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O.S.A.(CAD).No.24 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 10.02.2023

Judgment Delivered on : **24.03.2023**

CORAM :

**THE HON'BLE MR.T.RAJA, ACTING CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY**

O.S.A.(CAD).No.24 of 2022
and
C.M.P.Nos.17931 & 17933 of 2022

Pondicherry University,
Rep.by its Registrar,
Puducherry – 605 014.

... Appellant

Versus

Infoplus Technologies Pvt. Ltd.,
Rep.by its Director,
Mrs.Sakunthala Devi,
No.61, Developed Plot Estate,
Perungudi, Chennai.

... Respondent

Prayer : Original Side Appeal filed under Clause 15 of Letters Patent, to set aside the impugned order dated 11.01.2022 in Arb.O.P.No.332 of 2021, passed by the Learned Single Judge .

For Appellant : Mr.P.H.Aravind Pandiyan, Senior Counsel.
for Mr.M.Ravi.

For Respondent : Mr.D.Nellaiappan



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JUDGMENT

D.Bharatha Chakravarthy.J.,

A. The Appeal :

This Original Side Appeal is directed against the order of a learned Single Judge, dated 11.01.2022 in Arb.O.P.No.332 of 2021 and A.No.1699 of 2021, thereby, dismissing the application filed by the Appellant to set aside the Arbitral Award under Section 34 of the Arbitration and Conciliation Act, 1966.

B. The facts of the case:

2. The brief facts leading to the filing of the appeal is that the appellant, namely, Pondicherry University floated a tender inviting offers for design, development and delivery of 3D Visual E-Learning content for various courses. The respondent participated in the tender and was declared as the successful bidder. Accordingly, the appellant awarded the work on 27.04.2015, and a form of agreement in respect thereof was entered on 07.07.2015. As per Clause 9 of the said agreement, any dispute arising out of the agreement shall be settled through Arbitration. According to the respondent, they had delivered the Visual E-Learning Solutions for 32 subjects of Phase-I, which were verified, received and utilised by the University. The respondent submitted their initial invoice



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for Rs.84.74 Lakhs, which the Appellant/University did not pay. The respondent also submitted their further invoice valued at Rs.106.72 Lakhs in respect of the said subjects. The Appellant/University neither made any payment nor called upon the respondent to supply the content for the other remaining subjects. Therefore, the respondent invoked Arbitration proceedings.

2.1. By an order, dated 03.07.2018 in O.P.No.912 of 2017, this Court appointed a Sole Arbitrator. After due conduct of arbitration, by an award dated 17.06.2009, the learned Sole Arbitrator partly decreed the claim by passing an award directing the Appellant/University:

(i) To pay a sum of Rs.1,78,11,800/- together with interest at the rate of 12% per annum, from 01.09.2015 till the date of the award, totalling a sum of Rs.2,59,16,169/- ;

(ii) Further directing the Appellant/University to pay another sum of Rs.34,80,000/- towards loss of profit, however, without any further interest; and

(iii) The Appellant was also further directed to pay further interest at the rate of 12% per annum on the award amount totalling to a sum of Rs.2,93,96,169/- at the rate of 12% per annum till the date of realisation of the award.



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2.2. Aggrieved by the said award, the Appellant herein filed an Arb.O.P.No.332 of 2021 under Section 34 of the Arbitration and Conciliation Act, praying to set aside the award.

2.3. The learned Single Judge after considering the submissions made on either side, dismissed the petition by order dated 11.01.2022 against which the present Original Side Appeal is laid before this Court.

C. The Submissions:

3. *Mr. P.H.Arvinth Pandian*, learned Senior Counsel appearing on behalf of the Appellant/University, firstly would submit that the entire award is liable to be set aside as the contract itself is void. According to the learned Senior Counsel, the mandatory approval of the Academic Council and the Finance Committee were not taken note of and the very action of calling for the tender for entering into the contract was completely irregular. When a Public Sector Institution which is bound by its statutes having the force of law, proceeds with entering into a contract in total violation of said statutes, then the contract would be *void ab initio*. The learned Arbitrator did not consider this very basic fact about the contract being *void ab initio*. Thus the award is in violation of the



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Fundamental Policy of Indian Law and thus suffers from patent illegality and is liable to be set aside under Section 34 of the Arbitration and Conciliation Act.

3.1 Learned Senior Counsel would further submit that the Arbitrator has also awarded a sum of Rs.34,80,000/- towards loss of profit and the same is arrived at by taking into account 5% of the total value of the undelivered part of the contract which was on presumption alone and was without any evidence. Hence, that part of the award is absolutely perverse and therefore, this wrong approach again will fall within the mischief of violation of Fundamental Policy of Indian Law, and thus, would pray that the award be set aside.

3.2 Opposing the above submissions, *Mr. D. Nellaiappan*, learned Counsel for the respondent would submit that the respondent's contract had absolutely nothing to do with the availing of prior permission of the various Committees which is the internal procedure of the University and that is no allegation against the respondent in that regard. The contract entered into between the parties is a valid contract, the respondent had executed its part of the contract and the Arbitrator has categorically found



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that in not even nominating a single point of the contract and then not going ahead with the contract in respect of other subjects even after taking the 3D Visual E-Learning content supplied by the respondent and utilising the same, amounts to the breach of contract and on that basis, awarded the invoice amount due and payable and over and above, had awarded only a sum of Rs.34,80,000/- towards the notional loss of profit. The Arbitrator is justified in awarding the same, as there is a categorical finding of breach of contract.

3.3 The learned Counsel also pointed out the finding of the learned Single Judge that even while awarding, in respect of the two subjects, after getting the content, a sum of Rs.13,34,000/- was deducted. The learned Single Judge, therefore, taking into account the said fact and overall facts and circumstances of the case, has reasoned in Paragraph No.19 of the Judgment under Appeal, that the award cannot be construed as patently illegal or contrary to public policy. Therefore, he would submit that the appeal be dismissed and the award amount, already deposited into the credit of the Execution Petition in E.P. No.98 of 2021, before the District Court at Puducherry, be permitted to be withdrawn by the respondent.



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D. Points for consideration :

4. We have considered the rival submissions made on either side and perused the material records in this case. Upon consideration, the following points arise for consideration of this case :

(i) Whether or not the contract between the parties be termed as void as it was entered into in violation of the statutes of the University and consequently, the award passed on such contract to be termed as contrary to the fundamental public policy of Indian law ?

(ii) Whether or not the award of the Arbitrator in notionally awarding the loss of profit @ 5% of the contract value is sustainable?

E. Point No.(i) :

5. In this case, absolutely, no fraud, collusion, or corruption is alleged against the respondent. In the absence thereof, when the respondent has participated in the open tender called for and having been declared as a successful bidder and having been awarded the contract, the same will not be in any manner to be vitiated for any internal procedural violations of the Appellant/University. The illegality is only with reference to the action of the concerned Officer /Authority who went ahead with the



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calling for the tender and it does not in any manner permeate into the contract or its execution. While considering the issue of arbitrability, the Hon'ble Supreme Court of India, in ***Rashid Raza Vs. Sadaf Akhtar***¹, held as follows :

“4. The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to “simple allegations”. Two working tests laid down in paragraph 25 are : (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain.

5. Judged by these two tests, it is clear that this is a case which falls on the side of “simple allegations” as there is no allegation of fraud which would vitiate the partnership deed as a whole or, in particular, the arbitration clause concerned in the said deed. Secondly, all the allegations made which have been relied upon by the learned counsel appearing on behalf of the respondent, pertain to the affairs of the partnership and siphoning of funds therefrom and not

¹ (2019) 8 SCC 710
<https://www.mhc.tn.gov.in/judis>



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to any matter in the public domain.”

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Thus, it can be seen that the allegations now raised by Learned Senior Counsel does not vitiate the contract, as the violations were not matters in public domain but relate to the internal affairs of the University.

5.1. On the contrary, the Fundamental Policy of Indian Law would demand the Appellant/University having availed the services of the respondent by taking E-Learning content of the various courses and utilising the same to pay the agreed amount. As a matter of fact, Section 65 of the Contract Act, would impose the liability to pay even if the benefits are out of a void contract. It is relevant to extract Section 65 as follows:

“65. Obligation of person who has received advantage under void agreement, or contract that becomes void.—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.”

Besides, the Orissa High Court, in ***State of Orissa Vs. Prathiba Prakash Bhavan²***, in a case where it was contented that the Block Development Officer had no jurisdiction to place orders, held that the amount is to be paid to the supplier.



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5.2 Therefore, we reject the contention of the Appellant/University and we answer the question that the contract is valid and for the breach thereof, the respondent is entitled for the remedies and the award of the arbitrator does not call for any interference.

F. Point No.(ii):

6. As far as the claim for loss of profit is concerned, it can be seen that as per Section 73 of the Indian Contract Act, 1872, the parties, who suffer breach, are entitled for the compensation for any loss or damage that had caused to them, thereby, which naturally arise in the usual course from such breach. However, the party will not be entitled if the loss is remote or indirect. In this case, it can be seen that from the inception itself, it can be known between the parties that any breach will cause loss of profit in respect of the other subjects, such damages arise naturally in the course of the contract and it cannot be said to be remote or indirect. Such loss of profit has to be logically computed only on a notional basis and the contention that there must be an actual evidence in this regard, cannot be accepted as far as the quantum is concerned.



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6.1. Thus it can be seen, a claim for loss of profit is very much maintainable and depending on the facts and circumstances of the case, various methods are used to compute the same, as it is possible to adduce evidence only in respect of the loss but the quantum has to be arrived on some formula/basis. In **McDermott International Inc. Vs. Burn Standard Co. Ltd.**³, while considering the method for computation of damages, it was held as follows :

“102. What should, however, be the method of computation of damages is a question which now arises for consideration. Before we advert to the rival contentions of the parties in this behalf, we may notice that in M.N. Gangappa v. Atmakur Nagabhushanam Setty & Co. [(1973) 3 SCC 406] this Court held that the method used for computation of damages will depend upon the facts and circumstances of each case.”

But, however, in all cases of calculating the notional profits, any criteria adopted, cannot result in exorbitant or fanciful amount. In this case, a sum of 5% of the total value of the contract has been awarded and even in the said amount, the learned Single Judge has found that in respect of two subjects that were delivered in advance, payments were excluded and that amount is Rs.13,34,000/-. Considering the overall value of the



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contract and the amount awarded in respect of the other head and in respect of loss of profit, it cannot be said that the award of the Arbitrator is perverse or illegal and we answer this point accordingly.

G. The Result :

7. In the Result,

- (i) The O.S.A.(CAD).No.24 of 2022 stands dismissed;
- (ii) The respondent will be entitled to withdraw the award amount deposited by the Appellant/University to the credit of the Execution Petition in E.P. No.98 of 2021, along with the accrued interest if any;
- (iii) After withdrawal of the said sum, if any amount is further payable, the respondent will be at liberty to pursue the above Execution Petition further in accordance with the law;
- (iv) There shall be no order as to costs;
- (v) Consequently, connected miscellaneous petitions are closed.

(T.R., ACJ.) (D.B.C., J.)
24.03.2023

Index : yes
Speaking order
Neutral Citation : yes



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**T.RAJA, ACJ.,
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D.BHARATHA CHAKRAVARTHY, J.,**

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Pre-Delivery Judgment in

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and
C.M.P.Nos.17931 & 17933 of 2022

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