



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

C.M.A.No.71 of 2016

M/s.N.S.Jayaraman & Sons,
Rep by its Proprietor,
J.Jayakumar @ Madurai,
Civil Engineering Contractors,
No.16-C, 2nd Cross, Ramanapuram,
Kadirkamam, Puducherry - 605 009.

.. Appellant

Vs.

1.Union of India,
Rep. by its Chief Secretary,
Government of Puducherry,
Puducherry - 1.

2.The Chief Engineer,
Public Works Department,
Puducherry.

3.The Superintendent Engineer, Circle-I,
Public Works Department, Puducherry.

4.The Executive Engineer,
Buildings and Roads (North) Division,
Public Works Department, Puducherry.

.. Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 37(1) of the Arbitration and Conciliation Act, 1996 seeking to set aside the Judgment and Decree dated 29.09.2015, made in A.O.P.No.28 of 2010, on the file of the learned Principal District Judge, Puducherry.

For Appellant : Mr.N.Thiagarajan

For Respondents : Ms.V.Usha
A.G.P. (Pondy)



J U D G M E N T

(The case has been heard through video conference)

This appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 challenging the order dated 29.09.2015, passed by the learned Principal District Judge, Puducherry in A.O.P.No.28 of 2010 allowing an application filed by the respondents under Section 34 of the Arbitration and Conciliation Act by which the Arbitral Award passed in favour of the appellant on 20.10.2009, was set aside.

2. The main contention of the appellant in this appeal is that the learned Principal District Judge, Puducherry under the impugned order has acted beyond the scope of Section 34 of the Arbitration and Conciliation Act by interfering with the arbitral award passed in favour of the appellant. According to them, the learned Principal District Judge, Puducherry ought to have seen that the sole Arbitrator passed the arbitral award in their favour in respect to the expected loss of profit due to the foreclosure of contract as per Clause 13 of the contract. According to the appellant, the learned Principal District Judge, Puducherry erred in law by misconstruing himself in applying Clause 13 of the agreement, which deals with foreclosure of contract due to abandonment or reduction in scope of work and erroneously set aside the arbitral award passed in favour of them.

3. Further, according to the appellant, the Arbitrator has rightly awarded compensation to the appellant towards loss on expected profit amounting to Rs.12,42,714/- on account of arbitrary foreclosure of work, which resulted in the appellant being prevented from performing the remaining part of the contract for no fault of the appellant. According to the appellant, the learned Principal District Judge, Puducherry has re-appreciated the evidence available on record before the Arbitrator and has erroneously set aside the arbitral award, which is not legally permissible under Section 34 of the Arbitration and Conciliation Act, where the scope of interference is very limited.

4. Heard Mr.N.Thiagarajan, learned counsel appearing for the appellant and Mrs.V.Usha, learned Additional Government Pleader (Pondy) appearing for the respondents.

5. The learned counsel appearing for the appellant drew the attention of this Court to Clause 13 of the contract entered into between the appellant and the respondents, under which, the appellant is entitled for loss on profit on account of foreclosure by the respondents for no fault of the appellant. Clause 13 of the contract reads as follows:



WEB COPY

"Clause 13: It at any time after acceptance of the tender Government shall decide to abandon or reduce the scope of the works for any reason whatsoever and hence not require the whole or any part of the works to be carried out, the Engineer-in-charge shall give notice in writing to that effect to the contractor and the contractor shall act accordingly in the matter. The contractor shall have no claim to any payment of compensation or otherwise whatsoever, on account of any profit or advantage which he might have derived from the execution of the works in full but which he did not derive in consequence of the foreclosure of the work or parts of the works."

6. As seen from the aforementioned clause, it is clear that the Engineer-in-Charge shall give notice in writing to the appellant for foreclosure in case the Government decides to abandon or reduce the scope of the work entrusted to the appellant under the contract.

7. The learned counsel for the appellant also drew the attention of this Court to the order dated 18.10.2007, issued by the respondents to the appellant and would submit that even without any notice in writing given by the Engineer-in-Charge, arbitrarily without assigning any reason an order has been passed for foreclosure of the contract with the appellant. The said order dated 18.10.2007, reads as follows:

"No.881/PW/BRN/DB/D3/1-394/2007-08 18 Oct 2007

To
M/s.N.S.Jeyraman & Sons,
No.16-C, II Cross,
Ramanathapuram,
Kadhirkamam - 9
Sir,

Sub: PW-BRN-Puducherry - Construction of
Administrative Block and Library Block for
Bharathiar Palkalai Koodam at Ariyankuppam,
Puducherry.

Ref: (1)
(2) C.E.Lr.No.2271/PW/CE Works/A3/No.293-BRN
(03) 2007-08, dated 29.08.2007.

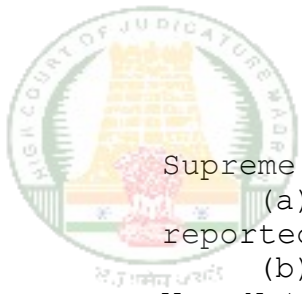
In pursuance of the reference (2) cited above, the work has been foreclosed.

Yours faithfully
Executive Engineer"



8. As seen from the above order dated 18.10.2007, there is no reference to any prior notice in writing given by the Engineer-in-Charge of the project to the appellant. Even in the application filed under Section 34 of the Arbitration and Conciliation Act before the learned Principal District Judge, Puducherry, the respondents have not stated that any prior notice in writing was given to the appellant by the Engineer-in-Charge of the project informing the appellant about the foreclosure.

9. The Arbitral Tribunal has taken into consideration Clause 13 of the contract as well as order dated 18.10.2007, issued by the respondents to the appellant foreclosing the contract and only thereafter, has awarded compensation of Rs.12,42,714/- towards loss of profit on account of foreclosure at 10% of the contract value for the balance work and also relied upon a judgement of the Hon'ble Supreme Court in the case of Dwaraka Das Vs. State of Madhya Pradesh and another (Civil Appeal No.1209 of 1992, decided on 10.02.2009) for the said purpose. However, under the impugned order dated 29.09.2015, the learned Principal District Judge, Puducherry, set aside the arbitral award. The learned Principal District Judge, Puducherry has not given any reasoning about the mandatory requirement of sending prior notice by the Engineer-in-Charge of the project to the appellant on the foreclosure of the work entrusted to the appellant. The learned Principal District Judge, Puducherry under the impugned order has set aside the arbitral award on the ground that the respondents have got the power to foreclose the contract under Clause 13 of the contract entered into between the appellant and the respondents, even though, as seen from the said order, the submission made by the learned counsel for the appellant that under Clause 13, mandatory notice will have to be issued by the Engineer-in-Charge of the project about the foreclosure of the work entrusted to the appellant. Admittedly, even according to the respondents no such notice was given by the Engineer-in-Charge to the appellant but instead a final order has been passed without any notice foreclosing their contract with the appellant by their order dated 18.10.2007. As rightly pointed out by the learned counsel appearing for the appellant, the learned Principal District Judge, Puducherry has misconstrued Clause 13 of the contract and has misdirected himself by interfering with the arbitral award only on the ground that under Clause 13 of the contract, the respondents have got power to foreclose the contract with the appellant. But, admittedly not discussed the mandatory requirement of issuance of notice in writing by the Engineer-in-Charge of the project to the appellant under the impugned order. The scope of interfering with the arbitral award under Section 34 of the Arbitration and Conciliation Act is very limited and the principle have been settled by various decisions of the Hon'ble



Supreme Court, which includes the following:

(a) Associate Builders Vs. Delhi Development Authority reported in (2015) 3 SCC 49;

(b) Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India reported in (2019) 15 SCC 131; and

(c) Project Director, National Highways Authority of India Vs. M.Hakeem and another reported in 2021 SCC Online SC 473.

10. None of the parameters required for interference under Section 34 of the Arbitration and Conciliation Act has been satisfied by the respondents, but despite the same, the learned Principal District Judge, Puducherry has erroneously set aside the arbitral award passed in favour of the appellant by misconstruing Clause 13 of the contract between the parties. It is also brought to the notice of this Court by the learned counsel appearing for the appellant that Clause 13, which is the subject matter of this appeal was interpreted in another appeal involving the very same respondents in C.M.A.No.38 of 2017, dated 27.02.2019, wherein, the learned Single Judge of this Court in the said decision has dismissed the appeal filed by the respondents under Section 37 of the Arbitration and Conciliation Act, challenging the order dated 04.03.2016, passed by the learned District Judge, Karaikal in A.O.P.No.6 of 2012, wherein, the learned District Judge, Karaikal has dismissed the application filed by the respondents under Section 34 of the Arbitration and Conciliation Act. The learned counsel for the appellant would further submit that the learned Single Judge of this Court in the said appeal in paragraph 8, while interpreting Clause 13 of the contract, has made it clear that the notice to be sent by the Engineer-in-Charge as per Clause 13 is mandatory. The relevant paragraph of the judgment dated 27.02.2019, passed in C.M.A.No.38 of 2017, by another learned Single Judge of this Court reads as follows:

"8. The said clause lays down certain pre conditions which are mandatory to prove the exercise by the authority concerned. The words "for any reason", "whatsoever" and "shall give notice is waiting to that effect" bonafide exercise of power and adhere of principles of natural justice. The Government connotes has power to take a decision to abandon or reduce the scope of work for "any reason". The words "any reason" emphasise the existence of that reason. That reason shall exist in exigencies of the administration and it is bonafide, further not actuated by malafides. In the instant case, though the contract was said to have been abandoned,



WEB COPY

tender was re-issued within a short span of time and the very same respondent has become a successful bidder. Therefore it can be easily inferred that the exercise of power under Clause 13 of the agreement is not for any valid reason and not bonafide. Be that as it may for exercising the above said power, the authority shall adhere to the mandatory condition of putting the contractor on notice in terms of conditions of contract. The word "shall give notice in writing to that effect to the contractor" means that the reason shall be assigned to the contractor. The words "to that effect" not only denote the decision taken to abandon or reduce the work but includes the reason whatsoever shall also be communicated in writing. A conjoint reading of the sentences would reveal the legislative intention. The power of the government to abandon or to reduce work for any reason shall be in writing to that effect. But the appellant has not only failed to assign any reasons for abandoning the work but also failed to give a notice in writing. After breaching the terms of contract, the appellant cannot take shelter under the same terms. In this case, as per Clause 13 of the contract, requirement of issuing notice in writing was not adhered to by the appellants. Secondly, the award came to be passed as per the norms prescribed by CPWD Mannural and instruction issued therein. The decision of the arbitrator is based on Office Memorandum in O.P.No.6 of 2012 dated 04.03.2016 and it is not from the personal knowledge of the Arbitrator. Moreover, the appeal filed under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996, cannot be entertained unless this Court finds any patent illegality or infirmity in the order passed by the District Court, Karaikal. I do not find any illegality warranting interference."

11. The learned counsel for the appellant would further submit that the respondents have preferred a Special Leave Petition before the Hon'ble Supreme Court aggrieved by the aforesaid decision in C.M.A.No.38 of 2017, which also came to be dismissed on 19.08.2021, in S.L.P.(Civil) Diary No.19802/2020. The order dated 19.08.2021, passed by the Hon'ble Supreme Court has also been produced before this Court.



12. For the foregoing reasons, this Court is of the considered view that the learned Principal District Judge, Puducherry has acted beyond the scope of Section 34 of the Arbitration and Conciliation Act by setting aside the arbitral award. Hence, there is merit in the appeal filed by the appellant. Accordingly, the impugned order dated 29.09.2015, passed by the learned Principal District Judge, Puducherry in A.O.P.No.28 of 2010, is hereby set aside and the Arbitral Award dated 20.10.2009, passed in favour of the appellant is confirmed. This appeal is allowed. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

kk

To

- 1.The Principal District Judge,
Puducherry.
- 2.The Chief Secretary,
The Union of India,
Government of Puducherry,
Puducherry - 1.
- 3.The Chief Engineer,
Public Works Department,
Puducherry.
- 4.The Superintendent Engineer, Circle-I,
Public Works Department, Puducherry.
- 5.The Executive Engineer,
Buildings and Roads (North) Division,
Public Works Department, Puducherry.

Copy to:
The Section Officer,
VR Section, High Court, Madras.

+1cc to M/s.N.Thiagarajan, Advocate Sr No.47812
+1cc to the Government Pleader for Puducherry Sr No.48262

C.M.A.No.71 of 2016

SRA (CO)
PR (18/11/2021)