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O.S.A.(CAD).No.118 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**

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and C.M.P.Nos.12803, 12806 and 23229 of 2022

1. The Chairman and Managing Director,
M/s.Bharat Sanchar Nigam Limited,
"Statesman House"
No.148, Bharakhamba Road,
New Delhi - 110 001.
2. The Chief General Manager,
Bharat Sanchar Nigam Limited,
No.78, Pursawalkam High Road,
Chennai - 600 010.
3. The Deputy General Manager (CC),
Bharat Sanchar Nigam Limited, Chennai Telephones,
No.7, Kushkumar Road, Nungambakkam,
Chennai - 600 034. ... Appellants

Versus

M/s.Ganesh Constructions
Represented by its Proprietor - S.Chandrasekaran,
No.23/2A, Chelliamman Koil Street,
Ayanavaram, Chennai - 600 023. ... Respondent



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Prayer : Original Side Appeal - Commercial Appellate Division filed under Section 13(1) the Commercial Court Act read with under Section 37 of the Arbitration and Conciliation Act, 1996 to allow the Original Side Appeal by setting aside the order, dated 25.04.2022 passed in Arb.O.P (Com.Div) No.197 of 2022 in confirming the award passed in O.P.No.876 of 2018 and A.F.No.73 of 2019, dated 10.02.2021.

For Appellants : Mr.T.Ravi 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 25.04.2022 in Arb.O.P (Com.Div) No.197 of 2022, 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 10.02.2021.

2. The brief facts leading to the present appeal are that under a tender floated by the appellants, *inter alia*, for laying of underground cables in Chennai Telephones for the year 2001-2002, the respondent was the successful bidder and was awarded the contract. Even though the contract



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was executed and certain bill amounts were settled, as far as the 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, since similar claims were made with regard to sea sand filling and excess earth removal by cable laying contractors and PSUs, 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. The said award, dated 20.03.2013 was set aside by this Court by an order, dated 08.12.2017 and subsequently, *de novo* proceedings were ordered by appointing a learned Retired Judge of this Court as an 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 and B to the claim statement. A counter statement was filed by the appellants to the claim statement. In the counter statement, the



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appellants contended that certain mandatory requirements, relating to removal of earth and back filling of sea sand, were not complied by the respondent and that it did not show cause itself when called for verification. It was further stated that the bill amounts in the unsettled bills were quoted excessively by the claimant.

4. On the strength of the pleadings, the parties went in for trial and on behalf of the claimant, **C.W.1** was examined and **Exs.C-1** to **C-23** were marked. On behalf of the appellants, no oral evidence was let in, however, **Exs.R-1** to **R-4** were marked. The learned Arbitrator, after considering the pleadings of the parties and evidence on record, passed an award, dated 10.02.2021 awarding a sum of Rs.3,55,255/- 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 (a) the learned arbitrator failed to frame a specific issue pertaining to the quantum of work executed by the claimant; (b) the respondent failed to furnish any documents / bills / invoices for the quantum of sand procured or the transportation costs incurred in the execution of work; and (c) the learned



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Arbitrator disregarded Clauses-3.7(a&b) as well as Clause-7.1 of the contract agreement for the specification for cable laying work which is binding on the respondent. After considering the submissions made on either side, by the order, dated 25.04.2022, the learned Single Judge found that the view taken by the Arbitral Tribunal is not an implausible view and held that the certification in the M-Books and other documents by the appellants at various stages by themselves presupposes that work has been done by the contractor in accordance with the terms of contract. It is also further held that since there is no prohibition in the contract for award of interest, the claimant was awarded *pendente lite* and post award interest at the rate of 12% per annum on the principal sum of Rs.3,55,255/- by the learned Arbitrator, which does not call for any interference. Aggrieved by the same, the present appeal is filed before this Court.

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

6. *Mr.T.Ravi Kumar*, learned Counsel for the appellants would contend that in view of Clause-3.7(a) of the contract, the contractor shall



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execute the work of filling the trenches with sea sand by themselves and was expected to submit the claim along with the details of estimate from such authorities. 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 submit that the learned Single Judge failed to take note that the award was on no evidence as the relevant supporting documents such as the bills, vouchers, indent placed for procurement, taxes paid by the respondent were not furnished before the Tribunal for examination. 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. He would further place reliance on a judgment of the Hon'ble Supreme Court of India in ***Union of India Vs. Manraj Enterprises***² to contend that certain concessions made by the counsel during the arguments shall not bind the parties.

1 (2010) 8 SCC 767

2 (2022) 2 SCC 331



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7. Per *contra*, Mr.Amalraj S.Penikilapatti, learned Counsel for the respondent would submit that in all these contracts, admittedly, there is a 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 was raised and the arbitration clause was 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 the power to



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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. 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 can be seen that the points which are raised namely, whether the work executed by the respondent in removal of excess earth and filling of sea sand is as per the contract stipulation; whether the appellants were justified in not accepting the entries in relevant M-Books, Check-Lists, Acceptance Test-Reports and Certified Bills submitted by the respondent for payment and other ancillary claims, all relate to the construction of the clauses of the contract and the working and the execution of the contract. When the learned Arbitrator passed an award duly considering the evidence on record and by construing the clauses of the contract, there is no question of re-appreciation of evidence by this Court in exercise of the powers under Section 34 or 37 of



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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. Regarding the manner in which the issue Nos.1 to 4 before the Tribunal was decided, the learned Single Judge examined the award under the realm of Section 19(1) of the *A&C Act*, which stipulates that the Arbitral Tribunal, is not bound by *The Code of Civil Procedure, 1908* and the *Evidence Act, 1872*. On the next contention that the award was in conflict with the Public Policy of India under Section 34(2)(b)(ii) of the *A&C Act*, the learned Single Judge elucidated the expression in light of *Associate Builders Vs. Delhi Development Authority*³ and *SSangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*⁴ and stretched his examination to the ground of patent illegality under Section 34(2A) of the *A&C Act*. For instance, in relation to admissibility of *Ex.A-4*, the learned Single Judge concluded that there cannot be re-appreciation of evidence particularly in a concluded contract when the measurement and certification at various stages have been approved by the appellants. Furthermore, the conclusion that the certification in the M-

³ (2015) 3 SCC 49

⁴ (2019) 15 SCC 131



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books and other documents by the authorities of the appellants at various stages by themselves, *res ipsa loquitur* (speak for itself) that work was executed in accordance with the contract is not an implausible view attracting judicial interference under Section 34 of the *A&C Act*. Moreover, the Committee set up the appellants, 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. 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



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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 Side Appeal fails and is accordingly dismissed. There shall be no order as to costs. Consequently, the connected miscellaneous petitions are closed.

(T.R., ACJ.)

(D.B.C., J.)

20.03.2023

(2/9)

Index : yes

Speaking order

Neutral Citation : yes

grs

T.RAJA, ACJ.,

AND

D.BHARATHA CHAKRAVARTHY, J.,

grs



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