caused to the Petitioner by the inclusion of a person interested in the Respondent. Secondly, she would contend that the Arbitral Tribunal, having found that the delay was not entirely on account of the Claimant, but the Railways was also reason for certain delays at various stages, ought not to have rejected the majority of the claims.



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9. The learned counsel for the Petitioner would further state that the Arbitral Tribunal did not appreciate the main contention of the Petitioner that when admittedly the centre pile area was not given to the Claimant, the responsibility for delay cannot be fixed on the Petitioner alone. She would further contend that dissecting the length of delay into shorter periods of days was improper and unjustified in the light of the specific stand taken by the Petitioner that without the Respondent providing a ready site, the Petitioner could not have proceeded to commence or complete the work as contemplated under the contract. She would further contend that the delay ought to have been calculated from the date of Letter of Acceptance instead of considering it in piecemeal. Therefore, the learned counsel for the Petitioner would seek for the above Original Petition being allowed, thereby setting aside the Award of the Arbitral Tribunal.

10. Per contra, Mr. P.T. Ramkumar, learned Standing Counsel for the Respondent Railways, meeting the submissions of the learned counsel for the Petitioner, would state as follows:

(i) with regard to appointment of the so-called person interested, the counsel for the Respondent would invite my attention to the letter of



the Respondent dated 07.03.2014, in and by which, the Petitioner was given an option to choose two of the three officers suggested by the Respondent. In response to the said letter, the Petitioner opted for two of the three nominees suggested by the Respondent and one among them was in fact, the person against whom the Petitioner now has a grouse on the ground that he was an interested party. The learned counsel for the Respondent would therefore contend that when the Petitioner was given a choice and was also put on notice about the three nominees and the Petitioner had voluntarily accepted the name of Mr.Mani, Deputy Chief Electrical Engineer/CN/MS, knowing fully well that he has been involved in the execution of the project, cannot now challenge the Award on the ground that he was a 'person interested'.

11. The learned counsel for the Respondent would further contend that under Section 13(2) of the Arbitration and Conciliation Act, 1996, a procedure for challenge to appointment of an arbitrator is contemplated and without resorting to the same, it is not open to the Petitioner to now challenge the appointment of one of the arbitrators on the ground that he was *'a person interested'*.

12. With regard to the delay and various claims made by the



Petitioner which are rejected/allowed/partly allowed, the learned counsel would invite my attention to the various extensions granted by the Respondent. He would point out that the invocation of Clause 17(B) was accepted by the Petitioner without any protest and having done so, it was not open to the Petitioner to belatedly claim that such extensions ought to have been granted under Clause 17(A)(ii) and not 17(B). The learned counsel for the Respondent would further take me through the Award and contend that the Arbitral Tribunal has discussed all the claims in detail and arrived at factual findings and ultimately passed the Award directing the Respondent to pay the Award amount besides also refunding certain amounts which were available at the hands of the Respondent having been directed towards liquidated damages. The Tribunal also ordered the bank guarantee bond to be released. He would therefore submit that the Arbitral Tribunal has passed a well-reasoned order and there is no requirement to interfere under Section 34 especially when there is no perversity or illegality shown by the Claimant.

13. I have carefully considered the submissions advanced by the learned counsel on either side and also perused the records.

14. With regard to the first contention, namely, that one of the



arbitrators to the Arbitral Tribunal being a “person interested”, it is seen from the documents that the petitioner was given an option to select 2 out of the 3 nominees proposed by the respondent and the petitioner voluntarily chose the name of Mr.P.Mani, to be one of the arbitrators. Moreover, as rightly pointed out by the learned counsel the respondent, if at all the petitioner desired to challenge the appointment of the said arbitrator Mr.P.Mani, recourse ought to have been taken under section 13(2) of the Arbitration and Conciliation Act, 1996. Admittedly, the procedure contemplated under section 13(2) has also not been invoked or followed by the petitioner. Therefore, having chosen the said arbitrator and thereafter also, not following the mandate prescribed under section 13(2) of the Act, it is not open to the petitioner to challenge the appointment of one of the arbitrators to the Tribunal at the stage of section 34 proceedings.

15. Further, I find that even as late as on 09.10.2015, when O.P. No.595 of 2015 came to be allowed permitting, the additional claims numbering 21 also being referred to the Arbitral Tribunal, the petitioner did not think it fit to challenge the appointment of one of the Arbitrators. Therefore, the contention in this regard is rejected.



16. Coming to the merits of the award, the learned counsel for the Claimant would fundamentally attempt to justify the delay on the ground that the claimant was not in a position to perform his obligations since admittedly, the site was not made ready or available in between two piles, namely, the centre pile and the respondents delayed handing over of the same by close to two years and therefore, the delay cannot be solely attributed to the claimant. It is the further contention of the learned counsel for the petitioner that when the Arbitral Tribunal found that the respondent had also caused intermittent delays, then the Tribunal ought to have calculated the delay right from the original date of letter of acceptance instead of making a piecemeal calculation of the delays caused by the Respondent. In this regard, I have gone through the award of the Arbitral Tribunal.

17. First and foremost, the extensions of time on various occasions were duly acknowledged by the petitioner. In fact, the rider agreements for extension of time were sanctioned under both 17(A) as well as 17(A)(ii) as well as Clause 17(B) of the GCC. Excepting two of the extensions which are under 17A(ii), all the other extensions were granted only invoking Clause 17(B) of the GCC. Therefore, having acknowledged invocation of Clause 17(B) of that GCC and taken advantage of the



extended time to complete the project, it is too late in the day for the petitioner to turn around and contend that the extensions should have been granted under Clause 17(A)(ii) alone and not under Clause 17(B).

No doubt, I find that in and by a letter dated 23.04.2013, the invocation of Clause 17(B) of GCC has been objected to by the petitioner and it was reiterated that the penalty Clause could not be imposed on the petitioner and even in the extensions, namely rider agreements, the petitioner has only signed the same subject to letter dated 23.04.2013. However, the Arbitral Tribunal has elaborately discussed these aspects dealing with the claims item wise and giving reasons for rejecting the contentions of the claimant that Clause 17(B) could not be invoked. Even though the contention of the petitioner that recovery of penalty could not be invoked under Clause 17(B) of the GCC was made before the Arbitral Tribunal, the Arbitral Tribunal did not specifically refer to the objection made by the petitioner by way of a letter dated 23.04.2013. Yet by going into the individual claims, the Arbitral Tribunal has found that the claimant did not even commence the work in right earnest and rightly excluded the periods for which the petitioner could not have been blamed for any delay, since such periods of delay totalling up to 205 days were occasioned, only because of the respondent. Therefore, the contention of the petitioner with regard to the invocation of Clause 17(A) or 17(B) has



also been gone into by the Arbitral Tribunal while discussing the claims individually.

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18. The Tribunal has also found that the claimant having addressed two communications to the respondent never even indicated there was any delay on the part of the respondent even as late as in April 2012 and also found that the claimant had not even completed the basic work relating to the substructure and therefore could not complain about any delay in approval of the drawings. The Tribunal has also found, on evidence, that the claimant commenced even the preliminary arrangements belatedly and completed the first concreting only in May 2014. However, the Tribunal has rightly factored the delays that were occasioned on the part of the respondent and giving leverage for the same has extended the time provided under the contract by a further 205 days which were found to be attributable to the respondent and rounded off the period for completion of the contract up to 30.06.2013 clearly giving such benefit to the petitioner.

19. Consequential benefits under Clause 17(A)(ii)/(iii) of the GCC were also given up to 30.06.2013 and the penalty amount sought to be recovered under Clause 17(B) of the GCC up to 30.06.2013 have also



been declared as unjustified.

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20. The Tribunal has also found from the evidence adduced by the parties that the payment would be entitled to price variation up to 30.06.2013 and restricted the penalty amount to a mere 13.80 lakhs instead of Rs.32,69,047/- required by the respondent under the head liquidated damages. The findings of the Arbitral Tribunal are based on available materials placed by the parties, and it is not the case of the petitioner that the award is based on no evidence. The grounds raised by way of challenge to the award are not falling within the pigeon hole rule of interference under Section 34 of the Arbitration and Conciliation Act, 1996. I do not find the award of the Arbitral Tribunal being perverse or patently illegal. Therefore, the grounds on which interference is sought for do not require the award being set aside under Section 34 of the Arbitration and Conciliation Act, 1996.

21. For all the above reasons, the OP is dismissed. There shall be no order as to costs.

21.12.2024

rkp

Neutral citation: Yes/no

Index : Yes/No



Speaking/Non Speaking

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1. The Union of India,
Represented by the General Manager,
Southern Railway, Park Town, Chennai-3.
2. The Deputy Chief Engineer-1 (Construction),
Southern Railway, Near My Lady's Garden,
Southern Railway, Park Town, Chennai-3.
3. Mr. K.Ramasubramonia Pillai (Presiding Arbitrator),
The Deputy Financial Adviser & Chief Accounts Officer,
Southern Railway, Head-Quarters, Chennai-3.
4. Mr.P.Mani (Arbitrator),
Deputy Chief Electrical Engineer/G/CN,
Southern Railway (Construction), Egmore, Chennai-8.
5. Mr.R.Amalraj (Arbitrator),
The Deputy Chief Engineer (Works),
Southern Railway (Construction),
Egmore, Chennai-8.

P.B.BALAJI, J.,

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Pre-delivery Order in
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