

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CWP-26301-2017
JUDGEMENT RESERVED ON :15.03.2023
JUDGEMENT PRONOUNCED ON: 21.03.2023**

RAJESH KUMAR NAIN

.....Petitioner

VERSUS

SUB DIVISIONAL ENGINEER

.....Respondent

CORAM : HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Present:- Mr. Raj Kapoor Malik, Advocate
for the petitioner.

Mr. Pankaj Mulwani, DAG, Haryana
for the respondent.

VINOD S. BHARDWAJ, J.

The instant petition has been filed under Articles 226/227 of the Constitution of India for seeking quashing of Memo No. 258 dated 24.04.2015 (Annexure P-3) whereby notice for depositing Rs. 1.5 lac against Optical Fibre Cable damage of Ellenabad-Karmshana has been issued by the respondent-Sub Divisional Engineer (Public Health Engineering), Sub Division No.2, Ellenabad, District Sirsa, against the petitioner on the basis of an award dated 09.04.2015 (Annexure P-4) passed by the Permanent Lok Adalat (Public Utility Services), Sirsa in case bearing No. 2839 of 2014 titled "Bharat Sanchar Nigam Limited, Sirsa versus Sub Divisional Engineer (Public Health Engg.) Sub Division No.2, Ellenabad, District Sirsa.

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2. The petitioner who is an authorized Civil Contractor registered with the respondent-department was allotted the work of Augmentation of Sewerage Scheme in Ellenabad Town , District Sirsa vide endorsement No. 3363-68 dated 19.05.2014. It is claimed that the aforesaid work was undertaken by the petitioner and completed in April, 2015 without any complaint against the due execution thereof. An agreement was also executed between the petitioner and the respondent-department. Clause No. 26 thereof reads as under:

“26:- Any damage of existing sewer/water supply/telephone line will be the responsibilities of contractor to make in good condition without any extra payment.”

3. It is averred that the petitioner had executed/completed the work within prescribed time frame and the same was also duly inspected by the respondent-department whereupon it was found to be executed as per the standards and the specifications prescribed by the respondent-authorities. However, the petitioner was surprised on receipt of a Memo No. 258 dated 24.04.2015 whereby the respondent-department asked the petitioner to deposit a sum of Rs. 1.5 lacs against the claim of BSNL for Optical Fibre Cable (OFC) Damage on Ellenabad-Karmshana route near Bhambhu Petrol Pump, Nohar Road, Ellenabad. After going through the abovesaid notice, the petitioner became aware that the BSNL had filed a case against the respondent-department before the Permanent Lok Adalat under Section 22 (C) of the Legal Services Authorities Act, 1987 and an award had been passed against the respondent-department. The petitioner claims that the respondent-department never issued any intimation to him about the claim raised by the respondent-BSNL or the pendency of the case before the Permanent Lok

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Adalat (Public Utility Services), Sirsa and as such he was not liable for the said loss. He thus denied the right of respondents to with-hold payment. A legal notice for seeking release of the withheld amount was sent by the petitioner to the respondent-department on 27.07.2017. The respondent denied release of the aforesaid amount and placed reliance on Clause No. 26 of the Agreement. The instant petition was thereafter filed by the petitioner.

4. A written statement on behalf of respondent-department through Jaibir Singh, Sub Divisional Engineer (Public Health Engineering) Sub Division No.2 Ellenabad, District Sirsa was filed taking a specific stand that the petitioner had been awarded work of Augmentation of Sewerage Scheme in Ellenabad, District Sirsa under ESP and laying of SWP pipes size 200 mm, 300 mm diameters, civil construction of MH Chambers of various size and all other contingent works. An emanating clause was duly incorporated in the Agreement No. 264 of 2014 entered with the petitioner as per which the petitioner-contractor would be responsible for any damage to any existing Sewer/water supply/telephone lines during the execution of the works and without any payment. It was averred that the petitioner did not take care of existing telephone line of Bharat Sanchar Nigam Limited and resultantly damaged the Optical Fibre Cable of BSNL. The respondent-BSNL filed for the aforesaid claim before the Permanent Lok Adalat (Public Utility Services), Sirsa which was decided in favour of the BSNL and the respondent-department was made liable to pay the aforesaid amount of Rs. 1.50 lacs. Accordingly, in terms of the conditions incorporated in the agreement, the respondent-department was entitled to recover the said amount from the petitioner. The amount in question having been deposited

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by the respondent-department vide receipt dated 01.05.2015, the action of the respondent in retaining the said money from the amounts due to the petitioner cannot be held to be bad or in violation of the any terms and conditions of the contract executed between the parties. It was specifically contended by the respondent department that the petitioner was aware of the proceedings filed by BSNL from the very beginning and also about dismissal of the application by the Permanent Lok Adalat (Public Utility Services), Sirsa for impleading him. Even thereafter, communication of the award was also sent to him & yet he chose to stay quiet for 02 years.

5. Even though the aforesaid written statement had been filed by the respondent-department on 19.04.2018, however, no rejoinder/replication controverting the stand of the respondents was filed by the petitioner despite lapse of nearly 05 years.

6. Counsel for the petitioner has submitted that the award in question had been passed without impleading the petitioner and that the respondent-department never informed the petitioner about the pendency of aforesaid claim and/or the application before the Permanent Lok Adalat (Public Utility Services), Sirsa. Consequently, he cannot be held liable for any award passed against him. He further contends that the petitioner had not caused any damage to the Optical Fibre Cable of the BSNL and that he cannot be held liable on account of any damage caused by any third party. In the absence of establishing that the damage to the Optical Fibre Cable was as a result of the work undertaken by the petitioner, recovery of the dues from the petitioner is ill founded. The amount in question thus deserves to be reimbursed to the petitioner.

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7. Per contra, learned counsel for the respondent-State has submitted that the claim for damage during the time of work has been awarded by the Permanent Lok Adalat (Public Utility Services), Sirsa & the petitioner has not been able to establish that the damage to the Optical Fibre Cable had no connection with the work undertaken by the petitioner. Further, there is nothing on record to substantiate that the damage to the Optical Fibre Cable had not taken place on the route where the work had been undertaken by the petitioner. Further, the award in question was passed by Permanent Lok Adalat (Public Utility Services), Sirsa wherein a specific plea had been raised by the respondent-department that the petitioner herein was the Contractor and was liable to off-set all claims/damages that have been suffered by the respondent due to any damage to the Sewer/Public Health/BSNL Lines. The relevant extract of the award referring to the said objections raised by the respondents reads thus:

“2. The respondent appeared and filed the written reply of the petition contesting the same on the grounds that the petitioner has no cause of action and Locus -Standi to file the petition; that the petition is bad for non- joinder of collector, Sirsa, Executive Engineer of PWD (Public Health) and Contractor Sh. Rajesh Kumar Nain; that the petitioner is estopped from filling the present petition by his own act and conduct because before starting the work, a notice bearing No. 418 dated 20.06.2014 was issued by the respondent to the petitioner for giving demarcation but the petitioner did not take any action on that notice nor deputed any persons to give the alignment of the optical fibre cable; that the petition is not maintainable in the present form as the subject matter of this petition does not fall within the preview of public utility services; that this Adalat has no jurisdiction to entertain the petition; that the petitioner has concealed the true

and material facts; that the respondent -Department informed the petitioner for deputing any person during the excavation of work for giving the alignment but the petitioner-Department failed to submit the alignment map or depute any person at the site; that the petition is false and frivolous; that the cable laid by BSNL was not as per specification as the alignment was not correct and the depth and distance was not proper. no protection over the cable was provided, therefore, BSNL is personally responsible for the loss; that no damage was caused to telephone cable by the respondent ; that the work of repairing water pipe line is also a matter of public utility and it could not be stopped; that the demand notice served by the petitioner to the respondent was devoid of merit, therefore, the same was ignored; that the work of repairing water pipe line is still carried out within the territory of opposite Bhambhu Petrol Pump, Nohar Road, Ellenabad, District Sirsa but the petitioner has not supplied the route map of cables to the respondent with these averments, the respondent has prayed for the dismissal of the petition.”

8. The contention of the respondent-department was declined by the Permanent Lok Adalat (Public Utility Services), Sirsa and it was specifically observed that the petitioner contractor worked under the respondent department. The agreement, copy whereof had been placed on record of the Permanent Lok Adalat (Public Utility Services), Sirsa did not in any manner bind the petitioner therein i.e BSNL. Liberty was granted to the respondent-department to recover or not to recover the amount of damages from the Contractor under the terms and conditions of the agreement in question. The relevant extract of the award reads thus:

“7. It is an admitted fact that the petitioner-Department laid underground optical fibre cable for providing BSNL mobile, data and other services to its users residing in the area of opposite Bhambhu Petrol Pump, Nohar road, Ellenabad district

Sesa. It is also an admitted fact that the respondent department also laid a sewerage pipe line on the same site to provide water facility to the inhabitants of that area. The respondent has pleaded that the petitioner was required vide letter, copy of which is Ex. R-3, to supply the site plan of laid optical fibre cable in that area and to depute some person to give alignment of fibre cable but the petitioner -Department did not provide the site plan and did not depute any person. The petitioner has denied the receipt of latter, copy of which is Ex. R-3. Therefore, it was for the respondent department to prove the issuance of letter, copy of which is Ex.R-3 but respondent has failed to prove this fact. Respondent has simply placed on record Ex.R-3 Whether this letter was actually delivered in the office of the petitioner is not proved on the file. There is no signature of any official or officer of the petitioner- department on Ex. R-3 in token of its receipt. Therefore, it cannot be held that this letter was actually delivered to the petitioner. Otherwise also, Ex. R-2 goes to show that the work of laying the sewerage pipe line was allotted by the respondent -Department to Rajesh Kumar Nain, contractor on 19.05.2014. Therefore, the respondent department was supposed to intimate the petitioner - department well in time about the execution of work. But the respondent department remained silent till 20.06.2014 and on that date it allegedly issued letter, copy of which is Ex.R-3 and them started the work on 21.06.2014 without waiting the reply of the petitioner and without giving remainder to the petitioner, thus from the conduct of the respondent-department, it stands proved that letter Ex.R-3 was not issued on 20.6.2014 and it was created later on when they came to know that the optical fibre cable of the petitioner-department has been damaged while doing the work. Therefore, Ex.R-3 does not help the respondent in any manner.

8. *The respondent has tried to avoid its liability to pay the compensation on the ground that the work in question was carried out by Rajesh Kumar Nain, contractor and as per the terms and conditions of contract agreement, copy of which is Ex.R-2, the petitioner can claim the damages from him. This plea of the respondent also does not carry any weight. Rajesh Kumar Nain Contractor worked under the respondent department. Agreement, copy of which is Ex. R-2 was executed between Rajesh Kumar Nain contractor and respondent department. The terms and conditions of this agreement are to be followed by Rajesh Kumar Nain and the respondent department. The terms and conditions of this agreement are not binding on the petitioner in any manner. The damage of the optical fibre of the petitioner-department is to be made good by the respondent department. Respondent department is at liberty to recover or not recover the amount of damages from Rajesh Kumar contractor in view of the terms and conditions of Ex. R-2.*

9. *According to the version of the petitioner, while laying sewerage pipe line, the respondent department caused damage to its optical fibre cable at some places and caused monetary loss of Rs. 1,50,000/-. The petitioner -department served notice, copy of which is Ex. P-2 to the respondent -Department on 27.06.2014. The respondent has not denied the receipt of this notice. In para no.3 of the petitioner, the petitioner has mentioned the complete particulars of notice, copy of which is Ex.R-2 and has clearly pleaded that it was served to the respondent on 27.6.2014. while giving the reply of averments of para No.3 (on merit), in its reply the respondent department did not reply these categorical averments of the petitioner. There, it amounts that the respondent-department has admitted the correctness of averments of para No.3 of the petition in tot and thus being so, we have no hesitation to hold that notice, coy of*

which is Ex. P-2 was duly served by the petitioner to the respondent. Therefore, it was the duty of the respondent to reply the notice but it failed to reply the same and threw it in the dust-bin and if the respondent ignored the notice, then respondent must be ready to face the consequences of its act also. Therefore, it stands proved that the optical fibre cable of the petitioner-department was damaged by the respondent department as alleged by the petitioner. The respondent Department has directly avoided its liability to pay the damage by saying that the optical fibre cable was not laid by the petitioner-Department in the proper manner. This stand of the respondent-department is also liable to be ignored because if the petitioner department did not lay the optical fibre cable in proper manner, it does not mean that the respondent department has every right to damage the same. Otherwise also, the respondent department has not adduced any satisfactory evidence to prove that the petitioner -department did not follow the norms of laying the underground optical fibre cable. Therefore, we have no hesitation to hold that the damage of cable owned by the petitioner-department is proved on the record and the respondent department is liable to make the losses of the petitioner department good.

10. So far as the legal objection taken by the respondents are concerned, the same are vague, unnecessary and liable to be ignored. in the given circumstances of the case the petitioner has the cause of action and locus-standi to file the petitioner because both the department pertaining to the Public utility services executed work to provide public utility services to the public and during this process the respondent department caused the loss to the cable of the petitioner-department and disturbed the public utility services. The matter is at pre-litigative stage and element of amicable settlement is there. Before coming to this Adalat, the petitioner served notice to

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make its losses good but the respondent department ignored that notice and compelled the petitioner to knock the door of law maintaining agency. The petitioner has not concealed any material and true fact in any manner, therefore, the petition is very much maintainable in the present form.”

9. By referring to the above, counsel for the petitioner contends that the Permanent Lok Adalat (Public Utility Services), Sirsa gave specific finding that the damages to the Optical Fibre Cable had been caused while undertaking the aforesaid work and that the said finding having not been dispelled, the petitioner cannot claim immunity from compensating the respondent-department for the loss sustained by them.

10. I have heard learned counsel appearing for the respective parties and have gone through the documents available on record.

11. The sole question which comes up for consideration for this Court is as to whether the respondent was entitled to withhold the sum of Rs. 1.50 lacs from the due payments of the petitioner on the basis of the award passed by the Permanent Lok Adalat (Public Utility Services), Sirsa.

12. Perusal of the Clause 26 of the Agreement dated 19.05.2014 extracted above establishes that the respondent-department was entitled to be indemnified for any damage to existing Sewer/Water Supply/telephone lines without any extra payment. It is, hence, entitled to be held harmless against any claim lodged against it.

13. The petitioner has not challenged the existence of the Agreement or the clauses thereof. Further, even though the petitioner has challenged the recovery on the basis of the award by the Permanent Lok Adalat (Public Utility Services), Sirsa, however, he opted not to raise a

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challenge to the award of the award by the Permanent Lok Adalat (Public Utility Services), Sirsa. Besides, the petitioner has not referred to any material about the loss not being as an outcome of the activity undertaken by him despite being fully aware of the award. It is not even averred that no work on the said route was undertaken by him or that digging was undertaken by any other person/agency for any other work. Further, even though the entire grouse of the petitioner is that the recovery is in violation of principles of Natural Justice, however, the petitioner chose not to file any replication/rejoinder to the specific response filed by the respondents taking the objection that the petitioner was aware of the proceedings and recovery & still chose to stay quiet for nearly 02 years. The plea of not being aware raised by the petitioner is thus required to be inferred against him.

14. Hence, the petitioner is undisputedly under a contractual obligation to hold the respondents harmless against any loss/damage or claim suffered by it. Failure of the petitioner to challenge the award or even to place any document to show his innocence or that the damage was not on account of any activity undertaken by him coupled with the fact that the award was passed by the award by the Permanent Lok Adalat (Public Utility Services), Sirsa for the damage caused to the Optical Fibre Cable lead to an inference that the damage was caused to the Optical Fibre during the execution of the work in question and that the petitioner is liable to hold the respondent-department harmless.

15. The grievance espoused by the petitioner is that he was never made aware of the claim having been lodged against them and hence, he is not

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liable to indemnify the respondent-department of such loss has to be rejected for failure to controvert the specific plea in defence as well.

16. The question which next arises is as to whether the petitioner was to be granted any opportunity of hearing before any such recovery is effected or not. The above-said principles apply where an authority carries out an adjudication or determination of an issue resulting in prejudice to a civil right of the person. The primary question which thus comes to fore is whether the recovery in question is an outcome of an adjudication or determination by the respondents or is solely a consequential act.

17. There is no evidence on record on the basis whereof it can be alleged that the demand/recovery made by the respondents was based upon an arbitrary/discriminatory act of the employer/department. The levy of the amount was pursuant to an award passed by the Permanent Lok Adalat (Public Utility Services), Sirsa. Further, the objections as regards to the petitioner undertaking the work and an objection qua non-joinder/mis-joinder of the necessary party has also been duly raised. The said objection was however turned down by the Permanent Lok Adalat (Public Utility Services), Sirsa. The respondent-department mitigated the loss by depositing the said amount without delay and causing further loss to the petitioner against interest. Recovery was hence a mere consequential act.

18. Further, clause 26 of the agreement does not stipulate granting of any opportunity of hearing before such indemnification. Moreover, the claim has been raised by the respondent on the basis of an award passed by the Permanent Lok Adalat (Public Utility Services), Sirsa. Hence, the action of the respondent does not suffer from the vice of arbitrariness,

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discrimination or non-application of mind. The interpretation of the petitioner that the respondent could seek indemnification/or recovery of the damages only after first carrying out an independent assessment of the damage and after granting Show Cause Notice would rather lead to an introduction of an altogether uncalled for mechanism for indemnification in the contract. Any such suggestive interpretation is likely to add a detailed procedure for seeking recovery of the damages and amount to alterations of the agreement. Where the action of respondent-authorities is not per se illegal or without jurisdiction, the act undertaken on the strength of an award passed by the Permanent Lok Adalat (Public Utility Services), Sirsa which is akin to a Civil Court decree, cannot be said to be illegal or unsustainable on a mere plea of being in violation of Principles of Natural Justice. In any case, the plea raised by the petitioner that the damage to the Optical Fibre Cable was not as a result of the activity undertaken by him is at best a disputed question of fact. The same cannot be determined by High court in a writ jurisdiction. The power of judicial review is to the extent of examining whether the action of State suffers from any vice of illegality; irregularity; arbitrariness; disproportionately; judicial impropriety; malice; harshness or discrimination and does not sit in review of the decision in the absence of above.

19. I find that there is no illegality or infirmity in the action of the respondent-authorities in effecting recovery/retaining the amount of Rs. 1.50 lacs towards damages and as awarded by the Permanent Lok Adalat (Public Utility Services), Sirsa. The petitioner may if so advised, taking recourse to

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an appropriate remedy for seeking adjudication of the disputed questions of fact.

The present petition is accordingly disposed of.

(VINOD S. BHARDWAJ)
JUDGE

MARCH 21, 2023
Vishal Sharma

Whether speaking/reasoned	:	Yes/No
Whether Reportable	:	Yes/No