THE HONOURABLE SMT. JUSTICE M.G.PRIYADARSINI

Civil Miscellaneous Appeal No.1007 OF 2008

JUDGMENT:

Aggrieved by the judgment dated 05.05.2006 (hereinafter will be referred as 'impugned judgment') in O.P.No.1929 of 2002 on the file of learned XIV Additional Chief Judge, City Civil Court, Hyderabad, the respondents filed the present Civil Miscellaneous Appeal to set aside the impugned judgment.

2. For the sake of convenience, hereinafter, the parties will be referred as per their array before the learned XIV Additional Chief Judge, City Civil Court, Hyderabad.

3. The brief facts of the case as can be seen from the record available before this Court are as under:

a) The claimant undertook a contract from the department to repair and re-erect the sheds in military campus for Rs.15,77,944.22 paise. The claimant commenced the work on 14.07.1997 and he has to complete the work by 13.07.1998. However, the respondent extended the time twice i.e., by 31.08.1998 and 28.09.1998. However, the claimant stopped the work, as such the department issued notices calling up the claimant to execute the remaining work and threatening to

cancel the contract. The department requested the claimant to start the work and complete the same but the claimant failed to do so, however, indulging in correspondence. Ultimately, the contract was cancelled by the department under clause 54 of the General Conditions of the Contract with effect from 08.02.1999 by the first respondent. An instruction was given to the claimant to be present for taking inventory of the material from the spot. The claimant protested the cancellation of contract and sought for payment of final bill. The department took inventory of material and entrusted the remaining work to a third party. The department did not even pay the final bill of the claimant as they have got a right to recover any loss suffered by them by entrusting the work to third party. Though the claimant requested the department to appoint an Arbitrator, the Department failed to appoint Arbitrator, as such, the Claimant approached the High Court for appointment of Arbitrator by Arbitration Application No.40/2000. The respondent No.4 was appointed by this Court as an Arbitrator, wherein the claimant filed claim statement alleging that the department committed breach of contract and that he is entitled to claim of Rs.18,00,000/-. The Department filed counter denying that they are responsible for breach of contract and alleging that claimant himself was responsible for breach of contract. Apart

from denying the averments of the claimant in the claim application, the department has made eight counter claims under different heads. the learned Arbitrator framed as many as 20 issues and awarded some amounts in favour of the claimant and some amounts in favour of the department and after adjusting the claim and counter claims, it was held that the claimant himself has to pay Rs.4,29,355/- with interest @ 6% per annum from 31.01.2001 till realization in favour of the department, Rs.5,000/- towards costs of reference in favour of the department, Rs.2,500/- towards reimbursement of share of the secretarial expenses in favour of the department, Rs.75,000/- towards Arbitrator's fee and Rs.2,500/- towards his share of secretarial expenses.

4. Aggrieved by the Award, dated 24.06.2002 passed by the Respondent No.4, the claimant has filed O.P.No.1929 of 2002 under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter will be referred as 'the Act'), which was allowed in part by ordering that the amount payable by the claimant to the department is reduced to Rs.2,79,355/- with interest @ 6% per annum from 31.01.2001 till the date of realization. Aggrieved by the same, the Department filed the present Civil Miscellaneous Appeal to set aside the impugned order.

5. Heard both sides and perused the record.

6. The first and foremost contention of the learned counsel for the Department/Appellant is that learned Judge erred in holding that the Arbitrator is not justified in awarding Rs.1,50,000/- as damages for the delay in execution of the work, which is contrary to the condition No.50 of the General Conditions of Contract and the Arbitrator after considering all the aspects only awarded Rs.1,50,000/- towards damages. It is seen that the learned Arbitrator i.e., Respondent No.4 in his Award dated 24.06.2002 has directed the claimant to pay Rs.4,29,355/- which includes the damages to a tune of Rs.1,50,000/-. Thereafter, the learned XIV Additional Chief Judge, Hyderabad has set aside the said award to the extent of awarding Rs.1,50,000/- and thereby reduced the amount payable by the claimant to the department from Rs.4,29,355/- to Rs.2,79,355/-. Thus, the only grievance of the Department in this appeal is setting aside the Award passed by respondent No.4 to the extent of awarding Rs.1,50,000/-.

7. The Arbitrator i.e., respondent No.4 in his Award observed that there was default on the part of claimant in concluding the contract within specific time in spite of extending the time to complete the work. Even the learned XIV Additional Chief

Judge, Hyderabad in the impugned judgment observed that the claimant could not complete the work in the schedule time and there is negligence on the part of the claimant, who has committed breach of contract. However, learned XIV Additional Chief Judge, Hyderabad in the impugned judgment opined that the quantum of damages to a tune of Rs.1,50,000/- awarded by the learned Arbitrator was not justified as the Department failed to submit any proof to show that it suffered damages to the extent of Rs.1,50,000/-. It is to be seen that learned XIV Additional Chief Judge, Hyderabad has not reduced the damages but in fact completely exonerated the claimant from paying damages. There is no explanation in the impugned order as to why the claimant was completely exonerated from paying damages, more particularly, when the learned XIV Additional Chief Judge, Hyderabad observed in the impugned judgment that the department suffered loss by re-entrusting the work to third party.

8. Merely because the Arbitrator has awarded Rs.2,04,052.60 paise towards extra expenditure incurred by the Department for getting the left work completed through third party, the claimant cannot be exonerated entirely from payment of liquidated damages. As can be seen from the record,

Condition No.50 of the General Conditions of contract between the parties, there is a specific clause for fixing the liquidated damages. No doubt, compensation payable under Sections 73, 74, 75 of the Contract Act is only for loss or damage caused by the breach and not on account of the mere act of breach. If in any case the breach has not resulted in or caused any loss or damage to a party, compensation cannot be claimed. But in the case on hand, there was breach of contract on the part of claimant and the Department has also suffered loss to a tune of Rs.2,04,052.60 paise.

9. Damages are a type of compensation granted to the party, who has been harmed to allow them to reclaim their position before the breach. Damages are claimed in different contracts for a variety of reasons, including loss of profit, opportunity, overheads, and so on. There are two sorts of damages i.e., liquidated and un-liquidated. The court may award un-liquidated damages, the amount of which is not known ahead of time. The term 'liquidated damage' is not specified in the Indian Contract Act, 1872, however, Section 74 defines the parts that make up the definition of liquidated damage. So, if a contract states that a certain number will be awarded in the case of a breach, the innocent party will be allowed to recover damages

equal to or less than that amount, based on the facts and circumstances of each case, up to the maximum amount stated in the contract. As stated supra, there is specific condition No.50 of the General Conditions of contract fixed the liquidated damages. In such circumstances, the claimant is liable to pay damages to the Department for breach of contract. Damages are granted to compensate the injured party and, as a result, it places the aggrieved party in the very same situation as it would have been if the breach had not occurred. Thus, there is no irregularity or infirmity in the Award passed by the learned Arbitration while granting damages to a tune of Rs.1,50,000/- in the Award, dated 24.06.2002.

10. The other contention of learned Government Pleader for Arbitration representing the Department/appellant is that the learned Judge agreed with the findings of Arbitrator, however, interfered and set aside the award of Arbitrator exceeding the scope for setting aside award under Section 34 of the Arbitration and Conciliation Act as if he is sitting in appeal over arbitrator award. It is further contented that the learned Judge erred in observing that Apex Court in **Oil and Nvatural Gas Company Limited (ONGC) v. Saw Pipes Limited**[1] certain

[1] AIR 2003 SC Page 2629

grounds for setting aside the award were added besides whatever mentioned in Section 34 of the Arbitration and Conciliation Act. In support of above contention, the learned Government Pleader for Arbitration relied upon a decision in **the Project Director, National Highways No.45 E and 220 National Highways Authority of India v. M. Hakeem**[2], the Apex Court at paragraph Nos.40 and 46 held as follows:

> *"40. It can therefore be said that this question has now been settled finally by at least 3 decisions of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the 'limited remedy' under Section 34 is co-terminus with the 'limited right', namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.*
>
> *46. Quite obviously if one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what, according to the justice of a case, ought to be done. In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament very clearly intended that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996. It is only for Parliament*

[2] Laws (SC) 2021 7 20

to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over."

11. The Apex Court in **ONGC's case** (supra) has enumerated certain grounds to set aside the award passed by an Arbitrator under Section 34 of the Act. However, in the case on hand, none of the grounds mentioned in **ONGC's case** (supra) are available for the learned XIV Additional Chief Judge, City Civil Court, Hyderabad to set aside the Award passed by the respondent No.4, more particularly with regard to damages when there is specific condition that in case of default by either of the parties, the party, which suffered loss is entitled for damages. No doubt the Arbitrator awarded Rs.2,04,052.60 paise in favour of the Department as amount found due towards extra expenditure incurred for getting left over work completed. But there is no explanation as to what was the loss suffered by the Department for non completion of the work within stipulated period. In such circumstances, Condition No.50 of the General Conditions of contract comes into picture and the said condition stipulates that if the contractor fails to complete the work within the time, the aggrieved is entitled for 10% of the contract as liquidated damages. Therefore, the learned XIV Additional Chief Judge, City Civil Court, Hyderabad ought not

to have interfered with the findings of the learned Arbitrator so far as awarding damages to the extent of Rs.1,50,000/- is concerned, more particularly, when the scope and ambit of the Court under Section 34 of the Act to interfere with Award passed by the Arbitrator is limited until and unless the irregularity goes to the root of the matter. In the case on hand, there is no dispute that the contractor has committed breach of contract for which the Arbitrator has awarded liquidated damages in favour of the Department. Thus, on the face of the record, there is no patent irregularity in the Award passed by the learned Arbitrator.

12. In view of the above discussion, viewed from any angle, there are no grounds at all to interfere with the findings of the learned Arbitrator in the Award, dated 24.06.2002. Thus, the learned XIV Additional Chief Judge, City Civil Court, Hyderabad has committed an irregularity in modifying the Award, dated 24.06.2002, more particularly, when the scope and ambit of interfering with the Award under Section 34 of the Act is very restricted as stated supra. Hence, the Department is entitled for liquidated damages to the tune of Rs.1,50,000/- towards liquidated damages as rightly awarded by the learned Arbitrator.

13. Accordingly, the Civil Miscellaneous Appeal is allowed by setting aside the judgment dated 05.05.2006 in O.P.No.1929 of 2002 on the file of learned XIV Additional Chief Judge, City Civil Court, Hyderabad to the extent of exonerating the claimant/contractor from paying liquidated damages of Rs.1,50,000/- and thereby the Award dated 24.06.2002 passed by the respondent No.4/learned Arbitrator is confirmed. There shall be no order as to costs.

Pending Miscellaneous applications, if any, shall stand closed.

JUSTICE M.G.PRIYADARSINI

Date: 15.11.2023
AS