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O.S.A.(CAD).No.107 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 20.02.2023

Judgment Pronounced on : **20.03.2023**

CORAM :

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

O.S.A.(CAD).No.107 of 2022
and C.M.P.Nos.10718 and 10719 of 2022

1. M/s.Bharat Sanchar Nigam Limited,
Rep. by its Chief General Manager,
Chennai Telephones,
No.78, Purasawalkam High Road,
Chennai - 600 010.

2. The Deputy General Manager (NP),
Bharat Sanchar Nigam Limited,
Chennai Telephones,
No.E-5, III Avenue, Anna Nagar,
Chennai - 600 102.

... Appellants

Versus

The RITES Ltd,
(A Govt. of India Enterprises -
Ministry of Railway),
Rep. by its Senior Deputy General Manager,
No.758, Mount Chamber,
1st Floor, Anna Salai,
Chennai - 600 002.

... Respondent



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Prayer : Original Side Appeal - Commercial Appellate Division filed under Section 37 of the Arbitration and Conciliation Act, 1996 to allow this Original Side Appeal by setting aside the order, dated 05.10.2021 in Arb.O.P (Com.Div) No.172 of 2021 in confirming the award in O.P.No.904 of 2018 and A.F.No.78 of 2019, dated 20.04.2021.

For Appellants : Mr.R.Rajesh Kumar

For Respondent : Mr.Amalraj S.Penikilapatti

JUDGMENT

D.BHARATHA CHAKRAVARTHY, J.

Challenge made in this intra-Court appeal is to the order of the learned Single Judge, dated 05.10.2021 in Arb.O.P (Com.Div) No.172 of 2021, whereby, the learned Single Judge rejected the prayer under Section 34 of the *Arbitration and Conciliation Act, 1996* (hereinafter referred to '*A&C Act*') to set aside the award passed by the learned Arbitrator, dated 20.04.2021.

2. The brief facts leading to the present appeal are that under a tender floated by the appellants, *inter alia*, for laying underground cables in Chennai Telephones for the year 2001-2002, the respondent was selected as one of the Consultants and was awarded the contract. Even though the contract was executed and certain bill amounts were settled, as far as the



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claim made by the respondent in respect of filling the trenches with sea sand and removal of excess earth laid after closure of the trenches, the bills were not settled. As a matter of fact, the appellants as well as the respondent, being Government of India Enterprises, since similar claims were made with regard to many of the contracts executed by the respondent, a Committee was set up by the appellants by its communication, dated 24.03.2004 and the said Committee also submitted its report recommending the release of such claims. Even thereafter, the amounts were not released. Therefore, the respondent raised a dispute and the same was referred to the sole Arbitrator, appointed by the appellants herein, who rejected all the claims of the respondent, *inter alia*, on the reasons that the claim is barred by limitation and that no evidence was adduced in relation to the balance payment. The said award was set aside by this Court by an order and subsequently, *de novo* proceedings were ordered by appointing a learned Retired Judge of this Court as an learned Arbitrator.

3. In the second round of arbitration, the respondent filed a Claim Petition seeking to pass an award in terms of the amounts claimed by it under Annexure-A to the claim statement along with *pendente lite* and post



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award interest. A counter statement was filed by the appellants to the claim statement. In the counter statement, the appellants contended that they have duly paid 50% of bills initially and the actual disallowed amount by them, shown in the last sitting of the arbitration, is far lesser than the amount claimed by the respondent as disallowed amount and it is for want of necessary supportive documents and thus, question of acknowledgment of retention does not arise. When the respondent is restricting the claim after 16 years by scaling down almost 45% of the claim, that itself is vexatious and the arbitration award passed by the earlier arbitrator holds rhyme and reason. It is the further contention of the appellants that the Avadi Municipality area does not come under Corporation limits at the time of execution of work where sea sand filling is not mandatory and when the optional work is carried out, the question of supportive documents for the claim arise along with it naturally.

4. On the strength of the pleadings, the parties went in for trial and on behalf of the claimant, *C.Ws.1* and *2* were examined and *Exs.C-1* to *C-257* were marked. On behalf of the appellants, no oral evidence was let in, however, *Exs.R-1* to *R-7* were marked. The learned Arbitrator, after



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considering the pleadings of the parties and evidence on record, passed an award, dated 20.04.2021 awarding a sum of Rs.99,66,395/- along with 12% as *pendente lite* and post award interest. The claimant was also awarded costs. Aggrieved by the same, the appellants herein filed a petition under Section 34 of the *A&C Act* to set aside the award, *inter alia*, raising grounds that the learned Arbitrator (a) failed to appreciate the fact that no waybills / invoices / tax receipts for lifting sea sand from sea shore is produced along with the claim bills; (b) erred in awarding interest in the absence of a specific clause in the contract; (c) actual quantum of work carried out by the respondent was not ascertained while allowing the claim. After considering the submissions made on either side, by the order, dated 05.10.2021, the learned Single Judge recorded that the factual findings on the basis of documents and work carried out by the respondent cannot be re-appreciated at the stage of filing of petition under Section 34 of the *A&C Act*. As far as interest is concerned, the learned Single Judge confirmed the rate of interest, since there is no prohibition in the contract for award of interest. Therefore, the learned Single Judge concluded that the award did not call for any interference in relation to the claim amount of Rs.99,66,395/- and *pendente lite* and post award interest at the rate of 12% per annum on the principal



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sum of Rs.99,66,395/-. Aggrieved by the same, the present appeal is filed before this Court.

5. Heard *Mr.R.Rajesh Kumar*, learned Counsel for the appellants and *Mr.Amalraj S.Penikilapatti*, learned Counsel for the respondent.

6. *Mr.R.Rajesh Kumar*, learned Counsel for the appellants contended that as per Clause-12.4 of the agreement, dated 15.10.2001, all materials required by the respondent would be provided by the appellants and if any material has to be purchased, then the respondent shall do so only after getting prior approval from the appellants. However, their claim relating to procurement of alleged sea sand is not maintainable as no prior approval was obtained. He would contend that when there is no express provision in the contract to award interest, the learned Arbitrator erred in awarding the same. He would further submit that when the contract work was concluded and the bills were submitted as early as in the year 2003, the claim made in the year 2007 is barred by limitation and the said question has been completely overlooked by the learned Arbitrator. The learned Counsel also contended that the rule that the trenches should be filled up by sea sand is



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applicable only in respect of the works within the limit of Corporation of Chennai and in the present contract, since it is outside the Chennai Corporation limits, the necessity itself is not there. In support of his submissions, the learned Counsel relied upon a judgment of the Hon'ble Supreme Court of India in ***Sree Kamatchi Amman Constructions Vs. Divisional Railway Manager (Works), Palghat and Ors.***¹, more particularly on paragraph No.19, to contend that unless the parties have agreed that interest shall be paid, no interest can be awarded by the learned Arbitrator. Learned Counsel also relied upon a judgment of the Bombay High Court in ***Anmol Steel Processors Private Limited, through its Director Amar D.Shah Vs. Colour Roof (India) Limited***², referring to paragraph No.53 to contend that the instant claim is barred by limitation. He would further place reliance on a judgment of the Hon'ble Supreme Court of India in ***Union of India Vs. Manraj Enterprises***³ to contend that certain concessions made by the counsel during the arguments shall not bind the parties.

7. Per *contra*, Mr.Amalraj S.Penikilapatti, learned Counsel for the respondent would submit that in all these contracts, admittedly, there is a

1 (2010) 8 SCC 767

2 2022 SCC OnLine Bom 116

3 (2022) 2 SCC 331



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mandatory condition by the local authority / Corporation to fill up the trenches only with sea sand. Once the trenches are filled up to a particular level by the sea sand, certainly, excess earth is liable to be there and the same has to be removed. The works in respect thereof have been charged as per the rates available. The works performed in respect thereof are duly entered in the M-Book and the concerned Supervising Officer of the appellants have duly signed the same. The M-Book has been duly marked before the learned Arbitrator.

8. As a matter of fact, immediately after the bills were submitted, the appellants were not sure as to whether those amounts had to be paid or not. Therefore, they referred the matter to the Committee by their communication, dated 24.03.2004 and the said Committee has submitted its report only on 26.03.2004 and thereafter the bills were unpaid, a dispute is raised and arbitration is invoked. Therefore, there is no delay whatsoever on the part of the respondent and the claim is very much within the period of limitation. The learned Arbitrator has power to award *pendente lite* as there is no prohibition in the contract. Both the *pendente lite* and post award interest has been granted at the rate of 12% which is very much reasonable.



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He would submit that absolutely, no ground whatsoever has been made to interfere with the award under Section 34 of the *A&C Act*.

9. We have considered the rival submissions made on either side and perused the material records of the case. Firstly, it has to be seen that whether the procurement of materials by the respondents, without prior approval of the appellants, is in violation of the agreement. The learned Single Judge accepted the categorical finding of the learned Arbitrator that no work orders have been obtained by the respondent for sea sand filling and removal of excess earth. The learned Single Judge further concurred with the finding of the learned Arbitrator that the Acceptance Test-Report, M-Book and other documents which are not in dispute, were duly signed by the officials of the appellant Company and they have not disputed to the work carried out by the respondents. The learned Single Judge has restricted himself from re-appreciating the evidence on record because the learned Arbitrator passed an award duly considering the evidence on record and by construing the clauses of the contract. In that regard, there is no question of re-appreciation of evidence by this Court in exercise of the



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powers under Section 34 or 37 of the *A&C Act* and the same will not fall within the realm of any of the grounds under Section 34 of the *Act*.

10. Secondly, even on a careful perusal of the said Clause-12.4, it would only relate to the materials supplied by the appellants, like that of the cables etc., and it is highly illogical to contend that the said clause would include the procurement of sand to fill up the trenches. Thirdly, it can be seen that the appellants and the respondent, both being Government of India institutions, had set up a Committee and referred the issue, by a report, dated 26.03.2004, which is also marked as a document before the learned Arbitrator, have recommended for releasing of the said pending bill amounts. Fourthly, we see from the counter affidavit that only an evasive stand is taken by the appellants and no categorical stand as to (i) whether the respondent filled up the trenches upto a level by filling it with sea sand; (ii) whether they removed excess earth or not; and (iii) the plea regarding limitation, was taken before the learned Arbitrator. Fifthly, when the respondent has actually filled up the trenches with sea sand, when it is the case of the appellants that there was no such requirement in respect of the instant contract, it was for the appellants to establish the same by way of letting in evidence before the learned Arbitrator which was not done. On



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the other hand, if the same was not a requirement, there was no question of maintaining the M-Book and the officials of the appellant signing the M-Book. In that view of the matter, we find that absolutely no grounds are made out to interfere with the award of the learned Arbitrator and therefore, the learned Single Judge has rightly rejected the contentions of the appellants.

11. Similarly, the question regarding interest is no longer *res integra*. The Hon'ble Supreme Court of India has categorically held in its judgment in ***Sree Kamatchi Amman Constructions Vs. Divisional Railway Manager (Works), Palghat and Ors.*** (cited *supra*), more particularly paragraph Nos.13 to 19 that only if the agreement between the parties expressly prohibits the award of interest, the same would be a bar for the learned Arbitrator to award *pendente lite* interest. But, in this case, there is absolutely no clause whatsoever prohibiting the award of the interest and accordingly, no exception can be taken for the award of interest by the learned Arbitrator.

12. Therefore, we find that the order of the learned Single Judge, in rejecting the challenge to the award, is in order and therefore, this Original



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Side Appeal fails and is accordingly dismissed. Considering the fact that the appeal has been preferred absolutely without any iota of merit whatsoever, we are inclined to impose costs of Rs.25,000/- to the credit of Madras High Court Advocate Clerks Association within a week from today (i.e., on 20.03.2023). Consequently, the connected miscellaneous petitions are closed.

(T.R., ACJ.)

(D.B.C., J.)

20.03.2023

(5/9)

Index : yes

Speaking order

Neutral Citation : yes

grs

T.RAJA, ACJ.,

AND

D.BHARATHA CHAKRAVARTHY, J.,

grs

To

The Secretary,
Madras High Court Advocate Clerks
Welfare Association,
No.6, 1st Floor, Francis Joseph Street,
Chennai - 600 001.

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