



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.12.2021

CORAM :

THE HON'BLE MR.MUNISHWAR NATH BHANDARI,
ACTING CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE P.D.AUDIKEVALU

O.S.A.(CAD) No. 120 of 2021

M/s. Dharani Hi-tech Projects (P) Ltd.,
Railway Contractors,
No. 28, Annavasal Street,
Maargudi - 614 001,
Tiruvavarur District,
Tamil nadu,
Represented by its Managing Director .. Appellant/Respondent

vs

1. The General Manager,
Southern Railway,
Head Quarters Office,
Park Town, Chennai - 600 003.
2. The Deputy Chief Engineer/II,
Gauge Conversion,
Southern Railway, Construction,
Thiruchirappalli - 620 001. .. Respondents/Petitioners

Prayer: Appeal under Clause 15 of the Letter Patent read with Order XXXVI, Rule 1 of O.S. Rules to set aside the Judgment and Decree dated 11.05.2020 passed by the Learned Judge passed in O.P. No. 1045 of 2017 on the file of the Original Side of this Court and thereby upholding the award of the Learned Arbitrator dated 11.09.2017 as far as the award related to claim for damages for non-execution of the contract, Claim No. 3 concerned.

Prayer in OP.No.1045 of 2017: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act 1996 set aside Arbitral Award dated 11/09/2017 is so far as part of the amount awarded in Claim No.1, Claim No.2, Claim No.6, and interest at 18% against the petitioners in the disputes arising out of the Agreement N.117/HQ/Dy,CE/GC/II/TPJ dated 21.11.2011



passed by the Learned Arbitrator.

For the Appellant : Ms. K.Aparna Devi

For the Respondents : Mr. P.T.Ramkumar,
Standing Counsel

ORDER

(Order of the Court was made by
the Hon'ble Acting Chief Justice)

The appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 to challenge the order dated 11.05.2020 in O.P.No.1045 of 2017 passed by the learned single Judge on an application under Section 34 of the Act of 1996.

2. It is a case where the appellant after invoking the clause of arbitration, made an application thereupon submitting a claim. After completion of the pleading, the learned Arbitrator framed the issues and considered the matter in reference to different claims. An award thereupon was passed on 11.09.2017 accepting the claim in the manner indicated therein.

3. The respondents herein made an application under Section 34 of the Act of 1996 raising objection against the award. While pressing the application, the respondents restricted the application under Section 34 of the Act of 1996 only in reference to claim no.3 decided by the learned arbitrator. The learned single Judge accepted the application and, accordingly, the claim awarded by the learned Arbitrator in regard to claim no. 3 was set aside.

4. The facts of the case show that the agreement between the parties was for performance of work. It is stated that the railways defaulted in making the land available for performance of the work and, accordingly, they granted seven extensions from time to time to perform the work. The appellant had undertaken the work and even completed the same to the extent of 80%, but thereupon the agreement was terminated by the railways in an arbitrary and unreasonable manner. The learned Arbitrator was approached not only to challenge the termination of the agreement, but to claim consequential benefits, apart from claims made towards loss of profit occurred due to termination of the agreement by the railways in an illegal manner. The learned Arbitrator found the termination of the contract to be



illegal and, accordingly, allowed the claim for loss of profit assessing it to be 15% of the amount of unexecuted value of work. The determination of the amount of loss of profit was after recording the finding that the termination of the contract was illegal and considering the facts given therein. However, the learned single Judge interfered with the award and held that there was no pleading to show basis for the claim for loss of profit and even no factual basis was disclosed by the learned Arbitrator for the award of amount towards loss of profit. Accordingly, the application under Section 34 of the Act of 1996 was accepted to that extent, while not accepting the prayer of the appellant for remand of the case to the learned Arbitrator if no reason was assigned for the same.

5. Learned counsel for the appellant submits that once the termination of contract was held to be illegal, the appellant was entitled to get the claim on loss of profit as determined by the learned Arbitrator. It was after taking into consideration the finding with regard to issue in claim nos. 1 and 2 holding that the termination of contract is illegal that the claim no.3 was allowed by the learned Arbitrator and, therefore, the order of the learned single Judge should be set aside making award of the learned Arbitrator to be absolute. Reference of few judgments was given to justify the award of loss of profit to the extent of 15% of the amount of unexecuted value of work. Those judgments could be considered by the Court while dealing with the argument of the non-appellants.

6. The appeal has been opposed by learned counsel for the non-appellants. It is submitted that the learned Single Judge did not find any pleading or evidence to allow loss of profit and even otherwise, no reason was assigned by the learned Arbitrator to award 15% of the amount of unexecuted value of work towards loss of profit and thereby, the learned single Judge rightly set aside the award in regard to claim no. 3. It is further stated that so far as the award of other amounts to the appellant is concerned, that has already been satisfied other than the amount awarded towards loss of profit. The prayer is to dismiss the appeal for the aforesaid reason.

7. We have considered the rival submissions of the parties and perused the records carefully.

8. The main issue for our consideration is as to whether the learned Arbitrator has disclosed any basis to award loss of profit. It is in a case where termination of agreement by the railways is held to be illegal by the learned Arbitrator and as



a consequence thereof, the appellant may be entitled to claim loss of profit, but it is only after supplying the basis and pleading for it. The award of the amount towards loss of profit cannot be without any basis. To examine the aforesaid, we have carefully gone through the award and find that while considering the claim towards loss of profit, the following facts were taken into consideration:

- "i) Delay caused in the progress of the work during the execution by the default of the employer;
- ii) Failure on the part of the employer to fulfill his obligations under the contract which has an impact upon the profitability of the contract;
- iii) Non-completion within the stipulated time due to the default of the employer;
- iv) Abandonment of the work wholly or partly by the employer."

After recording the facts aforesaid, the learned Arbitrator awarded 15% of the amount of unexecuted value of work. It is after referring to a judgment where similar benefit was extended by the Court, ignoring the fact that award of 15% of the amount in the case relied by the learned Arbitrator was based on the facts earlier considered by the High Court while determining the amount inter se in other case between the same parties. Therefore, the award of 15% of the amount was on the given facts applicable to that case. The award of loss of profit in this case is not after discussion of facts but in reference to the judgment referred in award ignoring that award therein was on the facts of that case. The interference in the award was made by the learned Single Judge exercising his powers within the four corners of Section 34 of the Act of 1996. It is in view of the fact that the award of the amount by the learned Arbitrator, if remains without the reasons, then can be interfered by the learned single Judge exercising jurisdiction under Section 34 of the Act of 1996.

9. It is, no doubt, true that whenever it was found that termination of the agreement is found to be illegal, the Court can award reasonable amount towards loss of profit, but before awarding the benefit, the Court need to disclose the basis and it cannot be awarded in vaccum. The learned single Judge found that no basis has been disclosed in the award, apart from the fact that no pleading to disclose the basis for the claim of loss of profit was made by the appellant followed by material. The award of loss of profit was not accepted and, accordingly, interference was made in the award.

10. We do not find any illegality in the order of the



learned single Judge and otherwise, we are having limited jurisdiction while exercising the appellate jurisdiction under Section 37 of the Act of 1996. Accordingly, we are not inclined to cause interference in the order passed by the learned single Judge. It is even for the prayer of the appellant for the remand of case to the learned Arbitrator. The remand of case can be made only when a case is made out. The learned counsel for the appellant was given chance to show pleading or any material forming the basis for the Court to determine the loss of profit, but despite time granted by the Court, pleading or material could not be referred before the Court. Learned counsel for the appellant though submits that when detailed reasonings have been given by the learned Arbitrator holding the termination of the contract to be illegal, the reasonings there may be the basis for determination of the amount of loss of profit. We have considered the aforesaid argument also, but find that there is no discussion of that nature in the award. The learned Arbitrator has not referred to any finding in reference to other issues and more specifically, regarding termination of the agreement to be illegal and there is no pleading or material to make it as the basis for the award of benefit of 15% of the amount of unexecuted value of work towards the loss of profit.

Accordingly, the appeal fails and the same is dismissed. There will be no order as to costs.

Sd/-

Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

Vjt

To:

1. The Sub Assistant Registrar,
Original Side,
Madras High Court,
Chennai - 600 104.

+1cc to Mr.P.T.Ramkumar, Advocate SR.No.63320(17/02/2021)

O.S.A.(CAD) No. 120 of 2021

SSI(CO)
GN(13/12/2021)