



C.M.A.(MD)No.95 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.95 of 2008

G.Selvam

... Appellant

vs.

1.The Union of India,
Rep. by the Superintending Engineer (Civil),
BSNL Civil Circle, K.K.Nagar,
Madurai – 20.

2.The Executive Engineer (Civil),
BSNL Civil Division,
Tiruchy – 1.

3.Shri.Niraj Goel,
Sole Arbitrator,
Superintending Engineer (Civil),
BSNL Civil Circle,
Telecom Building,
Mettupalayam Road,
Coimbatore – 641 043.

... Respondents



C.M.A.(MD)No.95 of 2008

WEB COPY

PRAYER:- Civil Miscellaneous Appeal filed under Section 39 of the Arbitration and Conciliation Act, 1996, against the fair and decreetal order, dated 26.03.2007, in Ar.O.P.No.2 of 2004, on the file of the Principal District Court, Madurai.

For Appellant

: Mr.M.P.Senthil

For R1 to R3

: 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 BSNL in respect of constructing Telephone Exchange building at Pudukkottai, for the first respondent.

2. The case of the appellant:-

2.1. The appellant herein, who is a building contractor, entered into a construction agreement with the second respondent herein for constructing a Telephone Exchange Building at Pudukkottai. The time stipulated for completion of the construction was 9 months and the construction was supposed to



C.M.A.(MD)No.95 of 2008

WEB COPY

commence from 17.01.1999. Due to unavoidable hindrances in execution, there was a delay in completion of work and instead of 16.10.1999, the construction got completed only on 29.03.2000. The delay in completing the work is alleged to be,

(i) the ground floor flooring has been affected due to non-supply of power cable duct; and

(ii) the ground floor flooring has been affected due to non-supply of MDF cable duct.

2.2. Stating that due to the above unavoidable hindrances, execution of construction got delayed, hence, the respondent BSNL is liable to pay cost escalation and other incidental expenses. However, the Department has levied penalty on the Contractor for the delayed execution by invoking Clause 2 of the Agreement, which provides for levy of compensation as penalty for extension of time under certain conditions.

2.3. Referring the dispute to the Arbitrator as per the terms of contract, the appellant made 6 claims. They are:- against the levy of compensation as penalty



C.M.A.(MD)No.95 of 2008

WEB COPY

without following the procedure and without causing any notice under Section 55 of the Indian Contract Act, 1872, which is manifestly violation of law. The delay in completing the work is attributable to the respondent, who has failed to supply power cable duct and MDF cable duct to the ground floor. Towards the Watch and Ward staff, the Contractor incurred expenses of Rs.82,500/-. The extension of time beyond the stipulated date was caused due to non-supply of material by the Department and therefore, the expenditure incurred for engaging Watch and Ward staff for the extended period, the Department is bound to pay. The final bill ought to be settled within 60 days of the completion of the work. While the actual date of completion was 29.03.2000, the payment was made belatedly and for the delayed period, they entitled for interest. Similarly, EMD / SD deposited in the form of bank guarantee not been released even after completion of the work. Therefore, for the delayed payment, the Department is liable to pay Rs. 50,000/-. That apart, for mental harassment and cost of arbitration compensation was sought before the Arbitrator.

3. The Arbitrator, after considering the submissions, passed the award on 29.04.2004. The terms of the award is as below:-

4/16



C.M.A.(MD)No.95 of 2008

WEB COPY

"Claim No.1 : Whether penalty under Clause 2 levied by SF [C] is arbitrable or not claim 19856/- amended by claimant to Rs.2,00,000/-

I have examined the clause 2 of Agreement and procedure followed by SE (C) is deciding levy under clause 2. Due notice was given. Respondent cited various case in defence of SE [C] judgment who is quasi judicial authority.

As per Supreme Court decision AIR 1989 SC 952 Vishwanath Sood vs. Union of India and another, the provision of clause 2 of the Agreement and due procedure followed by SE (C), the claim under clause is not arbitrable.

Claim No.2 : Expenditure due to watch and ward = Rs.67,000/-

Amendment by claimant = Rs.82500/-

No proof or evidence submitted by claimant during progress of work, nothing claimed. As per Full Bench of M.P. Tribunal, reported in 2001 (1) Arb LR 443 held at Page 444, "that simply on the basis of calculation made by the petitioner on Schedule A, this claim of overhead cannot be allowed."

Claim awarded – Nil.

Claim No.3 : Rs.5100/- amended to Rs.5,625/- by the claimant.

Delayed payment of final bill.



C.M.A.(MD)No.95 of 2008

WEB COPY

Respondent did not give any valid reason for delayed payment of final bill after 17 months. Due date of final bill was 28.09.2000, actual date of payment 02.03.2002.

An interest at the rate of 12% awarded by the Agency for delayed payment after 6 months from the date of completion w.r.t. 28.09.2000 to 02.03.2002, which comes out to be Rs.3296/- on final bill amount of Rs. 19244/-.

Amount Awarded Rs.3296/-

Claim No.4 : Delayed payment of SD / EMD – Rs.50,000/-

SD / EMD was deposited in the shape of Bank guarantee. The agreement no on bank guarantee was 028/TCD/98-99, dt. 07.01.99 while agreement is 082/EE/TCD/98-99. It was not a valid Bank guarantee.

Award on delayed payment on SD / EMD – Nil.

Claim No.5 : Rs.1 lakh – Mental Harassment

No proof of evidence given by the claimant. Respondent argued that this claim is beyond civil disputes under agreement, it falls under 'TORT'. Respondent referred to the judgment AIR 2000 SC 2003 Ghaziabad Development Authority vs. Union of India. It states that damages for anguish and vexation caused by breach of contract cannot be awarded in ordinary commercial contract.

Award Amount – Nil.



C.M.A.(MD)No.95 of 2008

WEB COPY

Claim No.6 : Cost of Arbitration – Rs.50,000/-

Since the claimant caused financial loss due to delay in settlement of final bill beyond reasonable period. This claim is party justified. Considering cost of Advocate, cost of proceeding and went to Coimbatore to Chennai, I award a sum of Rs.25,000/- to client.

Amount of Award : Rs.25,000/-

Amount of Total Award : Rs.25,000 + Rs.3,296 = Rs.28,296/-

Interest of Award:

This respondent do pay the sum of award as indicated above i.e. Rs.28,296/- to the claimant within a period of 60 days from the date of award, failing which a simple interest of @ 12% per annum on the award amount is allowed with effect from the 61st day from the date Award upto date of realisation."

4. The appellant/contractor not satisfied with the said award, preferred appeal before the learned Principal District Judge, Madurai, in Ar.O.P.No.2 of 2004 stating that the reason for turning down Claim Nos.1, 2, 4 and 5 is unsustainable. By relying upon the provisions and interpretation of the old Arbitration and Conciliation Act, 1996 to the new Act has led to injustice. The



C.M.A.(MD)No.95 of 2008

WEB COPY

decision of the Arbitrator in respect of Claim Nos.1, 2, 4 and 5 is inappropriate. It suffers with legal infirmity and non-application of mind. The rejection of Claim No.1 challenging the levy of penalty as compensation is apparently bristles with non-application of mind.

5. According to the appellant, Clause 2 of the Agreement, which enables the Department to levy compensation in case of delay in completion of the work has to be read together along with Clause 5, which entitles the Engineer-in-Charge to extend the time for completion of work. The claim of damages can be made only after causing notice. Whereas, even without any provisional sanction for extension of time and notice claiming damages, the levy of penalty as compensation been imposed by the Arbitrator. The said arbitrary act of collecting penalty is part of the works contract and arbitrable. However, the Arbitrator has rejected Claim No.1 as non-arbitrable, even though there is manifest abuse of power by the Department in imposing the penalty. Similarly, Claim No.2 seeking expenditure due to Watch and Ward staff and Claim Nos.4 and 5 interest for the delayed payment of EMD / SD and compensation for mental harassment erroneously rejected without proper appreciation of law.



C.M.A.(MD)No.95 of 2008

WEB COPY

6. The said Petition under Section 34 of the Arbitration and Conciliation Act, 1996, strongly opposed by the Department on the ground that the Arbitrator has rightly rejected Claim Nos.1, 2, 4 and 5 as non-arbitrable. As far as Claim Nos.3 and 6, the interest for the delayed payment after the settlement of final bill been duly considered and rightly awarded with the cost of Rs.25,000/- for arbitration. The delay in completing the work was considered by the Engineer-in-Charge. The unavoidable hindrances, which are not attributable to the conduct of the Contractor, were taken into consideration and no compensation levied for those period. Whereas, for the unexplained delay fully attributable to the conduct of the Contractor, penalty was levied. The decision of categorizing the delay, which is condonable and waiver of compensation, vests with the Engineer-in-Charge and his decision is final.

7. The Arbitrator relying upon the decision of the Hon'ble Supreme Court in **Vishwanath Sood vs. Union of India and another** [AIR 1989 SC 952], has rightly held that Clause 2 of the Agreement is not arbitrable. Similarly, the claim of compensation for alleged mental agony, expenditure towards Watch and Ward and interest for the delayed payment of EMD / SD rightly rejected assigning



C.M.A.(MD)No.95 of 2008

WEB COPY

reason. The defective Bank guarantee furnished in lieu of EMD, does not warrant payment of any interest after expiry of the Bank guarantee period. While the Bank guarantee furnished by the Contractor is found to be defective, payment of interest does not arise.

8. The said objection of the Department been accepted by the Court below and the appeal was dismissed, by confirming the award passed by the Arbitrator.

9. As against the order of dismissal in Ar.O.P.No.2 of 2004, the present Civil Miscellaneous Appeal is filed by the Contractor.

10. Heard the learned counsel for the appellant and perused the records.

11. The Arbitrator after considering the claim and the material placed, had rightly concluded that the extension of time granted to the Contractor for completing the work *per se* will not entitle him for waiver of penalty. The Department on the basis of the record, had levied penalty only for the delayed period attributable to the conduct of the Contractor and not for the whole period.

10/16



C.M.A.(MD)No.95 of 2008

WEB COPY

Further, for the delayed payment of the final bill, the Arbitrator has awarded interest and also for the arbitration expenses, Rs.25,000/- been awarded and out of 6 claims, only Claim Nos.3 and 6 were found to be genuine and relief been granted.

12. The award of the Arbitrator was challenged before the District Court under Section 34 of the Arbitration and Conciliation Act. Same ground was raised by the Contractor before the Court below. On appreciation of evidence, the Court below has found no illegality in the order passed by the Arbitrator. Reconsider the decision of the lower appellate Court, when there is no perversity or illegality, not permissible.

13. 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



C.M.A.(MD)No.95 of 2008

WEB COPY

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

14. 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:-

12/16



C.M.A.(MD)No.95 of 2008

WEB COPY

"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."

15. Section 34 of the Arbitration and Conciliation Act, 1996, empowers the Court to set aside the arbitration award on certain conditions. When the claim does not fall within those parameters, the Arbitrator has every right to reject the claim on the ground that it is not arbitrable. Precisely, in this case, the Arbitrator has rightly rejected the compensation claimed for mental agony and interest for the defective Bank guarantee. Similarly, the decision of the Arbitrator, fixing the quantum of compensation for the delayed completion of the work does not fall within the purview of the Arbitrator as per the Terms of the Contract. Therefore, the rejection of these claims by the Arbitrator was confirmed by the Court below.

13/16



C.M.A.(MD)No.95 of 2008

WEB COPY

16. Section 37 of the Arbitration and Conciliation Act, 1996, provides an appeal remedy against the orders passed by any Court authorised by law. When there is no perversity or illegality in the order passed by the Court while exercising the power under Section 34 of the Arbitration and Conciliation Act, High Court on Second Appeal in exercise of power under Section 37 of the Arbitration and Conciliation Act, 1996 need not sit upon the law and facts once again for reappreciation. Therefore, the order of the Court below confirming the award passed by the Arbitrator does not warrant any interference, since the impugned order does not suffer from any infirmity or illegality. Hence, this Civil Miscellaneous Appeal is dismissed. No costs.

Index : Yes
NCC : Yes / No
smn2

28.02.2024

To

- 1.The Principal District Judge,
Madurai.
- 2.The Superintending Engineer (Civil),
Union of India,
BSNL Civil Circle, K.K.Nagar,
Madurai – 20.

14/16



C.M.A.(MD)No.95 of 2008

WEB COPY

- 3.The Executive Engineer (Civil),
BSNL Civil Division,
Trichy – 1.
- 4.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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C.M.A.(MD)No.95 of 2008

DR.G.JAYACHANDRAN, J.

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PRE-DELIVERY JUDGMENT MADE IN
C.M.A.(MD)No.95 of 2008

28.02.2024