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Arb.O.P.(Com.Div.).Nos.387 and 581 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.01.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)Nos.387 and 581 of 2023

In Arb.OP.(Com.Div).No.387 of 2023

- 1.The Union of India,
Represented by the General Manager,
Southern Railway, Park Town,
Chennai – 600 003.
- 2.The Chief Administrative Officer,
(Construction), Southern Railway,
Periyar EVR, High Road,
Egmore, Chennai – 600 008.
- 3.The Chief Engineer (Construction/East),
Southern Railway, Office of the CAO,
Periyar E.V.R. High Road, Egmore,
Chennai – 600 008.
- 4.The Deputy Chief Engineer/CN/I/MAS,
Construction, Southern Railway,
Near Mr.Lady's Garden,
Chennai – 600 003.

...Petitioners.

Versus

Mr.K.S.Baburaj

...Respondent.

Prayer in Arb.OP.(Com.Div).No.387 of 2023: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, praying to a) to set aside the Award dated 28.07.2022 and corrected Award dated 15.09.2022,



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passed by the learned Sole Arbitrator to the extent of interest part to which it is challenged.

For Petitioners : Mr.M.Kathikeyan

For Respondent : Mr.Amalaraj
S.Penikilapatti

In Arb.OP.(Com.Div).No.581 of 2023

Mr.K.S.Baburaj

....Petitioner.

Versus

- 1.The Union of India,
Represented by the General Manager,
Southern Railway, Park Town,
Chennai – 600 003.
- 2.The Chief Administrative Officer,
(Construction), Southern Railway,
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- 4.The Deputy Chief Engineer/CN/I/MAS,
Construction, Southern Railway,
Near Mr.Lady's Garden,
Chennai – 600 003.

...Respondents.

Prayer in Arb.OP.(Com.Div).No.581 of 2023: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, praying to a) to set aside the Award dated 28.07.2022 passed by the sole arbitrator and b) to direct the respondents to pay the cost of the petition.



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For Petitioner : M/s.Amalaraj
S.Penikilapatti
Gomathi Lakshmi

For Respondents : Mr.M.Kathikeyan

COMMON ORDER

These two cases are heard at length and therefore, by this common order, both the Petitions are being disposed. O.P.No.387 of 2023 has been filed by the claimant. O.P.No.581 of 2023 has been filed by the Union Of India, the respondent before the Arbitral Tribunal.

2. Both the parties are aggrieved by the impugned Arbitration Award dated 28.07.2022 passed by the Arbitral Tribunal. The claimant was awarded a contract by the respondents/Railways vide Letter of Acceptance dated 27.11.2015 and thereafter both the parties entered into Agreement No.16/Dy.CE/CN/I/MAS/2016 dated 29.02.2016 for the execution of the following works:

“MAS-GDR Sec-proposed 3rd & 4^h line between Attipattu Pudunagar and Attipattu Stations-Proposed linking of Permanent Way, Assembling of Points and Crossings and its allied works.”



3. The total value of the contract awarded to the petitioner/claimant was Rs.3,04,53,484/- by the respondents/Railways. The work was to be completed initially within a period of 260 days by 26.08.2016. The work also depended upon the completion of formation work by two other contractors of the respondents Railways.

4. It appears that there were delay in the formation work by the other contractors as a result of which the time that was stipulated for completion of work as 26.08.2016 was extended to 30.06.2018 vide Ex.R5 dated 21.12.2017. Thus, a first rider agreement dated 08.01.2018 was signed between the parties. The claimant had raised few invoices for transportation of the material which were settled. The claimant, therefore, wanted a discharge from the contract. Under these circumstances, communications were exchanged between the claimant and the respondents/Railways.

5. Ultimately, a Notice dated 21.05.2018 was issued under Section 21 of the Arbitration and Conciliation Act, 1996, for referring the dispute for arbitration, since the respondents/Railways failed to consent for the appointment of an arbitrator. The respondent however did not respond.



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6. The claimant therefore filed O.P.No.885 of 2018 under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator to refer claims arising out of the Agreement No.16/Dy.CE/CN/I/MAS/2015 dated 29.02.2016 and to direct the respondent to pay the cost of the petition.

7. O.P.No.885 of 2018 was ordered by this Court on 30.01.2019. Thereafter, the learned Arbitrator entered appearance and thereafter proceeded to pass the impugned Award.

8. After Order was passed on 30.01.2019 in O.P.No.885 of 2018, the petitioner/claimant issued another notice dated 06.02.2019 and undertook to renew the performance/Bank Guarantee which was earlier executed in favour of the respondents/Railways upto the completion of the proposed arbitral proceedings.

9. During the interregnum, the respondents/Railway terminated the contract vide a letter dated 02.05.2019. Initially, the claimant had raised 13 claims before the Arbitral Tribunal. However, in view of the termination of the contract and in view of subsequent development, the claimant filed a revised



claim before the Arbitral Tribunal. Thus, the claimant filed 17 claims before the

Arbitral Tribunal. After both the parties filed their pleadings, the Arbitral

Tribunal had framed the following issues:-

1. Whether the Claimant is entitled to all or any of the claims set out in the claim statement?
2. Whether the Claimant is entitled to any interest and if so, to what period and at what rates?
3. Whether the Claimant/Respondent entitled to any cost and if so, what is the costs?
4. To what other relief the Claimant/Respondent entitled to?

10. The Arbitral Tribunal has rejected Claim Nos. 1,2,3 and Claim Nos. 8 to 11 and claim No.13 of the claimant. The Arbitral Tribunal has partly allowed Claim Nos. 4,5,6,7 and claim No.12. In Arb.O.P.(Com.Div.).No.581 of 2023, the claimant is not pressing for any relief against the award passed by the Arbitral Tribunal in so far as Claim Nos.4 and 5 are concerned.

11. As far as the other claims are concerned, it is submitted that the Arbitral Tribunal has failed to consider material evidence that were available while rejecting the rest of the claims of the claimant. That apart it is submitted that applicant falls under MSME (Ministry of Micro, Small & Medium Enterprises) within the meaning of Micro, Small and Medium Enterprises Development Act, 2006 and is therefore entitled to interest under the said Act.



WEB COPY **12.** It is submitted that Claim Nos.14,15,16 and 17 have never been considered by the Arbitral Tribunal while passing the Award. It is therefore, submitted that the impugned Award has to go.

13. Learned counsel for the Railways in O.P.No.581 of 2023, the petitioner in O.P.No.387 of 2023 would draw attention to Section 33(4) of the Arbitration and Conciliation Act, 1996. It is submitted that both the claimant and respondents/railways have time to approach the Arbitral Tribunal under the said Section before the learned Arbitrator. It is thus submitted that the Award passed against the claimant, therefore, need not be set aside. It is therefore submitted that the Claim Nos.14,15,16 and 17 can be considered by the Arbitral Tribunal under Section 33(4) of the Arbitration and Conciliation Act, 1996.

14. It is further submitted by the counsel for the respondent that the impugned Award awarding interest @ 10 per cent is exorbitant. It is also submitted that only after the claimant was given extension of time upto 2018 for completion of work at the request of claimant, the contract was terminated on 02.05.2019. It is submitted that Arbitral Tribunal is in violation of the Clause 64.5 of the General Conditions of Contract signed between both the



parties.

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15. I have heard both sides and perused all the materials available on record.

16. The Arbitral Tribunal ought to have framed proper issues and thereafter answered the claims and counter claims of the respective parties. Proper issues were not framed. Thus, the Award passed by the Arbitral Tribunal is liable to be set aside under Section 34(2)(b)(ii) & clause (ii) of Explanation 1 of Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996, except in respect of claim Nos.4 & 5 of the claimant (petitioner in Arb.O.P.(Com.Div.).No. 581 of 2023). Considering the same all other issues are left open and to be decided afresh by the Arbitral Tribunal.

17. The evidence and pleadings recorded are complete for the purpose of fresh Arbitral Proceeding. The Arbitral Tribunal is directed to proceed with framing of issues and thereafter hear both parties on merits in accordance with law and pass a final Award except in respect of claim Nos.4&5.

18. At this stage both counsel have consented for appointing **Hon'ble**



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Mr.Justice G.M.Akbar Ali (Retd.,) Former Judge Madras High Court as
the Arbitrator.

19.Recording the same **Hon'ble Mr.Justice G.M.Akbar Ali (Retd.,)**
Former Judge Madras High Court residing at No.108/64, 2nd Floor,
Catholic Centre, Armenian Street, Parrys, Chennai – 600 001 (Mobile
No.+919445025151, gmakbarali52@gmail.com) is appointed as an arbitrator
to enter upon reference and adjudicate/resolve the *inter se* dispute between the
parties.

18. The learned Arbitrator appointed herein, shall after issuing notice to
the parties and upon hearing them, endeavour to complete the arbitral
proceedings and pass an award strictly in accordance with the provisions of the
Arbitration and Conciliation Act, 1996, as expeditiously as possible, preferably
within a period of twelve (12) months from the date of receipt of a copy of this
order without getting influenced by any of the observations made by this Court
in this order.

19. The learned Arbitrator appointed herein shall be paid fees and other
incidental charges as may be fixed with the consent of parties or in accordance



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with the provisions of the Arbitration and Conciliation Act, 1996, and the same shall be borne by the parties equally. In case, the respondents remain *ex-parte*, the petitioner shall pay the entire fee and other incidental charges to the Arbitrator and later recover the same from the respondents.

20. These Original Petitions are disposed of accordingly with the above observations and directions. Leaving the parties to bear their own costs.

08.01.2024

Index : Yes/No

Speaking Order/Non-Speaking Order

Neutral Citation : Yes/No

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C.SARAVANAN, J.

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