

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.09.2016

CORAM

THE HONOURABLE MR.JUSTICE **RAJIV SHAKDHER**

O.P.No.769 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. Mr.T.Arivunithi

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 01.03.2012 passed by the second respondent in O.P.No.935 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 under Section 34 of the Arbitration and Conciliation Act. By virtue of this petition, challenge is laid to award dated 01.03.2012.

2. The petition is effectively been filed by Bharat Sanchar Nigam Limited in short BSNL, in the background of the following broad facts:

2.1. BSNL had floated a tender for laying underground cables. Respondent No.1 i.e., Mr.T.Arivunithi, who was one of the enlisted contractors preferred a bid for South Zone against the tender floated by BSNL. Respondent No.1 was declared successful in the bidding process and consequently, an agreement dated 27.12.2001 was executed with BSNL.

2.2. Under the contract, Respondent No.1 was issued with six work orders, i.e., Work Order No. DE/KOD/EXTL-II/WO/2002-2003/05 (in short the first work order) dated 21.08.2002 and No. DE/KOD/EXTL-I/WO/2002-2003/17 (in short the second work order) dated 15.02.2003, No.DE/KOD/EXTL-I/WO/2003-2004/06 (in short the third work order) dated 22.07.2003, No.DE/KOD/EXTL-II/WO/2003-2004/05 (in short the fourth work order) dated 28.07.03, No. DE/KOD/EXTL-I/WO/2003-2004/10 (in short the fifth

work order) dated 23.09.03 and sixth work order (details not available). The completion date of the 1st, 2nd, 3rd, 4th and 5th work orders was 20.03.2003, 19.04.2003, 30.08.2003, 28.07.2003 and 23.09.2003 respectively.

2.3. Respondent No.1 has raised invoices against the aforementioned work orders. The amount claimed against invoice dated 25.04.2003 was Rs.3,16,748/-, invoice dated 11.08.2003 was Rs.92,215/-, invoice dated 02.09.2003 was Rs.1,47,222/-, invoice dated 19.12.2003 was Rs.85,863/-, invoice dated 30.01.2004 was Rs.2,49,404/- and invoice dated 21.03.2002 was Rs.67,805/-. BSNL, however, partially, liquidated the invoices in issue.

2.4. Against invoice dated 25.04.2003, a sum of Rs.78,416/- was paid, invoice dated 11.08.2003, a sum of Rs.25,372 was paid, invoice dated 02.09.2003, a sum of Rs. 34,232/- was paid, invoice dated 19.12.2003, a sum of Rs. 24,831/- was paid, invoice dated 21.03.2002, a sum of Rs.14,661 was paid, whereas, against the invoice dated 30.01.2004, no payment has been made.

2.5. Consequently, a dispute raised by respondent No.1, which led to the appointment of an Arbitrator and filing of a statement of claim. The Arbitrator, evidently, awarded a sum of Rs.2,38,332/- against invoice dated 25.04.2003, a sum of

Rs.66,843/- against invoice dated 11.08.2003, a sum of Rs.1,12,990/- against invoice dated 02.09.2003, a sum of Rs.61,032/- against invoice dated 19.12.2003, a sum of Rs. NIL against invoice dated 30.01.2004 and a sum of Rs.53,114/- against invoice dated 21.03.2002. For the sake of convenience, the details as given in the award are extracted hereafter.

<i>S l. No</i>	<i>Work Order No.</i>	<i>Completion Date</i>	<i>Bill No.</i>	<i>Bill Date</i>	<i>Bill Amount</i>	<i>Received Amount</i>	<i>Balance Claim Amount</i>	<i>Awarded Amount</i>
1	DE/KOD/EXTL-II/WO/2002-2003/05 Dt.21.08.02	20.03.03	TA/CTD/D/03-04/03	25.04.03	3,16,748	78,416	2,38,332	2,38,332
2	DE/KOD/EXTL-I/WO/2002-2003/17 Dt.15.02.03	19.04.03	TA/CTD/D/03-04/23	11.08.03	92,215	25,372	66,843	66,843
3	DE/KOD/EXTL-I/WO/2003-2004/06 Dt.22.07.03	30.08.03	TA/CTD/D/03-04/26	02.09.03	1,47,222	34,232	1,12,990	1,12,990
4	DE/KOD/EXTL-II/WO/2003-2004/05 Dt.28.07.03	28.07.03	TA/CTD/D/03-04/37	19.12.03	85,863	24,831	61,032	61,032
5	DE/KOD/EXTL-I/WO/2003-2004/10 Dt.23.09.03	23.09.03	TA/CTD/D/03-04/65 (Disallowed - barred by Limitation)	30.01.04	2,49,404	NIL	2,49,404	Nil Rejected
6	NOT AVAILABLE		TA/CTD/D/02-03/105	21.03.02	67,805	14,661	53,144	53,144
Total of Claim & Award							7,81,745	5,32,341

3. BSNL has assailed the amounts awarded by the learned Arbitrator, solely, on the ground that these amounts have been ordered to be paid for works for which no evidence was produced by

respondent No.1.

3.1.Pertinently, the amounts awarded pertained to six jobs carried out by respondent No.1, which were related to removal of excess earth and sea-sand filling.

4. It is the case of BSNL before me, that a perusal of the invoice would show that 60% of the amount claimed is towards the aforementioned jobs, which were only incidental, to the main work assigned under the contract, which was of laying cables.

4.1. It is also the case of BSNL, that, no material whatsoever was produced by respondent No.1, which could have established that these jobs had, in fact, been carried out by it.

5. Furthermore, it is sought to be argued that respondent No.1, was not required, in fact, to carry out these works under the terms of the contract.

6. Based on this argument, it is averred in the petition that the Arbitrator awarded amounts beyond the terms of the contract and hence, exceeded his jurisdiction.

6.1. These are, broadly, the grounds on which challenge is laid to the amounts awarded by the learned Arbitrator.

7. Mr.P.Sidharthan, the learned counsel, who appeared for BSNL argued in line with the aforementioned grounds taken in the petition filed by BSNL.

7.1. Thus, in fact, Mr.P.Sidharthan, learned counsel confined his challenge only to two aspects of the work assigned to the entity.

7.2. The first, with regard to removal of excess earth and, the second, with regard to sea-sand filling.

8. On the other hand, Mr. Amalaraj S.Penkilapatti, who appeared for respondent No.1, relied, largely, upon the award to rebut the submissions made on behalf of BSNL.

9. I have perused the record as also given due consideration to the submissions advanced by the learned counsel for the parties.

10. Upon perusal of the award and the material on record, I find that the conclusions reached by the learned Arbitrator need not be disturbed. The reason which persuades me to reach this conclusion is a finding of fact given by the learned Arbitrator to the

effect that entries were made in the measurement books with regard to the work executed. As a matter of fact, the learned Arbitrator has found that acceptance test reports were also generated by the officers of BSNL. In this regard, the learned Arbitrator has made the following observations, which are clearly indicative of fact that all arguments raised before were dealt with based on the evidence obtaining between them.

"The Claimants filed petition under Sec-11 of the Act before the Hon'ble High Court and the Hon'ble High Court appointed the Arbitrator after hearing both sides. The Learned counsel for the respondent has taken a plea that the Arbitrator has no jurisdiction to entertain the claim. According to him there is no clause for arbitration in the work order issued to the Claimant in all the three cases. It is necessary to state that the clause for arbitration is contained in Clause-17 of the main agreement as well as Clause-15 in the tender conditions. Simply because there is no clause for arbitration in the work order, it cannot be said that there is no provision for arbitration. In fact the appointment of Arbitrator was challenged by the respondents before the Hon'ble Apex Court and they were dismissed. Taking into consideration of Clause-17 of the main agreement as well as Clause-15 in the tender conditions there is no difficulty in coming to the conclusion that the Sole Arbitrator has jurisdiction to entertain the claim. More over when once the contention of the respondent has been rejected by the Hon'ble High Court as well as by the Apex court. It is no longer open to the respondent to take the same plea again. Hence I hold that the Sole Arbitrator has jurisdiction to entertain the claim.

Issue No.3 to 5

The learned counsel for the respondent pleaded that all the documents to the claim were not filed by the claimant as per the contract. Further more there is no proof to show that the claimant executed the work of the removal of excess earth as well as the work of sea sand filling and other items of works. In the absence of any bill or documents relating to these works it can be presumed that these works were not carried out by the Claimants and as such the non payment of these items by the Respondent is proper and incorrect. The learned counsel for the Claimant on the other hand contended that the respondent is not entitled to question the same at this distance of time. In fact there were Acceptance test reports and they were duly

signed by all the Officers of BSNL. Apart from that M-Book is also maintained by the Department and the Officers have test checked and recorded the same in the book. Based upon these documents only bills were prepared and presented with the concerned Officer who in turn had forwarded the same to the Accounts Officer. If really the bills or documents are necessary to prove the execution of the above mentioned works, the Officers of BSNL Department would not have forwarded the same to the Accounts Department for the purpose of payment. But they would have returned the bills to the Claimants themselves with a direction to produce the necessary bills or supporting documents in respect of the work relating to removal of excess earth or the work of sea sand filling.

CW-1 in the cross examination clearly stated that day to day measurement will be done by the Officials. The Department will also record the measurement. The Claimant also will sign in the M-Book. Sea sand will be purchased from the supplier on payment of charges. Acceptance test report will be done by the Department and they will also be present at the time. On an average one test pit will be done for acceptance test report for every 100 Mtr. In fact one copy of the test report also will be given to them. If the test report is not OK the work will be set right again. There was no occasion for them to reject the work. There was no adverse remark about the work. The bills were submitted along with the AT report. But only part of the amount was allowed and part of the amount was disallowed. He also denied the suggestion that earth was not removed and sea sand filling was not done by them. The Department never called for these documents. In the re-examination CW-1 stated 100% measurement checked and recorded by JTO, 50% was checked by the Assistant Engineer and 10% was checked by the Divisional Engineer. All of them will sign in the M-Book. There was no dispute about the measurements recorded in the M-Book.

RW-1 G.Vallinayagam, Asst.General Manager, BSNL also in the cross examination admitted that he was not aware whether any Department proceedings were initiated against the Officials of BSNL for any mismanagement in these contracts. No documents were filed in these cases about any disciplinary proceedings. The Department has not produced any document to prove that entries in the M-Book are incorrect. It is true to say that BSNL Engineers did their job with integrity. It is not correct to say that Divisional Engineer, Sub-Divisional Engineer and JTO had recorded the correct measurement in the M-Book. He further admitted that he did not know which Officer failed to discharge the work. He finally admitted that to his knowledge there was no disciplinary proceedings against any of the Officer of BSNL relating to these transactions.

The main dispute between the parties is with reference to the bills submitted relating to the claim for removal of excess earth and sea sand filling. It is admitted that the Unit Officers are responsible for maintaining the M-Book for the record of measurement of all the works entrusted to the contractors. As required in the manuals the M-Books are to be checked with the actual work at site at 100% by the JTO, 50% by the Unit Officers and 10% by the DE concerned. The bills raised by the Claimant were also certified by the BSNL Officers including DGM only after a careful scrutiny of all the quantities in the bills and M-Books. The entries in the M-Books are naturally binding on the Department and the Claimants can certainly take advantage of the same. The respondent never denied the entries in the M-Book at any point of time even prior to the arbitration proceedings. The fact that no disciplinary proceeding was initiated against any of the Officers of BSNL will only lead to the conclusion that the entries in the M-Book are correct. If there is any lapse on the part of the Officials the Department would not have failed to take any action against any one of the Officers.

The contention of the Learned Counsel for the Respondent about the absence of the bills or vouchers relating to the execution of the two works and payment cannot be made to the Claimant is not a sound one in the light of the entries in the M-Books as well as in the Acceptance test report. The contract stipulates that Acceptance test report of the executed works must be done by a team of BSNL Officers specially appointed for that purpose. In the event of any detention of difficulties during the time the Claimants must ensure that all such defects were duly rectified and only after successful completion of the work the payment will be made. No such thing had happened in any of these cases at any point of time. The actual quantities of works executed were indeed measured jointly by the Claimant and the Respondent. The completion certificates endorsed on the back of each bill issued by BSNL Contract Operating Officers also duly certify the various items of works. Now the Respondent/Department after lapse of more than 5 years claim vouchers and documents in respect of the aforesaid two works. After 5 years from the date of completion the intervening heavy monsoon rains and heavy vehicular traffic also has to be taken into consideration. Besides earth work related activities also would have been done by other Departments i.e. City Municipal Corporation, TNEB, Metro Water, Reliance, National and State Highways Department. In fact the Claimants have claimed for the work done only and wherever any entry was found in the Acceptance test report as "sand not provided" the amount has not been claimed. No such adverse entry was made by the Department Officials relating to the claim presently made.

Hence, the issues are answered in favour of the Claimants. "

(emphasis is mine)

11. A perusal of the aforesaid findings made in the award would show that the learned Arbitrator had come to a conclusion that work of removal of excess earth and sea-sand filling was, in fact, carried out by respondent No.1.

12. I may also indicate that submission raised before me by the counsel for the petitioner that the work of removal of excess earth and sea sand filling was not part of the contract is untenable, for the reason, that this was not an objection, evidently, pressed before the learned Arbitrator. This fact is discernible upon perusal of the issues framed by the learned Arbitrator. The unsustainability of this objection before this Court is evident from the fact that, there is on record a report submitted by a committee constituted by BSNL, which demonstrative of the fact, that it was mandatory for a contractor, who had been tasked with the job of laying cables, to remove excess earth and carry out sea sand filling.

12.1. It appears, that because these were findings of its own committee that BSNL narrowed down its objection before the learned Arbitrator, only qua the aspect that necessary bills and vouchers were not filed, which would evidence the execution of the

aforementioned jobs.

12.2. As indicated above, based on other cogent and substantive material available with the learned Arbitrator and given the time gap between the execution of aforementioned jobs and the adjudication of the matter at hand, he came to the conclusion that the said jobs were, in fact, executed by respondent No.1, notwithstanding the absence of bills and vouchers. Clearly, the conclusion reached by the learned Arbitrator is within the realm of appreciation of evidence and the weight to be given to the material produced before him. The decision of the Arbitrator falls within the scope of the "plausible view", principle.

12.3. Therefore, as stated above, this objection is a complete red-herring and, therefore, cannot be accepted.

13. Furthermore, the Arbitrator also came to a conclusion that he had the jurisdiction to adjudicate upon the claims raised by respondent No.1 in view of the incorporation of the arbitration agreement in clause 17 of the main agreement and in clause 15 of the tender conditions.

14. Having regard to the aforesaid, in my view, no interference is called for vis-a-vis to the impugned award, as it is a

settled law that as long as there is some evidence for the conclusion reached by the learned Arbitrator, a Court, while exercising jurisdiction under Section 34 of 1996 Act will not look at the quantity or the quality of evidence.

14.1. These aspects are, completely, within the domain of the Arbitrator.

15. I find no patent illegality of the sort which was attempted to be portrayed by the learned counsel for BSNL, which is that, there was no evidence whatsoever before the Arbitrator to have come to the conclusion that the work was either allotted or executed by respondent No.1.

16. Therefore, in view of the foregoing reasons, I find there is no merit in the petition. The petition is accordingly, dismissed, leaving the parties to bear their own costs.

21.09.2016

kua/sl

RAJIV SHAKDHER,J.

kua/sl

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