



C.M.A.No.86 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.09.2022

Delivered on : 06.12.2022

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.M.A.No.86 of 2016

&

C.M.P.No.863 of 2016

1.The Secretary
Pondicherry Housing Board,
Anna Nagar, Puducherry.

2.The Executive Engineer,
Pondicherry Housing Board,
Anna Nagar, Puducherry.

...Appellants

Vs

1.K.Raju

2.The Chairman,
Pondicherry Housing Board,
Anna Nagar, Puducherry

...Respondents



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PRAYER: Civil Miscellaneous Appeal is filed under Section 96 of CPC r/w Section 37 (1) of the Arbitration and Conciliation Act, 1996, against the order dated 24.10.2014 made in Arbitration O.P.No.9 of 2012 on the file of the Court of the Principal district Judge, Puducherry.

For Appellants : Mr.T.P.Manoharan,
Senior Counsel
for Mr.K.P.Jotheeswaran

For Respondent 1: Mr.N.Thiagarajan

For Respondent 2: No Appearance

JUDGEMENT

The Pondicherry Housing Board, Puducherry is the appellant before this Court challenging the order passed by the Principal District Judge, Puducherry in Arb.O.P.No.9 of 2012. The said Arbitration



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Original Petition was filed seeking to set aside the award dated 19.05.2011 passed by the sole Arbitrator in respect of all claims and to allow the counter claim of the petitioner / appellant herein. The parties are referred to in the same status as before the learned Arbitrator.

2. The claimant was entrusted the following which is herein below set out:

“1. (a) Date of work order - 9.03.1998

(b) Date of revised work order : 31.3.1998

2. Value of work

(a) Estimate Cost : Rs. 76,22,304/-

(b) Awarded amount based on contractors condition: Rs.

87,34,398

3. Time allowed :

(a) Originally 9.3.1998 : 12 months

(b) Modified time by PHB on 31.3.1998 : 9 months



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(c) Revised time based contractor's representation on 17.4.1998

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— P.H.B Letter dt. 28.4.98 : 12 Months

4.Stipulated date of completion as per Agreement : 9.4.1999

5.Actual date of completion : 26.11.1999

6.Total delay involved : 7 months & 18 days.

7.Final EoT granted by Chairman upto 26.11.1999 :

(a) 24.07.01 with Levy of compensation

of Rs.19056/- Delay considered — 11 days time taken — 20 months.

(b) Revised EoT on 12.07.2002 with Levy

of Compensation of Rs. 19056/- with delay for the period 10.04.1999 to 26.11.1999 time taken — 32 months”

3. As per the contract, the work had to be completed on or before 09.03.1999 and 31.03.1999 as per revised work order. However, the same could be completed only on 26.11.1999 with a delay of 7 months and 18 days. The final extension was granted by the Chairman of the



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respondent Board on 24.07.2001 levying compensation of Rs.19,056/- and the period of delay was notified as 14 days. Thereafter, the respondent Board had superseded the extension of time on 12.07.2002 with a levy of compensation of Rs.19,056/- and the period of delay was changed and notified from 10.04.1999 to 26.11.1999. The claimant had therefore raised a dispute and after a great deal of delay, the sole Arbitrator was nominated by the Appointing Authority on 13.07.2010.

4. The Claimant had contended that the work had been unnecessarily delayed on account of the following reasons:

(a) Total items as per Agreement was 81 Nos out of which 26 items were not permitted to be executed and the amount involved was Rs .23,70,000/-

(b) There was large scale variations in almost in all items besides execution of 47 items of Extra items & Substituted items and the amount involved was



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Rs.24,46,000/-

(c) The Agreement provides for issue of cement / steel at fixed rate and the supply was erratic and that too issued only on Thursday and Friday.

(d) Due to the above reasons cited vide (b) & (c) the contractor was under the state of preparedness with his Establishment..

(e) The weight of steel rod issued by PHB has not been regularized properly thereby affecting huge loss.

(f) The building was executed as per the PHB plan and extra rate admissible for the items executed in the curved portion not considered for payment.

(g) The PHB has not recorded the measurement for the items executed Viz.. 1.Disposal of surplus Earth, 2. Wax polishing 3.Firning the walls damaged by Electrical contractor.4. For the Items executed in curved



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surface extra rate was not paid.

(h) Cost escalation has not been paid fully.

5. The respondent Board had filed a counter denying the allegations contained in the claim statement. The main contention put forward by the respondent is that the final bill had not been presented by the claimant. The respondent Board had further contended that the entire amount due to the claimant had been cleared.

6. The learned Arbitrator who had entered reference had framed five issues, which are herein below set out:

“ISSUE 1

A.Whether the Balance work of construction of MIG Flats at Lawspet - Phase Ill, Block Il was commenced and completed within the scheduled period?

B.If not as in (A) above, what are the reasons for such delay?



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C. Whether the above period of delay is attributable to the claimant or the respondent?

ISSUE: II

A. Whether there were disputes during the period of execution, involving Final Bill left out measurement and difference in weight of steel issued by PHB and whether the said issues were resolved?

B. If not as in (A) above, what is the relief there to with regard to the following claims.

- 1. Pending final Bill.*
- 2. Items of work left out measurement.*
- 3. Difference in weight of PHB rods issued to the contractor.*
- 4. Recovery of stolen steel.*
- 5. Extra for substitution.*

ISSUE: III

Whether the contractor is entitled for cost escalation under



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10CC and if so what is the relief there on?

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ISSUE IV

A. Whether the contractor is entitled to uncovered field Establishment and over head charges during the extended period?

B. Whether the levy of compensation is proper?

ISSUE V

Whether the counter claim of the Respondent is maintainable? If so, what is the relief there on.

7. The learned Arbitrator had held that the respondent had committed a breach of the contract under the agreement clause no.12 by not giving instructions in writing for the large scale variations / extra items. It was based on the oral instructions that the claimant had carried out extra items of work till the completion of work. Therefore, the Arbitrator held that the respondent Board was exclusively responsible for the delay.

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8. As regards issue no.2, the Arbitrator gave a finding that the overall measurements were taken by the respondent Board in the absence of the contractor on 06.01.2001 and these measurements had been accepted by the claimant under protest.

9. The Arbitrator had also held that proper check measurement was not carried which is mandatory under the CPWD manual both by the Assistant Engineer / Executive Engineer and further the objections raised by the claimant had not been dealt with properly. The Arbitrator went on to hold that the procedure adopted by the Board was not justified and the amount recovered for item No.17 C and 17 D of the agreement has to be refunded.

10. Ultimately, the learned Arbitrator had held that the respondent was liable to pay a sum of Rs.2,34,523/- to the claimant

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under the final bill with reference to Issue II (B) (1) to (3). The following calculations had been given for the same:

<i>Claim</i>	<i>Description</i>	<i>Amounts</i>
Claim 1 (a)	(a) Amount due as per recorded measurements. i. Tender Excess para 17: Rs.18,152/- ii. Minus Payment to be refunded. Agreement 17 C and 17 D – para 18 Rs.77,474/- iii. Refund for Recovery made for rectification Work para 18 Rs.3,797/-	Rs.99,423/-
Claim (1b)	Items of Works left out in measurements para 22 Rs.86,493/-	Rs.86,493 /-
Claim (1c)	Difference in PHB rods and cost involved para 18 Rs.48,607/-	Rs.48,607/-
Total		Rs.2,34,523/-

11. With reference to Issue No.II (B) (4) relating to the recovery



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of stolen steel, the same was rejected since no evidence had been let in by the claimant to prove the same. With reference to issue No. II (B) (5) relating to the extra claim for substitution, the learned Arbitrator had awarded an amount of Rs.1,27,104/-. Issue No.III, relating to cost escalation was also rejected by the learned Arbitrator stating that there was no merits in the claim.

12. With reference to Issue No.IV, which had been broken-down as follows:

(a) Whether the contractor is entitled to Field Establishment and over head charges during the extended period;

(b) Whether the levy of compensation is proper; and

(c) Whether the contractor is entitled to interest at 18 % for the belated settlement of final bill,

the learned Arbitrator had held that the claim was on the higher side and therefore 50% of the claim was accepted at Rs.73,125/-. The



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Arbitrator had also allowed interest at a sum of Rs.3,09,185/-.

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13. Issue No.V regarding the maintainability of counter claim filed by the respondent and the relief they were entitled has been rejected by the learned Arbitrator.

14. Therefore, the learned Arbitrator had granted a sum of Rs.2,34,523/- towards claim No.I. Claim Nos.II and IV were disallowed. A sum of Rs.1,27,104/- was awarded towards Claim No.III and a sum of Rs.19,056/- was awarded towards Claim No.V. A sum of Rs.3,09,185/- was granted under the head of belated settlement of final bill and further a sum of Rs.73,125/- under the head of Overhead Charges which constituted the VI and VII claim, respectively. The counter claim filed by the respondent Board was rejected.

15. Challenging the same, the respondent Board had filed



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A.O.P.No.9 of 2012 on the file of the Principal District Judge, Puducherry. The learned Judge by his order dated 24.10.2014 held that the scope of interference under Section 34 (1) of the Arbitration and Conciliation Act was limited and the award could be set aside only on the grounds provided thereunder.

16. The learned Judge observed that none of the grounds which has been raised by the respondent would come within the scope of Section 34 (1) of the Arbitration and Conciliation Act. The respondent had argued that the challenge to the award was on provisions of Section 34 (2) (a) (v) of the Arbitration and Conciliation Act since the arbitral award was not in consonance with terms of the contract.

17. The learned Judge had observed that the appointment of the Arbitrator had been done by the Civil Court since the contract contemplated the appointment of the Arbitrator to resolve the dispute.



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The learned Judge ultimately held that the Arbitrator has provided sufficient reasons for granting the award for the various claims and therefore since the award has been passed based on the facts and as there was no ground as contemplated under Section 34, the petition filed by the respondent Board was dismissed.

18. Challenging the same, the appellant / respondent Board is before this Court.

19. Mr.T.P.Manoharan, learned senior counsel appearing on behalf of the appellant / respondent Board would submit that the Arbitral Tribunal and the learned Principal Judge have failed to appreciate the fact that the claimant had consented to the extension of time and therefore could not claim amounts under the head of final bill. The learned senior counsel would further submit that there is no agreement for claiming interest which the claimant has claimed under



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claim No.VI and the same was not as per the terms of the contract, therefore the Arbitral Tribunal has exceeded its Jurisdiction by awarding interest.

20. The learned senior counsel would further submit that as per clause 8 A, objections had to be made within a week's time after the completion of the work. However, in the instant case, no such objection has been raised. That apart, the claimant has only challenged the first extension and not the second extension.

21. As regards claim No.V, it is the contention of the learned senior counsel that in the counter to the claim statement, the respondent had set out in detail the reasons for the same. It is the contention of the learned senior counsel that from 02.11.1998 to 06.11.1998 for 5 days there was heavy rain as a result of which the work could not be continued. The extended period of contract is over and above the



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agreed period of 7 months and 18 days, out of this period only 5 days was justified and accepted by the Board without levying penalty. For the remaining 7 months and 18 days, it was only the claimant who was solely responsible for the delay and therefore the penalty had been levied. The learned senior counsel would submit that the learned Arbitrator and the Principal District Judge have just glossed over this defense.

22. The learned senior counsel would submit that since the claimant has caused the delay, they are not entitled to overhead charges as claimed under claim No.VIII. The Tribunal and the District Judge have committed a grave error in rejecting the counter claim. The counter claim had been made on account of the delay as the claimant ought to have completed the work as per the agreement on 09.04.1999. However, it was completed only on 26.11.1999, which is a delay of 7 months and 18 days barring the 5 days where the work was affected



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due to heavy rains. The learned senior counsel would therefore submit that the remaining days delay is on account of the claimant and no fault can be attributed to the respondent.

23. During the delay, the Board has been paying interest at 11% p.a, on the net value of Rs.1,11,29,035/- to HUDCO. By reason of the same, the reputation of the respondent Board has been severely dented. Therefore, the respondent had claimed a total sum of Rs.1,11,29,035 /-. In the final bill it was found that a sum of Rs.60,324/- was to be paid to the respondent Board by the claimant. Further, the respondent Board had already adjusted a sum of Rs.30,160/- in the final bill relating to Block VIII. Therefore, the respondent Board had requested the claimant to remit the balance amount of a sum of Rs.30,164/-, but the contractor has not remitted the same. Therefore, the respondent submitted that the rejection of the counter claim was without any basis.



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24. The learned counsel would also rely upon the following Judgements:

(i) **(2003) 4 SCC 80** – Food Corporation of India Vs. Surendra, Devendra & Mahendra Transport Co.

(ii) **(2001) 4 SCC 241** – Ramachandra Reddy & Co., Vs. State of A.P. & Others.

(iii) **(2009) 12 SCC 1** – State of Rajasthan & Another Vs. Ferro Concrete Construction Pvt. Ltd.,

(iv) **(2015) 3 SCC 49** – Associate Builders Vs. Delhi Development Authority.

(v) **(2014) 9 SCC 263** – ONGC Ltd., Vs. Western Geco International Limited.

25. The Judgement in **(2003) 4 SCC 80 – Food Corporation of India Vs. Surendra, Devendra & Mahendra Transport Co** was relied upon in support of the proposition that the Arbitrator exceeded his



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jurisdiction by entering upon the dispute and making an award in respect of a claim which was not referred to him.

26. In the Judgement reported in **(2001) 4 SCC 241 – Ramachandra Reddy & Co., Vs. State of A.P. & Others**, the Hon'ble Supreme Court had once again held that the Arbitrator cannot exceed the scope of his reference.

27. The Judgement reported in **(2015) 3 SCC 49 – Associate Builders Vs. Delhi Development Authority**, has been referred to by the learned senior counsel in support of his argument that the award should be fair, reasonable and objective, whereas, in the instant case, the Tribunal as well as the District Judge have not given sufficient opportunity to the respondent to put across their case.

28. The learned senior counsel, has relied upon the Judgement



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reported in (2014) 9 SCC 263 – *ONGC Ltd., Vs. Western Geco International Limited*, in support of his argument that the award suffers from patent illegality. He would contend that the learned Arbitrator in the instant case has taken into consideration claims not referred to him.

29. Per contra, Mr.N.Thiyagarajan, learned counsel appearing on behalf of the respondent / claimant would submit that the scope of interference by this Court under Section 34 of the A& C Act is very limited and the further appeal under Section 37 is further circumscribed. Both the Arbitral Tribunal and the learned Principal District Judge having considered the evidence on record extensively, it is not open to the appellant to now request this Court to once again look into the evidence.

30. The learned counsel would rely upon the following



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Judgement in support of his contention that the Jurisdiction of the Court under Section 37 of the A & C Act is very limited.

(a) **(2018) 1 SCC 718** – Sutelej Construction Limited

Vs. Union Territory of Chandigarh.

(b) **2015 (1) CTC 797** – Navodaya Mass

Entertainment Ltd., Vs. J.M.Combines.

31. The learned counsel would submit that the award and the order has been passed after considering the evidence in great detail and therefore this Court ought not to interfere with the well considered award passed by the learned Arbitrator which has been confirmed by the learned Principal District Judge, after perusing the records submitted before him.

32. Heard the learned counsels and perused the records.



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33. The appeal is one under Section 37 of the Arbitration and Conciliation Act. Section 37 of the Arbitration and Conciliation Act reads as follows:

“37. Appealable orders.—

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.—

(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.



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(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court

34. The appeal in the instant case is under Section 37 (1) (b) and is directed against the refusal to set aside the award. The Arbitrator and the learned Principal District Judge have considered the evidence on record and out of seven claims has only awarded five claims. In respect of the other two claims and the counter claim the arbitrator has rejected the same.

35. For every claim, the learned Arbitrator had given detailed and cogent reasons. The argument of the learned senior counsel is that the Arbitrator has considered the issues which have not been referred to the Arbitrator. However, the Arbitrator as well as the learned Principal



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District Judge have held that this statement is far from the truth.

Though there was no provisions for granting interest the Tribunal has proceeded to grant 10% interest. The learned Arbitrator has taken note of the fact that the respondent Board had not only given large scale variations and extra work without giving an adequate time to the claimant contrary to the terms of the contract but have also failed to pay them for the same in time. The said works does not form part of the original agreement. Therefore, in fairness to the contractor interest has been awarded. That apart, the Arbitrator has granted 10% interest taking note of the fact that the contract is a commercial one. The learned Arbitrator has given cogent and justifiable reasons for the grant of interest and there is no patent illegality.

36. A mere perusal of the award as also the order of the Principal District Judge, Puducherry would show not only clarity of thought but also a clear reasoning for granting the award. The order impugned is



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also a well reasoned one. This Court sitting in appeal under Section 37 of the Arbitration and Conciliation Act cannot re-appreciate evidence and re-visit the findings of the Arbitrator.

37. The Hon'ble Supreme Court in the Judgement reported in **(2015) 3 SCC 49 – Associate Builders Vs. Delhi Development Authority** has held that the Courts sitting under Section 34 is the final Courts of facts and has a very limited scope for interference.

38. This appeal under Section 37 is an appeal against an order passed under Section 34 therefore its scope is further reduced and the learned senior counsel has made submissions challenging the award purely on factual details. The argument that the Arbitral Tribunal has exceeded the Jurisdiction has not been substantiated by letting in any evidence.



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39. In the Judgement reported in **2018 (1) SCC 718 – Sutej Construction Limited Vs. Union Territory of Chandigarh**, the Hon'ble Supreme Court has set aside the order passed by the High Court in a Section 37 appeal against an order from a Section 34 application by stating that the Court sitting in Section 37 cannot re-appreciate the facts and act like an Appellate Court.

40. In the instant case, the challenge is primarily on the basis of facts, which definitely requires re-appreciation of evidence which is not permissible under Section 37. Further, the respondent has not been able to make out the case that the order passed by both the Arbitrator as well as the Court below is suffers from perversity and patent illegality. Accordingly, the Civil Miscellaneous Appeal is dismissed. Consequently, the connected Civil Miscellaneous Petition is closed. No costs.

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Index : Yes/No
Speaking order/non-speaking order

To

The Principal District Judge,
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Pre-delivery order in
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