



Arb.OP(Com.Div).No.630 of 2022

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.02.2026

PRONOUNCED ON : 13.02.2026

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

Arb.OP(Com.Div).No.630 of 2022

M/s. Sivashankar & Co
Rep.by its Proprietor D.Sivashankar
Having Office at 303, EBONY Apartment
110/2, River View Link Road
IAS/IPS Colony, Manapakkam
Chennai-600125.

..Petitioner

Vs.

The Divisional Railway Manager
Chennai Division ,Southern Railway
Chennai.

..Respondent

Prayer: Arbitration Original Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996, to set aside the award of the Arbitral Tribunal dated 27.3.2022 and received on 17.05.2022 and to direct the respondents to pay the costs.

For Petitioner : Mr.J.Srinivasa Mohan
for M/s.TVJ Associates

For Respondents : Mr.K.S.Jayaganesan
Senior Counsel



ORDER

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This Arbitration Original Petition has been filed challenging the award dated 27.3.2022 passed by the Arbitral Tribunal under Section 34(1) of the Arbitration and Conciliation Act, 1996, [hereinafter referred to as 'the Act'] .

2.The petitioner and the respondent entered into an agreement dated 27.3.2017 for work relating to provision of new foot over bridge at Chennai, Egmore. This was for platforms 2 to 11. The Letter of Acceptance was issued on 7.11.2016 and the duration of work was fixed as 12 months. However, extensions were granted till June 2020. Ultimately, a notice of termination dated 30.09.2020 was issued by the respondent under the General Conditions of Contract (GCC) 62(1) and 16(4)(f). Pursuant to the same, the Earnest Money Deposit (EMD), Performance Guarantee (PG) and Security Deposit (SD) were forfeited and certain claims made by the petitioner was rejected. The dispute was referred to the Arbitral Tribunal and the claimant made the following claims:

(a) To declare that the termination order dated 30-09-2020 is unlawful and also the termination has been done without currency.



WEB COPY



Arb.OP(Com.Div).No.630 of 2022

(b) Direct the Respondent to release the Performance Guarantee amount of a sum Rs. 16,62,557/- .

(c) Direct the Respondent to Refund the EMD of Rs. 2,82,400/-.

(d) Direct the Respondent to Refund the Security Deposit of Rs. 13,45,026/-.

(e) Direct the Respondent to pay the Price Variation Clause Amount of a sum of Rs. 17,63,411/-.

(f) Direct the Respondent to pay the GST Amount of a sum of Rs. 14,26,327/-.

(g) The Claimant is entitled to cost of Stock at site of a sum o Rs.4,50,000/-.

(h) The Claimant is entitled to loss of amount incurred in Idling of men and Machinery of sum of Rs. 1,40,000/-.

(i) The Claimant is entitled to overhead charges and establishment charges incurred of a sum of Rs.6,76,000/-.

(j) The Claimant is entitled to cost of 2.5 MT Finished steel structure of a sum of Rs.2,96,000/-.

(k) The Claimant is entitled to loss of profit at 10% on the balance work of Rs. 2,89,54,459/- amounting to Rs.28,95,446/-.



WEB COPY



Arb.OP(Com.Div).No.630 of 2022

(l) The Claimant is entitled to Rs. 15,06,047/- payable towards the Interest and charges paid by the Claimant to banks and others.

(m) The respondent is liable to pay compensation 20,00,000/-for the agony endured and which continues till date due to the wrongful termination of the contract.

(n) The claimant is entitled to interest on the claims.

(o)The respondent is liable to bear the cost of arbitration.

3.The respondent filed statement of defence and justified the termination of contract and forfeiture of EMD, PG and SD. The respondent sought for counter claims to the total tune of Rs.2.44 Crores. The respondent also sought for the rejection of the claim made by the petitioner.

4.The Arbitral Tribunal instead of framing issues thought it fit to deal with each claim made by the petitioner and the counter claim made by the respondent. On considering the facts and circumstances of the case and the documents relied upon by both sides, Claim Nos.5 and 6 alone were awarded. Insofar as the counter claims are concerned, the majority members held that the respondent is entitled for Counter Claim



Nos.1 and 2 and rejected Counter Claim Nos. 3 to 5. The summary of the award is tabulated hereunder:

48.1 Claims of Claimant :

Claim	Gist of claim	Amount of Claim (in Rs.)	Award given by presiding Arbitrator (in Rs.)	Award given by other two Arbitrators (in Rs.)
(1)	To declare termination of contract not valid	Declaratory	Claimant as well as respondent are responsible for termination.	Termination letter with retrospective effect is legally valid and justified.
(2)	Release of Performance guarantee amount	16,62,557/-	Half of each totalling 16,44,991/- in favour of the	Nil
(3)	Refund of EMD	2,82,400/-		Nil
(4)	Refund of security deposit	13,45,026/-	Claimant	Nil
(5)	Payment of price variation as per agreement	17,63,411/- increased to 26,20,140/-	25,94,300/- in favour of the claimant	25,94,300/-
(6)	Reimburse eligible GST neutralization	14,26,327/- increased to* 15,22,402/-	15,22,402/- in favour of the claimant	Rs.15,22,402/- in favour of the claimant
(7)	Payment of stock at site	4,50,000/-	Nil	Nil



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Claim	Gist of claim	Amount of claimant (in Rs.)	Award given by presiding Arbitrator (In Rs.)	Award given by other two Arbitrators (in Rs.)
(8)	Payment for idling of men and machinery	1,40,000/-	Nil	Nil
(9)	Payment towards overhead and establishment charges	6,76,000/-	Nil	Nil
(10)	Payment for fabricated steel structure	2,96,000/-	Nil	Nil
(11)	Loss of profit	28,95,446/-	Nil	Nil
(12)	Reimbursement of interest paid to Bank	15,06,047/-	Nil	Nil
(13)	Compensation for damage of reputation etc,	20,00,000/-	Nil	Nil
(14)	Payment of interest charges at 12%	TO BE DECIDED	Nil	Nil
(15)	Legal expenses and cost of Arbitration	9,00,000/-	Nil	Nil
(16)	TOTAL OF ALL CLAIMS	1,53,43,214/- (INCREASED TO 1,62,96,018/-) + to be decided	57,61,693/- in favour of the claimant	41,16,702/- in favour of the claimant

*Increased by the claimant through his submission at CD-4.



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49.COUNTER CLAIMS OF RESPONDENT:

C/ Claim	Gist of Counter Claim	Amount of claim (in Rs.)	Award given by presiding Arbitrator (In Rs.)	Award given by other two Arbitrators (in Rs.)
(1)	Forfeiture of Performance guarantee	16,62,557/-	Same as award against claims nos.2, 3 & 4 Rs.16,44,991/- in favour of respondent	16,62,557/- in favour of respondent
(2)	Forfeiture of EMD and SD	16,62,557/-		16,62,557/- in favour of respondent
(3)	Cost of supervision	58,56,339/-	Nil	Nil
(4)	Difference in cost due to escalation	1,66,11,249/-	Nil	Nil
(5)	Cost of Arbitration	To be quantified	Nil	Nil
(6)	Total	2,44,68,417/- (actual total comes to 2,57,92,702/-) plus amount to be quantified	Rs.16,44,991/- in favour of respondent	Rs.33,25,114/- in favour of respondent

5. Aggrieved by the above award passed by the Tribunal, the present petition has been filed before this Court.



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6.The learned counsel for the petitioner mainly focused his arguments with respect to Claim Nos.1 to 4, 7 and 11 and it will suffice to deal with these claims while testing the award passed by the Arbitral Tribunal.

7.This Court heard the learned counsel for the petitioner and the learned counsel for the respondents and has carefully considered the submissions of the learned counsel on either side and perused the materials available on record and the award passed by the Arbitral Tribunal.

8.Claim Nos. 1 to 4 are interconnected since the forfeiture of EMD, PG and SD was done pursuant to the termination of the contract. Therefore, if the termination of the contract is upheld, the forfeiture of EMD, PG and SD will be justified. If the termination is held to be bad, the forfeited amount will have to be refunded to the petitioner.

9.The time was fixed for the completion of work as 12 months. However, three extensions were granted. The first extension was granted on 26.6.2018 upto 31.12.2018 and this extension was granted under 8/22



Arb.OP(Com.Div).No.630 of 2022

Clause 17A(ii) of the GCC. The second extension was granted on 6.3.2019 once again by relying upon the same Clause upto 31.12.2019.

The third extension was granted on 21.01.2020 again by relying upon the same clause upto 30.06.2020. It is an admitted case that no further extension of time was granted and the period came to an end on 30.06.2020.

10.In the light of the above admitted facts, two issues that falls for consideration is as to whether after the expiry of the period a contract can be cancelled and whether extension of the period under Clause 17A(ii) of the GCC can result in breach of contract for not completing the work within the time stipulated.

11.The reasons for the extension of time are (a) GAD revised and approved only on 2.11.2018 (b) Alignment of FOB changed “Z” shape to a straight line (c) Site was not handed over for platforms 3 to 6, 10 and 11 and; (d) G1/A2B site – additional work.

12.Apart from the above, there were other reasons like certain third parties who had to vacate and hand over possession and which was protracting due to litigation.

9/22



WEB COPY 13.As stated supra, extension of time was granted under Clause 17A(ii) of the GCC. For proper appreciation, the relevant Clause is extracted hereunder:

17- A Extension of Time in Contracts:

(ii) **Extension for Delay not due to Railway or Contractor:** If in the opinion of the Engineer, the progress of work has any time been delayed by any act or neglect of Railway's employees or by other Contractor employed by the Railway under Sub-Clause (4) of Clause 20 of these Conditions or in executing the work not forming part of the contract but on which Contractor's performance necessarily depends or by reason of proceeding taken or threatened by or dispute with adjoining or to neighbouring owners or public authority arising otherwise through the Contractor's own default etc. or by the delay authorized by the Engineer pending arbitration or in consequences of the Contractor not having received in due time necessary instructions from the Railway for which he shall have specially applied in writing to the Engineer or his authorized representative then upon happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the Engineer within 15 days of such happening, but shall nevertheless make constantly his best endeavours to bring down or make good the delay and shall do all that may be reasonably required of him to the satisfaction of the Engineer to proceed with the works. The Contractor may also indicate the period for which the work is likely to be delayed and shall be bound to ask for necessary extension of time. The Engineer on receipt of such request from the Contractor



WEB COPY



Arb.OP(Com.Div).No.630 of 2022

shall consider the same and shall grant such extension of time as in his opinion is reasonable having regard to the nature and period of delay and the type and quantum of work affected thereby. No other compensation shall be payable for works so carried forward to the extended period of time; the same rates, terms and conditions of contract being applicable as if such extended period of time was originally provided in the original contract itself.

14. An extension made under Clause 17A(ii) is an extension given where the delay is not attributable either to the Railways or to the contractor. Thus, this Clause is invoked when there are justifiable reasons to extend the period of contract. It also makes it clear that no further compensation will be payable for the works carried out during the extended period of time and the same rates and terms of conditions of contract will be applicable even for the extended period as if such time was provided in the original contract itself.

15. In the termination notice dated 30.09.2020, it has been stated that the petitioner failed to complete the work and failed to apply for the further extension of period upto 30.06.2020 and did not show any progress even after the issuance of seven days notice and 48 hours notice and therefore the contract stands terminated with effect from 30.06.2020.



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16. While going through the materials placed before this Court, it is seen that various reasons have been given regarding poor progress shown by the petitioner from 16.3.2020. On 15.9.2020, the SSE bridges writes that the fabrication work for GI road side work is under progress but the progress is not substantial. The next day the same SSE bridges writes another letter stating that the work has not progressed for more than six months inspite of repeated instructions. On 29.9.2020, yet another letter was issued to the effect that the contractor has not even reported to the SSE bridges.

17. In the seven days notice, it is mentioned that the work has not restarted and that the claimant did not work from 16.3.2020.

18. On the side of the petitioner, certain documents were relied upon to show that steel has been procured and fabrication was in progress during September 2020 and during interregnum period between April and July 2020, nothing was able to be done due to the Pandemic period.

19. The Arbitral Tribunal in more than one place renders a finding that the contract has come to an end on 30.06.2020 and admittedly no

12/22



Arb.OP(Com.Div).No.630 of 2022

extension of time was granted thereafter. At this juncture, it has to be seen as to whether there can be a termination of contract that is not subsisting.

20.Once a contract comes to an end by efflux of time and the period is not extended, there is no question of issuing a termination notice and thereafter terminating the contract. The very process of termination pre-supposes that there is a subsisting contract. If there is no subsisting contract, there is nothing to be terminated thereafter. Useful reference can be made to the judgment of the **Bombay High Court in Union of India .V. M/s.Quick Communication Systems Pvt., Ltd., made in Arbitration Petition No.305 of 2009 dated 02.07.2012.** It is also relevant to take note of the judgment of this Court in **The Chief Engineer/CN/East, Construction Office, Southern Railway, Chennai .Vs. 1.Mrs.V.kalyani and Others** reported in **2018 SCC Online Mad 2138.**

21.The Arbitral Tribunal renders a finding that the determination of the contract three months after it came to an end is nothing but a declaration of the end of the contract on account of breach of contract by the claimant after the previous last day of validity of the contract. The

13/22



Arb.OP(Com.Div).No.630 of 2022

23.As stated supra, the extension of time was granted under Clause 17A(ii) of the GCC. Thus, the delay caused due to this extension is neither attributable to the petitioner nor to the respondent and therefore the same cannot lead to breach of contract for not completing the work within the time stipulated.

24.The judgment that was relied upon by the Arbitral Tribunal in the case of **Air India Limited .Vs. Gati Limited** will not apply to the facts of the present case since that was a case where there was inaction or delay on the part of one party and therefore the termination notice issued without following the proper procedure was held not to vitiate such termination.

25.In the light of the above discussion, this Court holds that the finding rendered by the Arbitral Tribunal justifying the termination order dated 30.09.2020 is clearly perverse and suffers from patent illegality.

26.The Arbitral Tribunal consisted of retired personnel who were working with Railways and they were trying to come up with various reasons to justify the termination of the contract and to justify the consequent forfeiture of EMD, PG and SD. Such state of mind on the

15/22



Arb.OP(Com.Div).No.630 of 2022

part of the Arbitral Tribunal is quite apparent on a careful reading of the award.

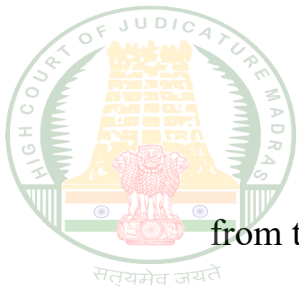
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27.In the light of the above finding, the forfeiture of EMD, PG and SD is unsustainable. Only if there is a valid termination of contract in line with GCC 62(1), it can lead to forfeiture of EMD, PG and SD under Clause 16(4)(f). If the termination of contract is held to be unlawful, the consequent forfeiture must also fall to the ground.

28.In the light of the above discussion, Claim Nos.1 to 4 which was rejected by the Arbitral Tribunal and which is connected with counter claim nos.1 and 2, is liable to be interfered with by this Court and the findings are set aside.

29.The next issue pertains to Claim No.7. This claim was made for payment of steel material purchased and stocked at the site. The Arbitral Tribunal rejected this claim only on the ground that the claimant had caused breach of contract by not completing the work and the termination of contract was upheld and therefore the claimant is not entitled for any award under this head. The only other reason that has been assigned is that the respondent has not taken custody of the materials of the claimant

16/22



Arb.OP(Com.Div).No.630 of 2022

from the work site. The finding rendered by the Arbitral Tribunal is liable to be interfered by this Court since the claimant has established the fact that the steel material purchased was stocked at the work site (platform 10 and 11) and it was never taken back by the claimant. Accordingly, claim No.7 has to be awarded in favour of the claimant.

30.Claim No.11 pertains to loss of profit due to illegal termination of the contract.

31.The specific case of the claimant is that the illegal and unlawful termination of the contract resulted in the claimant not being able to execute the balance work resulting in loss of money invested, loss of manpower and damage caused to the reputation of the claimant. The claimant was claiming for 10% on the balance work to the tune of Rs.26,18,886/-.

32.The Arbitral Tribunal had rejected this claim mainly on the ground that the claimant had committed breach of contract and the termination of the contract was also upheld and hence the claimant was held to be not entitled for any compensation under this head.



Arb.OP(Com.Div).No.630 of 2022

33. When it comes to loss of profit, certain amount of guesswork

and leeway is permitted and the Arbitral Tribunal can employ honest guess work and a rough and ready method for quantifying the damage. GCC61(3) provides that a contractor shall have no claim to any payment of compensation or otherwise howsoever on account of any profit or advantage which he might have derived from the execution of the work in full but which he did not derive in consequence of determination of contract.

34. The above Clause can be put against the petitioner if the termination of the contract was legal. This Court has already held that the termination of contract is illegal and unlawful. Under such circumstances, the petitioner will be entitled for loss of profit. However, there must be some basis for calculating this loss. The only basis on which the petitioner is claiming for loss of profit is the balance work not completed and out of which the petitioner is claiming for 10%. Such a claim cannot be awarded mechanically without giving reasons on the underlying facts which ultimately leads to adopting a formula to calculate loss of profit. Just because the Arbitral Tribunal or the Court are given the leeway or the scope for guesswork, that does not mean that an arbitrary amount can be fixed without reasons. In the case in hand, the

18/22



Arb.OP(Com.Div).No.630 of 2022

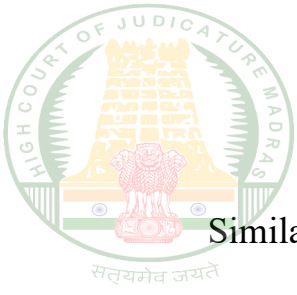
claimant is seeking for loss of profit at 10% on the balance work that was not completed and that certainly cannot form the basis for awarding compensation under the head of loss of profit. Hence, this Court is not inclined to interfere with the finding of the Arbitral Tribunal insofar as Claim No.11 is concerned.

35.The last issue that arises for consideration is as to whether the petitioner will be entitled to claim for payment of interest towards the EMD, PG and SD that has to be refunded by the respondent.

36.Under normal circumstances, these amounts will not carry any interest and it has to be refunded as such. However, these amounts have been retained by the respondent by forfeiting these amounts and such forfeiture was held to be illegal by this Court. Therefore, the petitioner will be certainly entitled for payment of interest on the EMD, PG and SD.

37.In the result, Claim Nos.1 to 4 and 7 are awarded in favour of the petitioner/claimant. Insofar Claim Nos. 2 to 4 are concerned, the EMD, PG, and SD shall be refunded to the petitioner with interest at the rate of 9% p.a., from 30.06.2020 till the date of actual payment.

19/22



Arb.OP(Com.Div).No.630 of 2022

Similarly, the sum of Rs.4,50,000/- for Claim No.7 shall be paid to the petitioner/claimant with interest at the rate of 9% p.a., from 30.06.2020, till the date of actual payment. The counter claims 1 and 2 awarded by the Arbitral Tribunal in favour of the respondent is set aside. The award in all other respects stands confirmed.

38.In the result, this Arbitration Original Petition is allowed in the above terms and there shall be a direction to the respondent to pay cost of a sum of Rs.2,00,000/- to the petitioner.

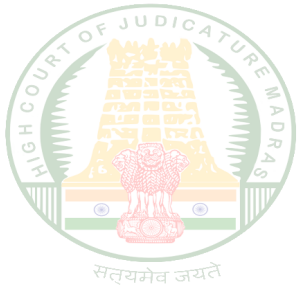
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Index:Yes/No

Speaking order/Non Speaking Order

NCC:Yes/No

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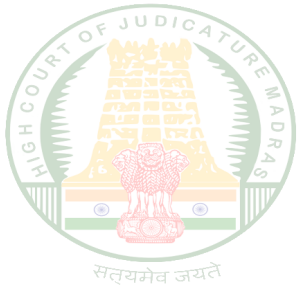
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Arb.OP(Com.Div).No.630 of 2022

To

The Divisional Railway Manager
Chennai Division
Southern Railway
Chennai.



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Arb.OP(Com.Div).No.630 of 2022

N.ANAND VENKATESH, J

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**Pre Delivery Order in
Arb.OP(Com.Div).No.630 of 2022**

13.02.2026

22/22