



O.S.A.(CAD)No.119 of 2021

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 31.01.2024	Delivered on 14.02.2024
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CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR JUSTICE R.SAKTHIVEL

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M/s.Qualtech Engineers Pvt. Ltd.,
Rep. by its Managing Director Mr.T.J.Sankar,
150, Tilak Street, Paneer Nagar, Mugappair West,
Chennai – 600 037.

...Appellant

Vs.

M/s.MR Ommayal Achi MR Arunachalam Trust,
Rep. by its Managing Director Ms.Valli Alagappan,
Coral Manor, “A” Ground Floor,
40/41, II Main Road, R.A.Puram,
Chennai – 600 028.

...Respondent

Prayer: Original Side Appeal (Commercial Appellate Division) filed under Order XXXVII Rule 1 of the Original Side Rules, 1956 read with Order 13 of the Commercial Courts Act and Order 37 of Arbitration and Conciliation Act, 1996 praying to set aside the order passed in O.P.No.34 of 2017 dated 04.02.2021.



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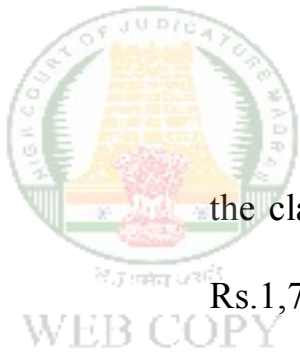
For Appellant : Mr.P.J.Rishikesh
For Respondent : Mr.A.R.Karunakaran

J U D G M E N T

(Judgment of the Court was delivered by **R.SUBRAMANIAN, J.**)

The above appeal is directed against the order of the Hon'ble Single Judge made in Arbitration O.P.No.34 of 2017, an application filed under Section 34 of the Arbitration and Conciliation Act, 1996, [for brevity “the Act”] by the claimant who partially succeeded before the Arbitrator.

2. The claim arose out of an agreement for construction of a Nursing College for the respondent Trust. The agreement was entered into on 26.04.2010 and the construction was to be completed by January 2011. However, there was a delay in completion of the construction as per the contract and finally the work was completed on 17.06.2011 and the main block was inaugurated on 18.06.2011. The College viz., a Nursing College started functioning from 19.06.2011. Claiming that the respondent has not paid the entire amount due under the agreement and several additional works which were not included in the bill of quantity (BOQ) were not paid,



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the claimant invoked the arbitration clause and made a claim for a sum of Rs.1,70,80,617/- with interest at 13.5% from 04.08.2011 till date of payment.

3. The abstract of the claims is as follows:-

Claim 1 : Rs.1,60,44,711/-

Claim 2 : Rs.6,06,031/-

Claim 3 : Rs.4,29,875/-

Claim 4 : Rs.90,31,376/-

Total : Rs.2,61,11,993/-

4. The claim was resisted by the respondent on various grounds, one of the main contentions was that the claims made fell under the except categories enumerated under Clause 34 of the Arbitration Agreement and therefore they are not *per se* arbitrable. It was also contended that as regards the quality and quantity of work done, the opinion of the architect is final and binding on the parties and therefore the claimant cannot question the wisdom of architect in dis-allowing certain claims in the final bill.



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5. It was the further contention of the respondent that it was the claimant which was responsible for the delay in completion of the project and therefore the claim itself is unjustified. The respondent would also point out that despite several reworking and rectifications carried out, the claimant was unable to complete the work to the satisfaction of the architect who was engaged. The respondent would also take shelter under the fact that the claimant had itself accepted various deductions by the architect over a period of time and therefore it was not open to the claimant to contend that the deductions made by the architect in the final bill are not called for. The parties also let in evidence on the above aspects.

6. The Arbitrator framed the following issues on the basis of the rival claims made in the pleadings:

1. Whether the claim made by the claimant falls within the ambit of 'Excepted matters' regarding which the decision of the architect is final as per the clause 34 and other provisions of the contract?

2. Whether the decision of the Architect with respect of other items where it was provided by the



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contract that the architect's decision on such matters are final, is arbitrable?

3. Was the respondent justified in making various deductions in the final bill submitted by the claimant?

4. Was there any bad workmanship on the part of the claimant? If yes, to what extent and whether the same justified enormous deductions as made by the respondent?

5. Whether the claimant is entitled for the amount towards the unpaid bill amounts towards work done but not included in the final bill, and amounts towards loss of profit for de-scoping of certain works?

6. Whether the occupation of the building by the respondent would suggest that the building was completed satisfactorily as per specifications in the contract?

7. Whether the claimant accepted the final payment of Rs.1,14,85,004.74 after deducting TDS from the respondent in full and final settlement of his duties?

8. Whether the claimant is entitled to any payments under various heads of claim?



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9. Whether the claimant is entitled for any interest?

10. Whether the respondent is entitled to the counter claim as prayed for?

7. The learned Arbitrator, a retired Judge of this Court, discussed each and every issue elaborately on the basis of the evidence that was made available. On the first issue relating to the arbitrability of the claim, the learned Arbitrator, upon consideration of Clause 34 of the Contract concluded that the claim towards unpaid bills or a dispute relating to the manner of deductions made by the architect will not fall under Clause 34 as excepted matters and therefore these claims are arbitrable.

8. The learned Arbitrator took up issue Nos.2, 3, 4 and 6 together for determination, since, they were interlinked. On these issues, the learned Arbitrator relying upon the minutes of several meetings that were held and the correspondence between the parties, concluded that the deductions made on the heads are justifiable except the deduction of Rs.4,50,897.66/- and the deduction of Rs.7,50,000/- on the heads of balance of work and future



repairs. The other three deductions that were applied by the architect were upheld by the learned Arbitrator.

9. Dealing with issue Nos. 5 and 8 which relate to unpaid bills to the tune of Rs.1,60,44,711/-, the learned Arbitrator concluded that, since the claimant had accepted the various deductions made during the course of the contract without demur, the claimant was entitled only to payment for the work done and not for unpaid bills or loss of profit on de-scoping of the work.

10. On issue No.7 which related to acceptance of the final payment, the learned Arbitrator concluded that the claimant is not estopped from raising a claim, since the acceptance of a sum of Rs.1,14,85,000.74/- is not without protest or in full satisfaction. The counter claim of the respondent was rejected on issue No.10. Finally as regards the interest, the Arbitrator concluded that the claimant would be entitled to interest only from the date of award and not for the prior period.



The gist of the award passed by the Arbitrator is as follows:-

11. There was an award in favour of the claimant for payment of a sum of Rs.18,06,928/- with interest at 12% per annum on the above said amount from the date of the award till date of payment. The other claims were rejected. The counter claim of the respondent was also rejected. The parties were directed to bear their own costs in the arbitration proceedings.

12. Aggrieved the claimant moved this Court under Section 34 of the Arbitration and Conciliation Act, 1996, as aforesaid. The main grounds that were urged in the application under Section 34 of the Act were that the Arbitrator had not adverted to the fact that the architect has not given any reasons for rejecting the claims, pointing out to the fact that in most of the claims, the architect had dis-allowed the entire costs of construction. It was contended that when admittedly the construction had been put up and the works had been done, not certifying the value of the entire work would amount to capricious manner in which the architect had applied his discretion. Particularly, in respect of the construction of the toilet block, it

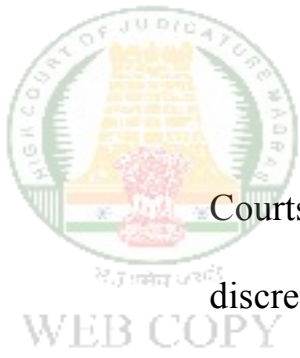


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was claimed that when it was not in dispute that the toilet block has been constructed and it has been put in use, the deduction of the entire costs of the tiling and plumbing work would amount to absolute injustice and therefore the Arbitrator should have at least granted the costs of the work found to have been done, which worked out to approximately Rs.33,00,000/-.

13. The Hon'ble Single Judge however noted that the Arbitrator has applied his mind to each and every deduction made and has come to the conclusion that only two out of three main claims based on deductions were unjust. It was found that there was enough material to support the conclusion of the Arbitrator and therefore it cannot be said that the award of the Arbitrator is either perverse or opposed to public policy. The other grounds available under Section 34 of the Act for setting aside the award are not very relevant for the case on hand.

14. On the question of interest, the Hon'ble Single Judge referred to Section 31(7)(a) of the Arbitration and Conciliation Act to conclude that once the Arbitrator has exercised his discretion in awarding interest, the



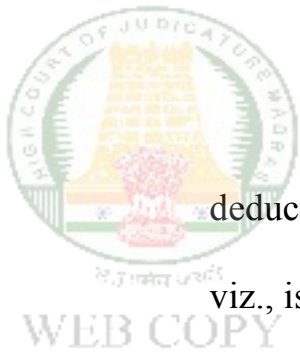
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Courts sitting under Section 34 of the Act cannot substitute its own discretion to that of the Arbitrator. On the said finding, the award of the Arbitrator was upheld, resulting in dismissal of the petition filed under Section 34 of the Arbitration and Conciliation Act. The claimant is on appeal.

15. We have heard Mr.P.J.Rishikesh, learned counsel appearing for the appellant and Mr.A.R.Karunakaran, learned counsel appearing for the respondent.

16. Mr.P.J.Rishikesh, learned counsel appearing for the appellant would submit that he is aggrieved only by the rejection of the claim for costs of the tiling and plumbing work in the toilet block, totalling a sum of Rs.33,00,000/- and the non-grant of *pendente lite* interest. According to the learned counsel, having concluded that the issues are arbitrable, the Arbitrator ought not to have rejected the claim on the ground that the decision of the architect has become final. The learned counsel would point out that the conclusion of the Arbitrator on issue No.1 where he finds that the claim relating to non-payment and the authority of the architect to apply

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deductions is arbitrable, he ought not to have while deciding the other issues viz., issue Nos.5 and 8 held that the decision of the architect is final.

17. He would also fault the Arbitrator and the Section 34 Court for not awarding *pendente lite* interest. The learned counsel would draw our attention to the Division Bench judgment of this Court in ***K.S.Baburaj and others Vs. The Union of India and others*** reported in ***2023-5-LW-203***, to which one of us (Hon'ble Mr.Justice R.Subramanina) was a party, to contend that the question of interest is severable and therefore the Court can grant interest which has not been granted by the Arbitrator and the same would not amount to modification of the award.

18. On the finality of the opinion of the architect, the learned counsel would submit that it is not in dispute that the toilet block was constructed and it has been put to use and therefore dis-allowing the entire costs of provision of tiling and sanitary work in the toilet block by the architect and its affirmation by the Arbitrator would definitely amount to perversity. The learned counsel would implore us to conclude that he will be entitled to something less at least, if not the entire claim.



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19. Reliance is also placed by the learned counsel upon the judgment of the Hon'ble Supreme Court in *Associate Builders Vs. Delhi Development Authority* reported in (2015) 3 SCC 49 and the judgment in *Indian Oil Corporation Limited Vs. Shree Ganesh Petroleum* reported in (2022) 4 SCC 463 on the scope of power of the Court sitting under Section 34 of the Act to set aside the award. He would also draw our attention to the judgment in *Indian Railway Construction Company Limited Vs. National Buildings Construction Company Limited* reported in (2023) 7 SCC 390 on the question of award of *pendente lite* interest.

20. Contending contra, Mr.A.R.Karunakaran, learned counsel appearing for the respondent would submit that the claimant had in fact agreed that the payments will be subject to the opinion of the architect. In support of his submissions he would draw our attention to various correspondence between the parties, particularly, in the form of minutes of the meetings held on various dates.



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21. The learned counsel would also invite our attention to the judgment of the Hon'ble Supreme Court rendered in ***Civil Appeal No.8067 of 2019 [S.V.Samudram Vs. State of Karnataka and another]*** dated **04.01.2024**, wherein, the Hon'ble Supreme Court had held that the modification of interest could be done by the Hon'ble Supreme Court under Article 142 of the Constitution of India exercising the plenary power of the Hon'ble Supreme Court and therefore according to the learned counsel, this Court sitting under Section 37 of the Act cannot modify the award and grant interest for the period prior to the award.

22. We have considered the rival submissions.

23. No doubt, the submission of Mr.P.J.Rishikesh, learned counsel appearing for the appellant on the apparent conflict between the conclusions of the Arbitrator on issue No.2 on one hand and Issue Nos.5 and 8 on the other hand is very attractive at the first blush. On a deeper examination, we find that there is no conflict at all. In fact, the Arbitrator has relied upon the correspondence between the parties and the minutes of various meetings



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between the parties to conclude that insofar as the deductions are concerned, the opinion of the architect would be final. Moreover, the contentions of the appellant that though the quality of the work is substandard, the appellant would at least be entitled to the value of the work done cannot be accepted.

24. In fact, in Ex.R42 the minutes of the meeting, held on 02.08.2011 just before the submission of the final bill, there was a specific agreement reached between the parties that in respect of deductions towards pending works/ un-satisfactory works/ rejected works etc., the decision of the architect would be final and binding. Therefore, we do not think that the findings of the Arbitrator on the deductions can be said to be contrary to his conclusion on issue No.1 viz., the arbitrability.

25. We must also point out that the jurisdiction of the Court in interfering with the awards either under Section 34 of the Act or under Section 37 of the Act are very very limited and unless the ground of challenge comes within the four corners of Section 34 of the Act, interference is impermissible. We are therefore unable to countenance the contentions of the learned counsel for the appellant on the deductions made



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in respect of the tiling and plumbing works in the toilet blocks.

WEB COPY 26. Adverting to the contention on the non-grant of interest *pendente lite*, Section 31(7)(a) of the Arbitration and Conciliation Act vests the power in the Arbitrator to grant interest both *pendente lite* and post award. The discretion vested in the Arbitrator has to be exercised judicially. The learned Arbitrator had found that the deduction of a sum of Rs.18,06,928/- by the architect is not justified, but, for the deductions, the claimant would have been entitled to payment of the amount even in 2011.

27. The award was passed on 31.08.2016 by refusing interest for the *pendente lite* period. The claimant has been deprived of interest almost for a period of 5 years. The arbitration proceedings were initiated by an order of this Court dated 05.02.2015. The Section 11 petition was filed even in the year 2013. Whether it is because of the opinion of the architect or otherwise, the fact that the claimant was deprived of the money which is actually due to it cannot be denied. The building was handed over as early as on 18.06.2011 and it is not in dispute that it has been put to use for running the Educational Institution. No doubt, the Arbitrator has given



some reasons for denying *pendente lite* interest. But, those reasons in our opinion, did not satisfy the test of judicial exercise of discretion and the respondent which had enjoyed the benefit of the facilities created by the claimant, no doubt as a contractor, cannot take undue advantage to deny payment of interest. Section 34 Court has also upheld the reasoning of the Arbitrator for not granting *pendente lite* interest.

28. Both the Arbitrator and the Section 34 Court have only gone by the fact that the respondent did not pay because the architect did not certify. If the rejection of the claim by the architect is found to be untenable or unacceptable, the claimant cannot be made to bear the loss. It is the respondent which had the benefit of the work, who should bear the liability to pay the interest also. If we are to examine the rejection of the claim for interest on the above conclusions, we find that the action of the Arbitrator in rejecting the *pendente lite* interest borders on perversity. We therefore have no hesitation in concluding that the non-grant of *pendente lite* interest is unjust and it deserves a re-look.

29. The judgment in *S.V.Samudram Vs. State of Karnataka and*



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another (supra) relied upon by the learned counsel for the respondent does not deal with the power of Section 34 Court on the issue of grant of interest.

It only points out that the Section 34 Court had interfered with the grant of interest without assigning any reasons. Therefore, the same cannot be taken as a precedent to conclude that Section 34 Court has no power to set aside the award or portion of the award which is severable, if it is found to be perverse.

30. Accordingly, the appeal is partly allowed the portion of the award relating to payment of interest alone is set aside. The next question is as to whether we should leave the claimant to seek re-arbitration or we can grant the dis-allowed portion of interest in this appeal itself.

31. No doubt, the consistent view of the Courts have been that there cannot be a modification of the award. This principle has received judicial recognition in *Project Director, National Highways Authority Vs. Hakkim* reported in *2021 (9) SCC 1*. Even in *Project Director, National Highways Authority Vs. Hakkim (supra)* the Court has recognized the principle of



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severability of the award propounded in *J.G.Engineers (P) Ltd., Vs. Union of India* reported in (2011) 5 SCC 758 wherein it was held that if the portion of the award is severable, the Courts can always interfere with that portion of the award, which is severable and such interference would not amount to modification of the award.

32. In *K.S.Baburaj and others Vs. The Union of India and others (supra)*, a Division Bench of this Court had held that the portion relating to interest is severable and we find that driving the claimant to seek re-arbitration to this claim of interest alone, that too, for a limited period would lead to unnecessary litigation and expenditure. The object of the Arbitration and Conciliation Act 1996 itself would be defeated, if the litigation is allowed to continue even after 12 years of completion of the works under the contract. We therefore set aside that portion of the award refusing *pendente lite* interest and award 12% interest on the claim allowed by the Arbitrator from the date of filing of O.P.No.221 of 2013 till the date of the award, on the sum of Rs.18,06,928/-.

33. In fine, the appeal is **partly allowed** the order of the learned



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Single Judge and the award of the Arbitrator, insofar as the refusal of the *pendente lite* interest are set aside and the *pendente lite* interest is granted at 12% per annum on the sum of Rs.18,06,928/- from 06.09.2012, the date on which the claimant issued a notice under Section 21 of the Act seeking appointment of the Arbitrator till date of payment of the sum of Rs.18,06,928/-. The parties shall bear their own costs in this appeal.

(R.SUBRAMANIAN, J.)

(R.SAKTHIVEL, J.)

14.02.2024

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Index : No

Internet : Yes

Neutral Citation : No

Speaking order



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