IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.01.2025

CORAM :

THE HON'BLE MR.K.R.SHRIRAM, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

OSA(CAD) No. 152 of 2024

M/s.Bridge Track And Tower Pvt Ltd.
Rep.by its Authorized Signatory Legal Manager,
Chandranath Bhattacharya, 18, R.N.Mukherjee Road,
6th Floor, Kolkata-700 001. .. Appellant

-vs-

Union of India through PCR/SR,
Rep. by Dy.CE/TP/HQ, PCE Office,
Southern Railways, Park Town,
Chennai 600 003. .. Respondent

Prayer : Appeal filed under Section 13(1A) of the Commercial Courts Act, 20156, against the fair and decretal order dated 15.07.2022 passed in Arb. O.P. (Comm. Div.) No.319 of 2022 on the file of original side of this Court.

For Appellant : Ms.Ramya Subramaniam
for Mr.Hitesh Singhvi

For Respondent : Mr.AR.L.Sundaresan,
Additional Solicitor General of India
Assisted by Mr.N.Ramesh,
Senior Panel Standing Counsel.

* * * * *

JUDGMENT

(Judgment of the Court was delivered by
Senthilkumar Ramamoorthy, J.)

The appellant entered into a contract with the respondent for supply of 6400 MM OR switches (curved) for BG 1 in 80.5-52 Kg rail on PSC sleepers. These goods were required to be manufactured as per drawings provided by the respondent. The contract also specified the delivery schedule. The original contract contained a Price Variation Clause, which was fixed on the basis of the Wholesale Price Index (WPI) 2004-05 series published by the Ministry of Commerce. With effect from 01.04.2017, it is common ground that the Ministry of Commerce stopped publishing the WPI 2004-05 series and instead started publishing WPI 2011-12 series. The appellant received a communication dated 18.11.2017 from the respondent informing the appellant about the replacement of the 2004-05 series with the 2011-12 series and stated that the price variation formula is required to be modified accordingly. By communications dated 01.12.2017 and 07.02.2018, the appellant objected to the change in price variation formula and, instead, requested the respondent to short-close the contract. By communication dated 23.07.2018, the respondent terminated the contract and forfeited the security deposit provided in the form of a bank guarantee. This resulted in a dispute between the parties.

2. At the request of the appellant, a Sole Arbitrator was appointed in accordance with the arbitration clause specified in the Indian Railway Standing Conditions of Contract. Pursuant to the appointment of the Arbitrator, the appellant lodged the statement of claim on 20.08.2021. In the said statement of claim, the appellant prayed for refund of a sum of Rs.15 lakhs, which had been withheld by the respondent. In addition, claims were made towards damages for unnecessary harassment and loss of reputation. The appellant also prayed for a declaration that the termination by the respondent was illegal, unlawful and untenable.

3. The Arbitral Tribunal considered these claims and by the Arbitral Award dated 27.12.2021 held that the termination was lawful and rejected all the monetary claims of the appellant. The award was challenged by the appellant in a petition under Section 34 of the Arbitration and Conciliation

Act, 1996 before a learned Single Judge of this Court. The challenge was rejected by order dated 15.07.2022. The present appeal arises in the said facts and circumstances.

4. Learned counsel for the appellant raised three grounds of challenge. The first ground of challenge was that the constitution of the Arbitral Tribunal was unlawful inasmuch as it was an unilateral appointment in contravention of the principles laid down in ***Perkins Eastman Architects DPC and another vs. HSCC (India) Ltd., (2019 SCC OnLine SC 1517) and TRF Limited vs. Energo Engineering Projects Ltd., (2017) 8 SCC 377***. The second ground of challenge was that the respondent unilaterally altered the price variation formula in spite of objections raised by the appellant, *inter alia*, under communications dated 01.12.2017 and 07.02.2018. The third ground of challenge was that the Arbitral Tribunal disregarded the evidence adduced by the appellant with regard to the delay being attributable to the respondent and not the appellant.

5. These contentions were refuted by the learned Additional Solicitor

General, who appeared for the respondent. He contended that the appellant had submitted itself to the jurisdiction of the Arbitral Tribunal by accepting the appointment and filing a claim statement and rejoinder statement before the Arbitral Tribunal. As regards the price variation clause, learned Additional Solicitor General submitted that the appellant consented to the modified price variation formula by issuing an invoice on the basis of the revised price variation formula on 24.04.2018. In any event, he contends that the original price variation clause was only valid until the expiry of the original term of contract, i.e., up to October, 2017. He also submitted that the amounts claimed by the appellant towards price variation were paid to the appellant by applying the modified formula. He also pointed out that no monetary claim was made in respect thereof before the Arbitral Tribunal. As regards the conclusion on termination, learned Additional Solicitor General submitted that such conclusion was based on an appraisal of evidence.

6. The first issue that falls for consideration is with regard to the unilateral appointment. The appellant has placed on record the pleadings before the Arbitral Tribunal. The appellant filed its statement of claim and

rejoinder. In neither of these pleadings, the appellant raised any objections with regard to jurisdiction. Consequently, in the award, the Arbitral Tribunal recorded as under with regard to jurisdiction:

> *"3.2. Both the parties confirmed that they had no objection against appointment of the AT and during the course of the Arbitral Proceedings, none of the parties, at any time, raised any doubt/question about the ability, independence and impartiality of the Arbitrator."*

The award further records the following:

> *"**4.0. Jurisdiction of the Arbitral Tribunal***
>
> *4.1. None of the parties raised any objection on the jurisdiction or the Arbitral Tribunal is exceeding the scope of its authority during the arbitral proceedings. No application was moved by any Party under Section 16 of the Act.*
>
> *4.2. Whereas the AT entered into reference on 09.07.2021 with the issue of Arbitration Notification No.01, duly briefing the procedure to be adopted by AT for conducting Arbitration as per Section 19 of the Act and also laid down the timelines for submitting Statement of Claims (SOC) by Claimant, State of Defence (SOD) by Respondent and Rejoinder by the Claimant."*

After taking note of the above facts, the learned Single Judge concluded that it is not open to the appellant to raise objections on the ground of unilateral appointment after participating in the arbitral proceedings, without raising any objection with regard to the constitution of such Tribunal. In this connection, reference may be made to a recent judgment of this Court in ***V.R.Dakshin Private Limited, by its authority vs. SCM Silks Private Limited, by its Director and others***, reported in ***2024 SCC OnLine Madras 6761***, wherein, in substantially similar facts and circumstances, we rejected the challenge on the basis of unilateral appointment. It should also be noted that the SLP challenging the said judgment was dismissed by order dated 16.12.2024 in Special Leave to Appeal (Civil) Nos.30047-30048 of 2024. Therefore, we concur with the conclusion arrived at by the learned Single Judge in this regard.

7. As regards the price variation formula, the first aspect to be noticed is that the appellant did not make any monetary claim in respect thereof. In addition, it should be noticed that the Arbitral Tribunal examined the evidence by way of invoices issued by the appellant and recorded the factual finding that the appellant had issued invoice dated 24.04.2018 based on the WPI 2011-12 series and that this would tantamount to acceptance of the revised series. The Arbitral Tribunal also calculated the amounts due and

payable towards price variation under the old and new indices and recorded a factual finding that the variation is negligible.

8. The last issue to be considered is whether interference is warranted with the conclusion that the termination by the respondent was valid. On this issue, after examining the evidence adduced by the parties, the Arbitral Tribunal recorded the factual finding that the rails were received by the claimant/appellant on 16.08.2017 and 05.09.2017, but 14 sets were supplied by the appellant between 27.02.2018 and 04.03.2018. On the basis of this factual finding, the Arbitral Tribunal recorded that the contention of the claimant/appellant that the delay was attributable to the respondent cannot be accepted. The relevant findings are set out below:

> *8.1.3.5 AT noted that the claimant supplied only 35 sets within original delivery period and further 14 sets supplied between 27.02.18 to 04.03.18 though the rails received by the claimant on 16.08.17 & 05.09.17, which proves that the claimant had breach the contract by delaying the supplies. The Claimant insistence for short closure of agreement for balance quantity inspite of delay in submitting the BG for free rails by them and delay in supply of 14 sets by them inspite of receiving the rails in August 2017 hold no water rather it proved that they are unable to manufacture intime due holding more orders than their capacity. In view of*

> *above, AT is of the considered view that the claimant failed to supply the material as per contract agreement and breached the contract hence AT dismiss the claim of the claimant and considered the termination order issued by the Respondent as legally valid and as per terms & conditions of the contract agreement."*

In matters relating to appraisal of evidence, the settled position is that this Court does not sit in appeal over the award and, therefore, re-appraisal of evidence is not permissible. The appellant has failed to establish that there was perversity in the appraisal of evidence either because the award is based entirely on irrelevant evidence or no evidence or by disregarding vital evidence.

9. For reasons set out above, we find no infirmity in the impugned order dated 15.07.2022 or the Arbitral Award dated 27.12.2021. Hence, O.S.A. (CAD) No.152 of 2024 is dismissed, without any order as to costs.

(K.R.SHRIRAM., CJ.) **(SENTHILKUMARRAMAMOORTHY, J.)**

28.01.2025

Index : Yes/No

NC : Yes/No

sra

THE HON'BLE CHIEF JUSTICE
AND
SENTHILKUMAR RAMAMOORTHY,J.

(sra)

To:

The Section Officer
Records Section, Original Side,
Madras High Court, Chennai.

O.S.A. (CAD) No.152 of 2024

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