



Original Side Appeal No.220 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on
18.03.2024

Delivered on
15.04.2024

CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR JUSTICE R.SAKTHIVEL

Original Side Appeal No.220 of 2019

1. The Chairman/Managing Director,
HLL Life Care Limited,
Mahilamandiram Road, Poojappura,
Thiruvananthapuram 695 012.
2. The Associate Vice President,
HLL Life Care Limited,
Infrastructure Development Division,
'Adarsh' TC6/1718(1) – Vettamukku,
Thirumala Post, Thiruvananthapuram 695 012.
3. The Deputy General Manager (Technical),
HLL Life Care Limited,
Infrastructure Development Division,
'Adarsh' TC6/1718(1) – Vettamukku,
Thirumala Post, Thiruvananthapuram 695 012.



Original Side Appeal No.220 of 2019

4. The Senior Manager (Civil),
HLL Life Care Limited,
(JIPMER – Project),
JIPMER Campus, Dhanvanthri Nagar,
Puducherry 605 006.

... Appellants/Petitioners

The Petitioner Nos.1 to 4 are represented by
their Company Secretary and
Associate Vice President (CAS)

Versus

M/s.Tarmaker,
Civil Engineers & Contractors,
Rep. by its Partner, K.Nakiran, B.E.,
No.12, Ground Floor, Sithankudi Road,
(via) Jayaram Thirumana Nilayam,
Puducherry.

.... Respondent/Respondent

PRAYER: Original Side Appeal filed under Order XXXVI Rule 9 of the
Original Side Rules read with Clause 15 of Letters Patent, to set aside the
fair and decretal order dated 22.04.2019 in OP No.951 of 2016



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Original Side Appeal No.220 of 2019

For Appellants : Mr. G.Rajagopalan, Senior Counsel
for M/s. Sunita Kumare

For Respondent : Mr.N.Thiagarajan

J U D G M E N T

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

This appeal under section 37 of the Arbitration and Conciliation Act, is at the instance of the petitioners in the original petition under section 34 of the Arbitration and Conciliation Act, bearing OP No.951 of 2016 which sought for setting aside the award of the sole Arbitrator dated 03.09.2016 made on a dispute relating to a construction Agreement between the parties dated 19.06.2013.

2. The first petitioner is a Central Government Company, which is involved in Healthcare, particularly provision of infrastructure development for the health care facilities of the Government of India. In the course of its



Original Side Appeal No.220 of 2019

business, the first petitioner called for tenders for construction of an Urban Health Centre in Puducherry. The project, which was valued at Rs.3,17,57,662/- was awarded to the respondent to carry out the civil construction of the Urban Health Centre of the Jawaharlal Institute of Post Graduate Medical Education and Research, Puducherry (JIPMER, Puducherry). An agreement was entered into between the parties on 19.06.2013 and the possession of the site with an old building was handed over to the respondent on 20.06.2013.

3. As per the terms of the contract, all statutory clearances required for construction were to be obtained by the contractor. There was some delay in grant of approval by the statutory Authorities and eventually approval was granted on 04.02.2014. On 03.03.2014 the old building that was existing was demolished and a Boomi Pooja was also performed. However, on the same day i.e. on 03.03.2014, the Executive Engineer of the Irrigation Division of the Public Works Department, wrote to the contractor requiring them to stop work.



Original Side Appeal No.220 of 2019

WEB COPY

4. A copy of the said letter dated 03.03.2014 was forwarded to the Senior Manager of the first appellant by the contractor on 06.03.2014. The stoppage of work was on the premise that the permission granted to divert the existing RCC hume pipe drainage course, which was running within the Urban Health Centre at the junction of Sardar Vallabhai Patel Road, Ambour Salai and Gingee Salai was deferred by the Executive Engineer of Irrigation Division. This led to various correspondence between the officials of the Appellants and the Government of Puducherry, Subsequently on 03.07.2015, after all most a year and four months, the Government of Puducherry withdrew the stop work order and permitted the work to be commenced.

5. In the interregnum, the respondent wrote to the Appellants on 17.07.2014 requesting extension of time and pointing out that it has been incurring expenses in maintenance of the site and providing essential skeleton staff for the said purpose. It was also contented that monthly expenses were in the region of Rs.1,00,000/-. Since there was no reply, on



Original Side Appeal No.220 of 2019

28.08.2014, the respondent sent a notice reiterating its demands and requiring appointment of an Arbitrator under Clause 25 of the Agreement, to resolve the issues. On 11.09.2014, the appellants sent a communication assuring that the respondent/Contractor would be paid for the work done and the delay was due to factors beyond the control of the parties. This was followed by a provisional extension of time on 12.12.2014 extending the period of contract by 90 days from 15.12.2014, the said letter also reiterated that the extension is granted without prejudice to the rights of the owner/appellants to recover liquidated damages in accordance with Clause 2 of the General conditions of the contract.

6. The respondent had on 20.10.2014 addressed the letter seeking appointment of an Arbitrator terming the reply dated 11.09.2014 as evasive. It must be pointed out at this juncture that the respondent had on 08.01.2015 raised a complaint that the three communications dated 12.06.2014, 12.09.2014 and 12.12.2014 addressed by the Engineer in-charge extending the time of the contract by 90 days on each occasion from 18.06.2014, 16.09.2014 and 15.12.2014 were put in the same cover and couriered to the



Original Side Appeal No.220 of 2019

respondent in January 2015 and the same was received by the respondent on 06.01.2015. The respondent also made it categorical that it is not accepting the unilateral extension of time, since the issue relating to the diversion of the drainage channel, which was running inside the Urban Health Centre, was not resolved.

7. The respondent reiterated their request for appointment of a sole arbitrator on 28.01.2015. At a meeting held on 20.01.2015 between the representatives of the JIPMER, the appellants as well as the respondent, a decision was taken to re-tender the contract due to the delay. The respondent's unwillingness to take up the work, since its request for increase of the total project cost by 20% was rejected by the appellant was also recorded. Thereafter, since the appellants rejected the claim for arbitration on 05.02.2015, the respondent had moved this court and this court had appointed a retired judge of this court as an Arbitrator by its order dated 12.08.2015 made in an application filed under Section 11 of the Arbitration and Conciliation Act.



Original Side Appeal No.220 of 2019

WEB COPY

8. The Arbitrator took up the reference and a Claim Petition was lodged by the respondent before the learned Arbitrator. The respondent made claim under at least seven heads which are as follows:

Claim No.1: was for an amount of Rs.4,65,960/- being the amount payable under the first Running Bill dated 23.09.2015 which included pre-construction activities and the dismantling of the existing RCC structure in the site;

Claim No.2: was for loss of expected profit which was put at Rs.47,63,650/- which was calculated at 15% of the total contract value of Rs.3,17,57,662/-;

Claim No.3: was for the establishment charges of the entire period from 10.06.2013 to 30.12.2014 at Rs.1,02,500/-. The sum of Rs.1,02,500/- per month was said to be expenses incurred by the respondent in maintenance of the site for the period of 18 months from 10.06.2013 to 30.12.2014.



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Original Side Appeal No.220 of 2019

Claim No.4: related to compensation for payment of interest on the earnest money deposit and the performance guarantee that were provided by the respondent for a period of 31 months from 06.04.2013 to 31.10.2015;

Claim No.5: related to the pre-construction activities, particularly the expenditure incurred in the pre-construction activities;

Claim No.6: related to interest for the delayed payment of the running bill, which formed the basis for claim No.1; and

Claim No.7: was for the cost for the arbitration.

9. The respondent had contended before the Arbitrator that though the site was handed over to it on 20.06.2013, it could not perform any work, since the grant of approval was delayed by the Puducherry Planning Authority and other Government Departments. Though the Irrigation



Original Side Appeal No.220 of 2019

Division of the Public Works Department initially agreed for deviation of RCC Drainage Channel which was running inside the campus, the said permission was deferred on 03.03.2014, thereby preventing the respondent from commencing the work in the area. Attributing the delay to the stand taken by the Government of Puducherry and the inability of the appellants to resolve the issue for more than a year, the respondent claimed that it has lost heavily. It had made various claims under various heads. The major claim of a sum of Rs.47,63,650/- which is the loss of expected profit is sought to be sustained by contending that it would have earned a profit of 15%, if it had completed the work without any delay.

10. Claim No.3 which amounted to Rs.18,44,500/- was sought to be justified by contending that the respondent/contractor had engaged essential staff for maintenance of the site during the dispute period. The other claims related to interest on EMD and the performance guarantee, here again the justification for the claim was that the delay was on the part of the appellants, since the work was stopped because of the objections raised by the Government of Puducherry.



Original Side Appeal No.220 of 2019

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11. These claims were resisted by the appellants contending that the appellants cannot be made liable for the delay as it was not responsible for the same. The delay in obtaining the plan approval was also cited as a reason for the delay in the completion of the contract. The action of the Executive Engineer, Irrigation Division of the Public Works Department of PWD, in deferring the permission granted to shift the underground drainage system which was in place inside the site. Over all it was contended that no work was commenced by the claimant/respondent and in the absence of any proof of actual loss, the respondent would not be entitled to a monetary claim on the ground that loss had been caused to it because of the non-performance of the contract. Apart from general denial of the claim each and every claim was separately dealt with and the correctness of the claims were denied by the respondent.

12. The parties placed both the oral and documentary evidence before the sole Arbitrator, apart from placing para wise remarks. The learned Arbitrator had framed the following issues for determination:



Original Side Appeal No.220 of 2019

WEB COPY

1. Whether the HLL Life Care Limited (Respondents) have taken possession of site in question before tenders are floated? If so, what is the date of possession;

2. Whether there was an old building of Health Centre at the site of contract, Who has dismantled it and when?

3. Whether there were live trees at site, If so, who has removed them & when;

4. Whether the preconstruction activities, viz. preparation and submission of plan and approval, preparation of structure drawings, dismantling the existing building, soil exploration test are part of agreement, If so, who has carried out the item?

5. Who has initiated the action to obtain Puducherry Planning Authority approval for construction of new building?



Original Side Appeal No.220 of 2019

WEB COPY

6. *Whether there were objections from Puducherry Govt. Official's viz. Puducherry Municipality/PWD, in regard to execution of work? If so, details there on;*

7. *Whether the delay in commencing the work is attributable to the Claimant or respondents, if so what extent? And what are the reasons thereof?*

8. *Whether claimant is entitled to all the heads of claims made in the claim statement;*

9. *Whether both parties have discharged their obligations arising out of the contract;*

10. *Whether there is any breach of contract as pleaded by the parties, if there is breach, which party is responsible for that?*

11. *Order as to costs;*

12. *To what other reliefs the parties are entitled?*



Original Side Appeal No.220 of 2019

WEB COPY

13. The Arbitrator upon a consideration of the evidence concluded that the claimant had removed the old building as well as certain live trees that were existing in the site in question. On issue No.4, the learned Arbitrator had concluded that the claimant had taken earnest steps, in getting the drawing approved by the Pondicherry Planning Authority and have in fact complied with the other requirements of the contract relating to planning approval for the new construction.

14. Adverting to issue Nos.1, 6, 7, 9 and 10 which relate to the crucial questions relating to the delay in execution of the work, the learned Arbitrator on evidence found that there was a stoppage of work between 03.03.2014 and 03.07.2015 and even though the site was handed over on 20.06.2013, the respondent was not permitted to work in the site because of the dispute regarding the location of the drainage. The learned Arbitrator also found that the delay in completion of the work was not attributable to the contractor and therefore, the respondents are liable to compensate the contractor for the loss.



Original Side Appeal No.220 of 2019

WEB COPY

15. On the above conclusions, the learned Arbitrator awarded the following sums under various heads:

Claim No.1:	Running bill/Statement of account	Rs. 4,65,960.00
Claim No.2:	Loss on expected profit at 10% of the Contract value	Rs. 31,75,662.00
Claim No.3:	Unnecessary over head establishment charges for the entire period from 10.06.2013 to 31.12.2014	Rs. 18,44,500.00
Claim No.4:	Capital Investment – unnecessary retention of EMD/PG compensation for Rs.1,35,544.00	Disallowed
Claim No.5:	Towards preconstruction activities	Rs. 5,99,814.00
Claim No.6:	For belated payment of running bill interest 18%	Rs. 1,53,763.00
Claim No.7:	Costs of arbitration	Disallowed
	Total	Rs.63,75,243.00



Original Side Appeal No.220 of 2019

WEB COPY

16. Aggrieved the appellant filed an Application under Section 34 of the Arbitration and Conciliation Act seeking to set aside the award. The main ground of attack before the Section 34 court was on claim Nos.2 and 3 for which, according to the appellants, there was no proof. The learned Single Judge, who heard the application under Section 34 of the Arbitration and Conciliation Act, found that the grounds that are alleged for setting aside the award do not come within the four corners of Section 34 and noting that the scope of the review under Section 34 is very very limited, dismissed the application under Section 34 of the Arbitration and Conciliation Act.

17. The learned Single Judge found that the sufficiency or otherwise of the evidence is within the domain of the Arbitrator and the Court exercising jurisdiction under Section 34, cannot go into it and take a different view in order to enable it to set aside the award of the Arbitrator. The learned Single Judge further found that the Law relating to setting aside the awards, given its narrow scope, does not permit the Courts sitting under



Original Side Appeal No.220 of 2019

Section 34 of the Arbitration and Conciliation Act, to delve into each and every finding of the Arbitrator and do a microscopic examination of the evidence that was placed before the Arbitrator to dislodge the award.

18. Doing so, the learned Single Judge also relied upon the oft quoted judgments of the Hon'ble Supreme Court in *Emkay Global Financial Services Ltd Vs. Girdhar Sondhi*, reported in (2018) 9 SCC 49, the judgment in *Fiza Developers & Inter-Trade (P) Ltd. Vs. AMCI (India) Pvt Ltd.*, reported in (2009) 17 SCC 796, and of course the judgment in *Associate Builders vs. Delhi Development Authority*, reported in (2015) 3 SCC 49.

19. Reliance is also placed by the learned Single Judge on the judgement in *Sutlej Construction Limited vs. Union Territory of Chandigarh*, reported in (2018) 1 SCC 718, wherein the Hon'ble Supreme Court pointed out that if the Court is to set aside the award on the ground of public policy, it would mean that the award should shock the conscience of the Court and it will not include what the Court thinks is just on the facts of the case. It was also pointed out that the Courts cannot substitute its views



Original Side Appeal No.220 of 2019

for that of the Arbitrator to do what it considers to be justice. On the above conclusions, the learned Single Judge dismissed the OP affirming the award, hence this Appeal.

20. We have heard Mr.G.Rajagopalan, learned Senior Counsel appearing for M/s. Sunita Kumari, for the appellant and Mr.N.Thiagarajan, learned counsel appearing for the sole respondent.

21. Mr.G.Rajagopalan, learned Senior Counsel appearing for the appellant would vehemently contend that the award could be set aside even on the ground of patent illegality, after the amendment under Section 34(2)(A) of the Arbitration and Conciliation Act, inasmuch as the award came to be passed after the amendment of Section 34 by Act 3 of 2016, with effect from 23.10.2015. Elaborating on the contention, Mr.G.Rajagopalan, learned Senior Counsel would submit that even though the Courts were exercising the power under Section 34 to set aside the awards on the ground of patent illegality, it always formed part of the conclusion on public policy.



Original Side Appeal No.220 of 2019

WEB COPY

22. According to the learned Senior Counsel, the introduction of Section 34(2)(A) by Act 3 of 2016, makes all the difference and the jurisdiction under Section 34 has been enlarged a little, if not to the extent of an appellate jurisdiction exercised under Section 96 of the Code of Civil Procedure. The learned Senior Counsel would therefore submit that if the Court finds that the award is patently illegal viz. it is based on no evidence or it is based on consideration of something extraneous or that it overlooks a vital piece of evidence which goes to the root of the matter.

23. Drawing our attention to the judgment in *Patel Engineering Limited Vs. North Eastern Electric Power Corporation Limited*, reported in (2020) 7 SCC 167, where the Hon'ble Supreme Court had an occasion to consider the ground of patent illegality, after referring to the judgements in *Associate Builders vs. Delhi Development Authority*, reported in 2015 (3) SCC 49 and *SSangyong Engineering and Construction Company Ltd Vs. National Highways Authority of India*, reported in 2019 (15) SCC 131, the Hon'ble Supreme Court had held that the new ground viz. patent illegality



Original Side Appeal No.220 of 2019

would take within its fold, the power to set aside the award on the ground of perversity also, Mr.G.Rajagopalan would submit that the Section 34 court was not right in dismissing the OP.

24. The learned Senior Counsel would also draw our attention to paragraph 40 of the judgment in *Associate Builders vs. Delhi Development Authority*, which deals with the ground of patent illegality. Even though the judgment in *Associate Builders vs. Delhi Development Authority*, was rendered prior to the amendment and introduction of Section 34(2)(A), the Hon'ble Supreme Court, in paragraph 40 of the said judgment has specifically dealt with the ground of patent illegality under a larger heading of public policy.

25. The question of patent illegality itself was gone into by the Hon'ble Supreme Court in *SSangyong Engineering and Construction Company Ltd Vs. National Highways Authority of India*, where the Hon'ble Supreme Court had explained the concept of patent illegality and had held that the ground of patent illegality which was introduced by Section



Original Side Appeal No.220 of 2019

34(2)(A) of the Arbitration and Conciliation Act, would enable the Court under Section 34 or under Section 37 to interfere with the awards which are found to be either perverse, shocking the conscience of the Court or where the Arbitrator wanders outside the contract and deals with matters not allotted to him.

26. Finally the learned Senior Counsel would also draw our attention to the judgment of the Hon'ble Supreme Court in *Unibros v. All India Radio*, reported in *2023 SCC Online SC 1366*, wherein the Hon'ble Supreme Court had held that in order to justify an award on the basis of loss of expected profit there must be concrete evidence to show that the contractor was in fact awarded certain other works and those works could not be carried out because of the commitment that was under taken in the contract out of which the Arbitration arises.

27. Contending contra, Mr.N.Thiagarajan, learned counsel appearing for the respondent/contractor would contend that once the fact that the contractor was prevented from carrying out the work is admitted, the owner



Original Side Appeal No.220 of 2019

viz. the appellant becomes automatically responsible for the delay.

Pointing out the conduct of the appellants in sending extension letters spread over a period in one cover and the absence of denial on the part of the appellants to the said claim of the contractor Mr.N.Thiagarajan, learned counsel would submit that there are no bonafides in the conduct of the appellants. The learned counsel would also further point out that the jurisdiction of the Court under Section 34 is very limited and factual errors, even if they exist, cannot be corrected by the Court, while exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act.

28. It was also contended by the learned counsel that the Hon'ble Supreme Court has gone into the extent of observing that even minor errors of law cannot be interfered with by the Courts sitting under Section 34 or 37 of the Arbitration and Conciliation Act. The learned counsel would also invite our attention to the judgment of the Hon'ble Supreme Court in *Konkan Railway Corporation Limited vs. Chennai Bridge Project*, reported in 2023 (9) SCC 85, where the Hon'ble Supreme Court had again reiterated the settled position of law that the jurisdiction under Section 34 and Section



Original Side Appeal No.220 of 2019

37 of the Arbitration and Conciliation Act is not akin to the normal Civil Appellate jurisdiction and that mere possibility of another view or an alternative view on the facts or on the interpretation of the contract will not entitle Courts to reverse the findings of the Arbitral Tribunal. The Hon'ble Supreme Court had also cautioned, according to the learned counsel, the Courts from doing a microscopic examination of the reasoning of the Arbitrators, who are often lay persons as they have no exposure to legal intricacies and they are approached cannot always be akin to that of a legally trained mind.

29. We have considered the rival submissions.

30. The admitted facts are as follows:

The appellant on behalf of JIPMER, Puducherry took up the work of construction of Urban Health Centre in Puducherry Town. The existing building was to be demolished and a new structure was to be constructed there at. The contract was entered into on 19.06.2013 and possession of the site was handed over to the contractor on 20.06.2013. It, however, took



Original Side Appeal No.220 of 2019

nearly nine months for the contractor to obtain planning permission, finally the approval was granted on 04.02.2014. Soon thereafter the respondent contractor carried out the work of demolishing the existing structure as well as removing certain trees was completed on 03.03.2014, and a Boomi Pooja was also performed on the said date.

30.1. However, on the very same date, the Executive Engineer of the Irrigation Division of the Public Works Department required stoppage of work, since there was some dispute in re-aligning the underground drainage which was within the premises of the Urban Health Centre. This dispute went on till July 2015 to be precise till 03.07.2015 when the prohibition was withdrawn. Though there was regular correspondence between the appellant and the contractor, the contractor has been demanding appointment of an Arbitrator throughout the period. It had also blamed the Engineer for having sent three letters of extension together in order to make it appear that these letters were sent periodically. The extensions that were granted on 12.06.2014, 12.09.2014 and 12.12.2014 were withdrawn by the



Original Side Appeal No.220 of 2019

appellants, after the contractor pointed out that these letters have been sent on the same day vide its communication dated 08.01.2015.

30.2. Thereafter since the appellants failed to appoint an Arbitrator, the respondent had moved this Court under Section 11, eventually an Arbitrator was appointed by this Court on 12.08.2015. A total claim was made for a sum of Rs.79,40,556/- under various heads as adverted to *supra*. The Arbitrator considered each and every claim independently and had allowed 5 out of the 7 claims, while rejecting claim Nos. 4 and 7 which related to capital investment and the cost involved in getting the Arbitrator appointed.

30.3. Mr.G.Rajagopalan, learned Senior Counsel appearing for the appellant would vehemently attack the award, particularly on two heads viz. the loss of expected profit awarded at 10% of the contract value and the award of a sum of Rs.5,99,814/- towards pre-construction activities, the learned Senior Counsel would point out that the pre-construction activities that were made subject matter of claim No.5 where only duplication of



Original Side Appeal No.220 of 2019

claim No.1, which was subject matter of a running bill. Acknowledging the fact that the contractor had done a part of the work viz. dismantling of the existing construction and removal of certain trees which were located, the learned Senior Counsel would submit that those expenses are part of claim No.1, and therefore, a claim for pre-construction activities around 6,00,000/- of rupees ought not to have been awarded.

30.4. On the award of 10% loss on expected profit, the learned Senior Counsel would submit that there was no proof that the contractor had some other contract and it could not do the said work because of the delay in completion of the present contract and thereby it incurred a certain loss. Challenge was also made to the award on the head of unnecessary overhead establishment charges for the entire period from 10.06.2013 to 31.12.2014. As rightly pointed out by Mr.G.Rajagopalan, learned Senior Counsel appearing for the appellants there is no evidence for loss on expected profit which has been granted at 10% of the contract value.



Original Side Appeal No.220 of 2019

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30.5. No doubt the contract had failed, but the failure cannot be attributed either to the appellants or the respondent. The failure was due to the vacillating stand taken by the Public Works Department of the Government of Puducherry, regarding the re-location of the underground drainage which was running across the premises on the Urban Health Centre. True there was a delay of nearly more than a year because of the said dispute, the work could not progress. Unless there is evidence to show that the delay was due to one of the contracting parties, an award cannot be made on the head of loss of expected profit, unless it is shown that the contractor had been offered some other work and it could not do the said work because of the commitment made under the contract in dispute. We must immediately point out that such evidence is completely absent in the case on hand.

30.6. No doubt, the Hon'ble Supreme Court has pointed out that the jurisdiction of the Court under Section 34 of the Arbitration and Conciliation Act 1996, is very limited, however, as pointed out by the



Original Side Appeal No.220 of 2019

Hon'ble Supreme Court in paragraph 40 of the judgment in *Associate Builders vs. Delhi Development Authority*, and in paragraph 37 to 48 of the *SSangyong Engineering and Construction Company Ltd Vs. National Highways Authority of India*, where the Hon'ble Supreme Court had explained the concept of patent illegality and had opined that the concept of patent illegality would take within its fold, the sub headings of the Arbitrator not adopting a judicial approach, breach of principles of natural justice, contravention of statute not linked to public policy or public interest and opposed to most basic notions of justice. It was also clarified that an award which is perverse can be interfered with by the Court.

30.7. The term “perverse” has been defined as follows in Black’s Law Dictionary as follows:

*“Behaving unreasonably, esp. by deliberately
doing the opposite of what a reasonable person might
be expected to do”*

The term “perverse verdict” has been defined as follows:



Original Side Appeal No.220 of 2019

“A jury verdict so contrary to the evidence that it justifies the granting of a new trial”

The terms ‘perverse’ and ‘perverse finding’ according to P.Ramanath Aiyar’s Advanced Law Lexicon, mean as follows:

“Perverse: The expression ‘perverse’ occurring in Section 48 means that the findings of the subordinate authority are not supported by the evidence brought on record or they are against the law or suffer from the vice or procedural irregularity..”

Perverse finding: No reasonable person should have arrived at those findings.

“perverse finding” means a finding which is not only against the weight of evidence but is altogether against the evidence itself. Parrys (Cal) Employees’ Union v. Parry & Co., AIR 1966 Cal 31,42.[Constitution of India, Art. 226]”



Original Side Appeal No.220 of 2019

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The expression ‘perverse’ as pointed by the Hon’ble Supreme Court in *Gayadin v. Hanuman Prasad*, (2001) 1 SCC 501, means a finding not supported by the evidence brought on record or there are against law or suffer from the vice of procedural irregularity.

30.8. We had adverted to the recent pronouncement of the Hon’ble Supreme Court in *Unibros v. All India Radio*, reported in 2023 SCC Online SC 1366, on the requirement and the standard of proof for claims relating to loss of profit and if we are to test the award on hand on the basis of the said recent pronouncement of the Hon’ble Supreme Court, we will have to necessarily concede that the claimant has not placed any material whatsoever in support of its claim on the said ground and the award particularly on that head is based on no evidence. It will be advantage for us to extract the observations of the Hon’ble Supreme Court on the standard of proof that is required, particularly to support a claim or loss of profit “para 16 and 17 of the judgment reads as follows:



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Original Side Appeal No.220 of 2019

“16. To support a claim for loss of profit arising from a delayed contract or missed opportunities from other available contracts that the appellant could have earned elsewhere by taking up any, it becomes imperative for the claimant to substantiate the presence of a viable opportunity through compelling evidence. This evidence should convincingly demonstrate that had the contract been executed promptly, the contractor could have secured supplementary profits utilizing its existing resources elsewhere.

17. One might ask, what would be the nature and quality of such evidence? In our opinion, it will be contingent upon the facts and circumstances of each case. However, it may generally include independent contemporaneous evidence such as other potential projects that the contractor had in the pipeline that could have



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Original Side Appeal No.220 of 2019

been undertaken if not for the delays, the total number of tendering opportunities that the contractor received and declined owing to the prolongation of the contract, financial statements, or any clauses in the contract related to delays, extensions of time, and compensation for loss of profit. While this list is not exhaustive and may include any other piece of evidence that the court may find relevant, what is cut and dried is that in adjudging a claim towards loss of profits, the court may not make a guess in the dark; the credibility of the evidence, therefore, is the evidence of the credibility of such claim.”

If we are to search for such evidence in the case on hand, we find none.

30.9. No doubt there was some delay in the performance of the contract as we have already pointed out the delay was not due to either of the parties. Therefore, unless there is compelling evidence of a missed



Original Side Appeal No.220 of 2019

opportunity or loss of profit due to presence of viable opportunity, no award could be made on the basis of assumptions. Therefore, the award on the head of loss of expected profit becomes unconscionable. Similarly the award on the claim of pre-construction activities really amounts to duplication as the very same activities are part of the running bill which has been submitted by the contractor on 23.09.2014.

30.10. The Arbitral Tribunal has awarded the sum of Rs.4,65,960/- as claimed in the running bill and has also gone on to award a sum of Rs.5,99,814/- towards pre-construction activities, this is actually a duplication. Hence the award under that head also cannot be justified, as we find it is opposed to basic notion of justice. Adverting to the other heads viz. the overhead establishment charges and interest on belated payment made as claim No.3, it is basically the money that is said to have been spent by the contractor in maintaining the site in question for the period between 10.06.2013 to 31.12.2014.



Original Side Appeal No.220 of 2019

WEB COPY

30.11. The facts demonstrate that the contract was kept alive for that entire period of almost 18 months and it was only after the ban was lifted by the Irrigation Division of the Public Works Department of PWD on 01.07.2015, did the parties agree that the contract has to be re-tendered. Therefore, it was incumbent upon the claimant/contractor to have maintained the premises in question with appropriate staff as per the clause 36 of the contract. A reading of Clause 36 of the contract shows that the contractor is to appoint an Engineer In-charge and other staff to maintain the premises. The contractor has been making repeated demands on the ground that it has been expending monies on maintenance of the site at Rs.1,02,500/- per month and this claim has not been denied by the appellants at any point of time.

30.12. There is nothing in the evidence or in the counter statement to show that the contractor was not required to maintain any staff. Therefore, we are unable to fault the Arbitrator for having awarded a sum of Rs.18,44,500/- claimed under that head. The other head on which



Original Side Appeal No.220 of 2019

compensation has been awarded is the interest for the belated payment of the running bill which also is found to be reasonable and Mr.G.Rajagopalan, learned Senior Counsel appearing for the appellants is unable to make any impressive ground to enable us to dis-lodge the award on the other three heads viz. the claim made on running bill on claim No.1 for the work done, the claim made on compensation for expenditure incurred by employing workmen on claim No.3 and for the belated payment of the running bill which has been dealt with under Claim No.6.

30.13. The next question that would beg our attention is the severability of the award. In *Project Director, National Highways Authority of India vs. M.Hakeem*, reported in (2021) 9 SCC 1, the Hon'ble Supreme Court had held that the Court has no power to modify the award and therefore, the question that would loom large is as to whether we could confirm the award in part while setting aside portions of it. In *J.G. Engineers (P) Ltd. V. Union of India*, reported in (2011) 5 SCC 758, the Hon'ble Supreme Court has pointed out that if the award is severable and the portion of the award can be set aside without disturbing the other



Original Side Appeal No.220 of 2019

portions, the Section 34 Court can set aside that portion of the award which according to it, is either perverse or opposed public policy.

30.14. A Division Bench of this Court to which one of us (R.Subramanian, J.) is a party, in *K.S.Baburaj vs. Union India*, made in OSA No.388 of 2011 delivered on 20.10.2023, has after referring to the judgment of the Hon'ble Supreme Court in *J.G. Engineers (P) Ltd. V. Union of India*, concluded that the grant or otherwise of interest is severable from the quantification of damages made by the Arbitrator.

30.15. In the case on hand, the award has been made under seven heads, while the Arbitrator has disallowed two heads, he has allowed a certain amount on the five other heads. Of the award made under five different heads, we have found that the award made under Claim Nos.1, 3 and 6 are justified. We have concluded that the award made under Claim Nos.2 and 5 is perverse and therefore, cannot be sustained. When an Arbitrator makes award under different heads and the Court under Section 34 of the Arbitration and Conciliation Act, finds that the award made under



Original Side Appeal No.220 of 2019

some of the heads cannot be sustained, it is open to the Court to set aside that portion of the award which according to it is perverse while retaining the other portions of the award. This would not amount to modification of the award.

30.16. Modification would mean, altering the quantum of the award under a particular head to cite an example in the case on hand under Claim No.1, the Arbitrator has awarded a sum of Rs.4,65,960/-, which relates to settlement of running bill. The effect of *Project Director, National Highways Authority of India vs. M.Hakeem*, is that a Court under Section 34 or 37 of the Arbitration and Conciliation Act, cannot reduce or increase the said sum of Rs.4,65,960/-. Such reduction or increase would amount to modification. If the award is under various heads and each head is severable, it is always open to the Court to sever the award and set aside the portions which according to the Court are perverse or patently illegal or opposed to public policy, while sustaining the other portions of the award.



Original Side Appeal No.220 of 2019

30.17. We therefore, conclude that the award of the learned Arbitrator on claim Nos.1, 3 and 6 should be sustained and the award under Claim Nos.2 and 5 is liable to be set aside. The Appeal is partly allowed, the order of the learned Single Judge made in OP No.951 of 2016 is set aside, the award of the Arbitrator on Claim Nos. 2 and 5 is set aside, while sustaining the award on Claim Nos.1, 3 and 6. In view of the fact that the appellants have partially succeeded in the Appeal, we direct the parties to bear their own costs in the Appeal.

(R.SUBRAMANIAN, J.) (R.SAKTHIVEL, J.)

15.04.2024

jv

Index : Yes

Internet : Yes

Neutral Citation : Yes

Speaking order



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Original Side Appeal No.220 of 2019

To
The Section Officer,
Original Side,
High Court of Madras



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Original Side Appeal No.220 of 2019

R.SUBRAMANIAN, J.

and

R.SAKTHIVEL, J.

jv

Original Side Appeal No.220 of 2019

15.04.2024