

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.09.2016

CORAM

THE HONOURABLE MR.JUSTICE **RAJIV SHAKDHER****O.P.No.652 of 2012**

1. The Chief General Manager
 Bharat Sanchar Nigam Limited, Chennai Telephones
 No.78, Purasawakkam High Road, Chennai-600010.

2.The Deputy General Manager (Cable Constructions)
 Bharat Sanchar Nigam Limited, Chennai Telephones
 IV Floor, No.7, Kush Road,
 Nungambakam, Chennai-600034.

.. Petitioners

.Vs.

1. M/s.PAMBS Engineers and Constructors
 Represented by its Partner
 Mr.Selvam,
 No.86, 1st, TP Chatram,
 Kilpauk, Chennai-600 010.

2. Justice Mr.A.Ramamurthy (Sole Arbitrator)
 Former Judge, Madras High Court
 Plot No.9, 3rd Main Road,
 Mugapair West Garden, Chennai-37.

.. Respondents

* * *

Prayer : Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the arbitral award dated 11.10.2010 passed by the second respondent in O.P.No.958 of 2007 and dismiss the claim of the first respondent.

For Petitioner : Mr.P.Sidharthan

For R1 : Mr. Amalaraj S.Penkilapatti

ORDER

1. This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as

1996 Act.)

1.1. By virtue of this petition, challenge is laid to award dated 11.10.2010.

2. The award covers two (2) work orders. In respect of the said work orders, the respondent had raised bills, which were partially paid. The details of Work Order, Bill Amount and Amount Received are set out hereafter:

<i>Sl.No.</i>	<i>Work Order No.</i>	<i>Bill Amount Rs.</i>	<i>Received Amount Rs.</i>
1.	SDE/EXTL-1/CABLES/WO/01 Dt.17.10.03	2,22,327	74,716
2.	SDE/EXTL-1V/ANR/WO/01 Dt.17.11.03	1,76,709	38,851

3. Accordingly, the respondent agitated the matter before the Arbitrator appointed by this Court under Section 11 of the 1996 Act.

4. The Arbitrator has passed an award dated 11.10.2010 in favour of the respondent in the sum of Rs.2,85,469/-.

5. The record show that the petitioner in effect representing Bharat Sanchar Nigam Limited, Chennai (hereinafter referred to as BSNL) had floated tenders for executing cable laying work within Chennai Telephone District.

6. The respondent had bid for the tender and on being declared successful, was awarded the work of laying cables.

6.1. An agreement dated 28.12.2001 was executed in this behalf which required the respondent to lay cables in North Zone, as indicated above.

6.2. Disputes arose between the parties herein with respect to non -payment of amounts qua bills raised.

6.3. The details of which are mentioned in paragraph 2 above.

7. During the course of the argument, what emerged was, the fact that, amounts remained unpaid qua the two aspects of the work awarded to the respondent. These being: "removal of excess earth" and "sea-sand filling". It is in this context, that issues were framed by the learned Arbitrator. The issues framed were as follows:

1. Whether the dispute raised by the claimant is an arbitrable issue?

2. Whether the claimant executed the work of 'the removal of excess earth' and the work of 'sea-sand filling' as stipulated in the instant Contract Documents and the other items of works as claimed by the claimant?

3. Whether the claimant can raise a dispute pertaining to the part of the contract after the acceptance and having given consent to the conditions stipulated in the contract pertaining to the nature of work?

4. Whether act of the claimant is not seeking clarification at the time of the signing of the contract precludes the claimant

from same at a later stage?

5. Whether the claimant is entitled for the alleged outstanding payment covered under the documents mentioned under Annexure-A of the Claim Statement?

6. Whether the claimant is entitled to interest due to the retention of amounts covered under the documents mentioned under-A of the claim petition?

7. Whether the parties are entitled for cost?

8. Whether the parties are entitled for any other reliefs?

8. Insofar as issue Nos. 1 to 5 are concerned, they were answered in favour of the respondent. As regards issue No.6 which pertains to the aspect regarding payment of interest, the learned Arbitrator granted interest to the respondent at the rate of 12% per annum, with effect from 01.04.2004 till the date of payment.

9. As regards issue No.7, which pertains to cost, the learned Arbitrator awarded cost in the sum of Rs.15,000/- in favour of the respondent.

10. Accordingly, as indicated above, relief was granted to the respondent by awarding a sum of Rs.2,85,469/-. with interest at the rate of 12% per annum from 01.04.2004 till the date of payment, along with the cost of Rs.15,000/-. Furthermore, there was also a direction for payment of honorarium to the Arbitrator.

11. BSNL was, thus, directed to make the payment within a period of three months.

12. Before me, Mr.Sidharthan, who appears for BSNL has assailed the award primarily on the ground that no evidence was produced by the respondent which would demonstrate that work pertaining to removal of excess earth and sea sand filling was carried out by the respondent.

13. According to me, this aspect of the matter was clearly dealt with by the learned Arbitrator, while dealing with issue Nos.1 to 5. The relevant observations of the learned Arbitrator with regard to this aspect are set forth below:

"The respondent disputed the claim on the ground that there is no work order relating to removal of excess earth and sea sand filling. He was not required to do this work. More over the documents called for by the Department in support of the claim has not been produced by the claimant. Since he failed to produce the documents called for the claim is not paid. The contractor also failed to maintain daily check list. Failure to produce necessary details namely source of procurement of sea sand for filling trenches, permission from State Govt. for lifting sea sand, tax paid for sea sand lifting, tender for transporting excavated earth and sea sand, transport Corporation invoices, municipal authorities direction for sea sand filling appropriate orders from the authorities for procurement for sea sand and cost of sea sand so procured in particular quantum for filling the trenches would only lead to disentitlement of the claim. More over there is no arbitral issue after having received part of the amount

from the respondent.

It is clear from Clause-15 of the tender condition as well as from Clause-17 of the agreement that they will attract any question/dispute/difference arising under the agreement between the parties. It is not the case of the respondent that the claimant has received part of the amount in full satisfaction. The claimant had submitted a bill claiming a larger amount and the respondent approved only part of the amount and disputed in respect of the balance of the amount. Simply because part of the amount was received it cannot be concluded that the claimant had received the amount in full satisfaction and he has no right to invoke arbitration clause as provided under the agreement as well as in the tender condition. The documents filed on the side of the claimant clearly proved that they have claimed a larger amount and has gone to the extent of stating that if the amount is not paid they will resort to arbitration. Based on Clause-15 and Clause-17 there is no doubt in coming to the conclusion that there is an arbitral clause and the claimant is entitled to invoke the same.

Annexure-A to the claim contains the total amount claimed, amount allowed by the respondent and the amount remains due and payable. The respondent in the counter has clearly admitted that the work has been completed by the claimant. The main ground of attack is that there is no work order and the claimant has failed to produce necessary documents to support the claim for having completed the work. The learned Counsel for the claimant stated that the acceptance test report has been duly signed by the Officials of the BSNL and these documents are also filed. Apart from that M-Book had also been signed by the officials. The Signature by the Officials of BSNL in various

documents is not disputed. Nowhere in the documents the Officials have disputed the work carried out by the claimant.

The claimant relied on the report of sand filling etc. of the Committee constituted by the Chief General Manager of BSNL and marked in the case as Ex.C-20. Perusal of the same disclosed that a code of conduct was issued by Corporation of Chennai during 1993 which had been made applicable to all Service Departments including Chennai Telephones. According to the code of conduct all service departments who dig trenches for various purposes shall back fill them with sea sand/Karanodai sand and remove the excess earth within a time frame to avoid fines. The agreement between Chennai Telephones and the cable laying contractors specify that the code of conduct issued by Chennai Corporation should be followed. No exemptions were listed for this class of the agreement. After careful examination of all the relevant documents available with BSNL the Committee decided as follows:-

"Backfilling the trenches by sea sand/Karanodai sand is a must within the geographical limits of Chennai Corporation and is in accordance with the agreement entered for cable laying and allied works by Chennai Telephones with PSU/Departmental contractors. Unless and otherwise mentioned in any work order, not to back fill the trenches with sea sand/Karanodai sand, it is implicit and mandatory that all cable laying trenches dug up within the Corporation limits shall be back filled with sand and the excess earth shall be removed within the specified time frame. Hence the claims of the contractors pertaining to these two items shall be settled in accordance with the approved rates mentioned in the agreement".

The Committee constituted by BSNL has come to the conclusion based on the documents that the claim of the contractor pertaining to these items shall be settled in accordance with the approved rates mentioned in the agreement. When this being the state of affairs the contention of the respondent that the documents called for were not produced by the claimant and as such they were disallowed cannot be accepted. The acceptance test report as well as entries in the M-Book clearly proved that the work has been completed by the contractor and as such even in the absence of any work order these works were to be carried out to comply with the statutory requirement namely the code of conduct issued by Corporation of Chennai. The Officials also admitted that it is applicable to all service departments including Chennai Telephones. Hence in my view the disallowance of the claim is not proper and correct and as such it is payable to the claimant.

The Learned counsel for the claimant also stated that if the work has not been carried out and if the Officials have certified improperly the Department would have definitely taken action against the concerned Officials. No such action was taken by the Department. The acceptance test report and the entries in M-Book contains quantitative and qualitative measurement by the responsible officers of various items of the works completed by the contractor. After 3 to 4 years due to intervening monsoon rain and heavy vehicular traffic this could not be effectively checked at this distance point of time. No specific reason was also assigned by the department for not taking any action against the Officials who have signed in these documents. Absence of any such thing would only lead to the irresistible conclusion that the work has been completed by the contractor and there is no reason to disallow the same. There is absolutely no necessity for the claimant to seek any clarification even at the time of signing of

the contract when a dispute of this type could not be thought off.
Hence these issues are answered in favour of the claimant. "

(emphasis is mine)

14. Having regard to the findings recorded by the learned Arbitrator, the submission on behalf of BSNL, that no evidence was produced, is unsustainable.

15. The Arbitrator, taking into account the material produced before him, has come to a conclusion that the respondent carried out the work pertaining to "excess earth removal" and "sea-sand filling". The fact that excess earth removal and sea-sand filling was mandatorily required to be done has also been noticed.

15.1. Reliance in that behalf has been placed on the committee constituted for that purpose by BSNL.

15.2. Interestingly, BSNL, after paying part of the money, withheld the rest, on the ground, that no work order was issued in respect of the subject work.

15.3. As rightly noticed by the Arbitrator, if this was the situation, why was no departmental action taken against the officers by the BSNL.

16. It is not the BSNL's case that work was not carried out. If

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the work was carried out, at least, that is what is the finding of the Arbitrator is, it had to be carried out by someone, the weight of the evidence in this behalf appears to be in favour of the respondent.

16.1. It is trite to say that this Court will not examine while exercising power under Section 34 of the 1996 Act, the quantity and quality of evidence produced before the Arbitrator.

16.2. As long as there is some evidence on record, which has been appreciated by the learned Arbitrator, no interference is called for by this Court. [See Associated Cement Companies Vs.Keshvanand (1997(12)TM 1629)]

17. Therefore, according to me, there is no merit in the petition. Accordingly, the petition is dismissed, leaving parties to bear their own costs.

21.09.2016

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