



C.M.A.(MD)No.599 of 2008

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
16.02.2024	28.02.2024

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

C.M.A.(MD)No.599 of 2008

G.Selvam

... Appellant

vs.

1,The Union of India,
Bharat Sanchar Nigam Ltd.,
Through its Executive Engineer,
Madurai Division.

2.The Arbitrator,
Telecom Civil Circle,
Bharat Sanchar Nigam Ltd. (Civil),
Chakkrakulam,
Calicut,
Kerala State.

... Respondents

PRAYER:- Civil Miscellaneous Appeal filed under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996, against the judgment and decre, dated 26.03.2007, in Ar.O.P.No.4 of 2005, on the file of the Principal District Court, Madurai.

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For Appellant

: Mr.M.P.Senthil

For R2

: No Appearance

JUDGMENT

This appeal is preferred by the Contractor against BSNL being unsatisfied with the order passed by the Court below under Section 34 of the Arbitration and Conciliation Act, 1996, confirming the award passed by the Sole Arbitrator appointed as per the terms of the contract entered between the appellant and the respondent in respect of constructing Telephone Exchange Building at Karaikudi, for the first respondent.

2. Brief facts:-

The appellant an authorised Civil Contractor for BSNL, entered into an agreement with the first respondent on 25.09.1997, for construction of 10K CDOT, Telephone Exchange Building at Karaikudi. As per the terms of the contract, the time fixed for completion of work was 14 months commencing from 05.10.1997. The time was essence of the contract and in case of any delay attributable to the Contractor, the time for completion can be extended, on payment of compensation as penalty. If the delay is due to unavoidable hindrance



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not attributable to the contractor, then, the levy of compensation can be waived as per Clause 5 of the Contract. Admittedly, in the instant case, the work got completed only in the month of September, 1999 with delay of 660 days. Based on the data recorded in the hindrance register for the days of delay not attributable to the Contractor, waiver was granted and for 155 days being the unjustifiable part of delay, compensation of Rs.31,000/- levied as penalty.

3. The appellant relying upon the entries made in the Hindrance Register and the file notings, sought reference to the Sole Arbitrator, wherein he made 7 claims, which includes refund of penalty levied and claim of interest and compensation for delayed payment along with interest for delay in refunding EMD / SD and costs.

4. The sole arbitrator on considering the pleadings, arguments and material records, passed award on 02.05.2002 as below:-

Claims in brief	Award
1. Refund of penalty levied under Clause 2 of the Contract	Not arbitrated as it is beyond the purview of arbitration.



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2. Payment towards expenditure on idle establishment	Partly justified to the extent of Rs. 40,000/- [Rupees Forty Thousand only]
3. Payment of 10% extra over and above quoted rates	Not found justified
4. Payment towards interest on delayed payment of RA & final bills	Partly found justified to the extent of Rs.20,337/- (Rupees Twenty Thousand Three Hundred and Thirty Seven only)
5. Payment towards interest on delayed refund of EMD / SD	Partly found justified to the extent of Rs.40,000/- [Rupees Forty Thousand only]
6. Payment towards compensation for mental agony / strain	Not found justified
7. Payment towards cost of arbitration expenses	Not found justified

5. The appeal under Section 34 of the Arbitration Act, 1996 against the above award came to be dismissed by the learned Principal District Judge, Madurai, in Ar.O.P.No.4 of 2005 on 26.03.2007. The first appellate Court affirmed the decision of the Arbitrator holding that the penalty levied under Clause 2 of the Contract is not within the purview of arbitration (claim 1). Likewise, the rejection of demand of 10% extra over and above the quoted rate, the demand of compensation for mental agony and cost of arbitration expenses claims 3, 6 and 7 respectively, also confirmed. The appellate Court confirmed the



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payment towards idle expenditure restricting to Rs.40,000/- (claim 2), payment of interest on delayed payment of RA and final bills to the extent of Rs.20,337/- (claim 4).

6. This Civil Miscellaneous Appeal is directed against the dismissal order passed in Ar.O.P.No.4 of 2005 on the ground that the decision of Superintending Engineer, imposing penalty as non-arbitrable is erroneous and contrary to law. Further, it is contended that the claim of 10% extra over and above the rate quoted, ought to have been allowed in view of the delay caused by the Department in providing material and other logistic support. The relief of granting interest for delayed payment restricting to Rs.20,337/- also found fault.

7. The learned counsel appearing for the appellant submitted that Clause 2 and Clause 5 of the terms of the Contract if read together will clearly indicate that whether extension of time to complete the contract with penalty or without penalty to be decided by the Engineer-in-Charge based on the report found in the Hindrance Register. Erroneous decision of the Engineer to impose penalty disputed before the Arbitrator on the ground without prior notice and proof of loss, compensation cannot be claimed. However, the Arbitrator has erred in



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holding that the decision of Superintending Engineer regarding the extent of justified hindrance is final and the issue cannot be arbitrated.

8. The learned counsel also submitted that the escalation of costs towards material and labour due to delay in handing over site for construction and the plan design entitles the appellant 10% extra cost, which was reasonable and justifiable. However, both the Arbitrator and the first appellate Court failed to consider this aspect.

9. The submission made by the counsel representing the appellant given due consideration in the light of the law and facts governing the issued.

10. This is a case of delay in executing the work beyond the time prescribed. The cause for delay being recorded in the Hindrance Register and Clause 5 of the Agreement says, in case of delay in completion of work beyond the time prescribed, extension of time has to be sought with the Engineer-in-Charge within 30 days. His decision to extend the time without penalty shall be final.



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11. The construction of building, which should have been completed within a period of 14 months from the date of commencement *i.e.*, on or before 04.12.1998, got completed only in the month of September, 1999. The exchange got commissioned on 23.06.1999. For the unexplainable delay for 155 days, levy of penalty as compensation been imposed after issuing show cause notice and the reply given by the Contractor. Clause 5 clearly vests with the Engineer-in-Charge to decide about the delay ascribing to the Contractor or otherwise. The Superintending Engineer is the final authority to fix the compensation as penalty. The decision does not fall within the scope of arbitration and therefore, the Arbitrator has rightly held that the Superintending Engineer's decision with regard to the quantum of compensation is final. The reasoning of the Arbitrator when subjected to scrutiny by way of challenge under Section 34 of the Arbitration and Conciliation Act, 1996, the Court below had declined to entertain the challenge to the reasonableness of the reason given by the Arbitrator. This is in tune with the judgments of the Hon'ble Supreme Court and therefore, this Court finds that the appeal on this score is liable to be dismissed.



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12. At this juncture, it is relevant to refer the decision of the Hon'ble Supreme Court in **State of Rajasthan vs. Puri Construction Co. Ltd. [(1994) 6 SCC 485]**, wherein it has been observed as follows:-

*"26. The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. In **Sudarsan Trading Co. vs. Govt. of Kerala [(1989) 2 SCC 38]** it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. (emphasis in original) Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court.*



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Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons."

13. Further, the Hon'ble Supreme Court in **Arosan Enterprises Ltd. vs. Union of India [(1999) 9 SCC 449]**, upon analysis of numerous earlier decisions, held as follows:-

"36. Be it noted that by reason of a long catena of cases, it is now a well-settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the court to reappraise the evidence is unknown to proceedings under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the court would not be justified in interfering with the award."

14. Regarding the other claims 2 to 7, the Arbitrator had rightly found that after completion of the work and drafting the final bills, there is a delay in



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payment to the Contractor and for which, the Contractor is entitled for interest.

As a result, the Arbitrator has awarded interest to an extent of Rs.20,337/- and similarly, for the delayed refund of EMD / SD, the Arbitrator has awarded a sum of Rs.40,000/- as interest.

15. In view of the above, there is no illegality or perversity in the finding of the Court below for this Court to interfere. Likewise, the demand of compensation for mental agony and cost towards arbitration expenses been rightly rejected by the Arbitrator and the same has been confirmed by the Court below. The challenge to this finding and the reasoning is baseless and liable to be rejected. On the whole, the appreciation of evidence and the facts by the Court below does not warrant any interference with the award passed by the Arbitrator, which has been duly and rightly confirmed by the learned Principal District Judge, Madurai, in Ar.O.P.No.4 of 2005.

16. In the result, this Civil Miscellaneous Appeal is dismissed. No costs.

Index : Yes
NCC : Yes / No
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To

- 1.The Principal District Judge,
Madurai.
- 2.The Executive Engineer,
Union of India,
Bharat Sanchar Nigam Ltd.,
Madurai Division.
- 3.The Arbitrator,
Telecom Civil Circle,
Bharat Sanchar Nigam Ltd. (Civil),
Chakkrakulam,
Calicut,
Kerala State.
- 4.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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DR.G.JAYACHANDRAN, J.

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PRE-DELIVERY JUDGMENT MADE IN
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