

HIGH COURT OF MADHYA PRADESH: JABALPUR
(Division Bench)

AR No. 07/2018

M/s S.V.E.C. Construction

.....PETITIONER

Versus

**State of Madhya Pradesh
& others**

.....RESPONDENTS

CORAM:

Hon'ble Mr. Justice Hemant Gupta, Chief Justice

Hon'ble Mr. Justice Atul Sreedharan, Judge

Appearance:

Mr. S. Rao, Sr. Advocate with Mr. S.K. Rao, Advocate for Petitioner.

Mr. Amit Seth, Government Advocate for the respondent/State.

Whether Approved for Reporting: Yes

Law Laid Down:

- The question whether time is essence of contract or not, depends upon the intention of the parties. Here, the petitioner sought modification of work order so as to complete it within the time granted and then himself chose to determine the contract. Thus, he understood that the time was essence of the contract. Such conduct of the petitioner as well as on behalf of the respondents shows that the parties intended to complete the contract within time frame. Thus, it was a case where time was essence of the contract.
- Further, since no finding of the Tribunal has been invited on the question as to whether time was essence of the contract or not and the Tribunal being master of fact, has examined all the documents produced by the parties in the context of terms of the contract, which was the appropriate stage to decide such question of fact, it cannot be said that the time was not the essence of the contract.
- In absence of any allegation that any of the document produced by the parties have been misled or not taken into consideration or that the Tribunal

has misconducted itself or the proceedings, the opinion of the Tribunal is final on the question of fact.

Significant Paragraph Nos.: 8, 12 to 16

Reserved on: 23.10.2018

ORDER

(Pronounced on this 31st day of October, 2018)

Per : Hemant Gupta, Chief Justice:

The present revision under Section 19 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (for short “the Act”) is directed against an Award rendered by statutory Arbitral Tribunal on 28.10.2017 in Reference Case No.18/2010 (*M/s S.V.E.C. Construction v. Secretary, Narmada Valley Development Department & others*) awarding a sum of Rs.21,757/- to the petitioner.

2. The petitioner was awarded a contract for construction of Sadumar Branch Canal from R.D. 0 to 4.5 Kms. and Dungariya Distributary 5 to 23 Kms. and its network at the contract amount of Rs.17,45,85,751/-. The work order was issued on 10.10.2006 / 01.11.2006. The stipulated period for completion of works was 21 months including rainy season and the schedule date of completion was 31.07.2008.

3. The grievance of the petitioner is that there was delay in handing over the layout plan, which led to loss of man and machine. The petitioner submitted a claim on 18.01.2007 (Exhibit P-3) for claiming Rs.30.00 Lac as the damages. It is also contended that possession of the land was not given as the acquisition proceedings were not concluded, even though the

petitioner has submitted the plan to carry out work on 04.03.2007. The petitioner also communicated on 27.12.2007 claiming escalation cost. The petitioner has summarized its claim in the communication dated 27.04.2008 (Exhibit P-12) in the following manner:-

- (i) non-availability of land;
- (ii) non-supply of approved drawings of structures and canals;
- (iii) the idling of machine;
- (iv) non-approval of revised construction programme; and
- (v) delay in according payment for abnormal increase in quantities ranging from 49% to 249% and anomaly in payment of escalation.

4. It is also pointed out that the concerned Superintending Engineer has granted extension of time up to 31.03.2009 for the reason that the delay in raising construction was on account of the respondent but still the petitioner was asked to complete the work up to December, 2008. It has also come on record that the petitioner has requested for extension of time up to 31.01.2009 but the Superintending Engineer has not taken any remedial step. The petitioner raised demand under different heads total amounting to Rs.5,13,09,800/- in the reference petition under Section 7-A of the Act submitted on 01.02.2010.

5. The learned Tribunal considered the various documents produced by the parties and returned a finding that it is the petitioner who has abandoned the work as the progress of the completion of work was slow. Thus, *inter alia* it was held that the petitioner is not entitled to the claim raised by it.

6. In the memo of revision, the petitioner has submitted that request was made to withdraw the work of nine minors from the scope of work as it was subjected to ill-treatment. The petitioner has also sought extension of time. Since the land for nine minors was not handed over, therefore, the petitioner determined the contract on 05.05.2009 vide Exhibit P-19 and requested for recording of joint measurement. It is mentioned that the respondents rescinded the contract on 29.07.2009 under Clause 4.3.3.1 and that time given in the show cause notice was not proportionate for completion of the balance work. It is also alleged that the time was also not made essence of the contract.

7. The sole argument raised by the petitioner is that the time was not essence of the contract; therefore, the contract could not be rescinded by the respondents. The reliance is placed upon a judgment of the Supreme Court in **M/s Hind Construction Contractors v. State of Maharashtra, AIR 1979 SC 720**. It is contended that the period of performance of the agreement could be extended and that penalties are payable for delayed work, therefore, the time is not essence of the contract. In **Hind Construction Contractors'** case (supra) it was held that question whether or not time was essence of the contract would essentially be a question of fact depending upon the intention of the parties to be gathered from the terms of the contract. The relevant extract from the said judgment reads as under:-

“7. The first question that arises for our consideration, therefore, is whether time was of the essence of the contract that was executed between the parties on July 12, 1955 (Ex. 34). It cannot be disputed that question whether or not time was of the essence of the contract would

essentially be a question of the intention of the parties to be gathered from the terms of the contract. The contract in the instant case is for the construction of an aqueduct across the Alandi River at Mile No. 2 of the Nasik Left Bank Canal and unquestionably 12 months' period commencing from the date of the commencement of the work had been specified within which the construction had to be completed by the appellant-plaintiff. Indisputably, in the work order dated July 2, 1955 the Executive Engineer had directed the appellant-plaintiff to commence the work by July 5, 1955 intimating in clear terms that the stipulated date for starting the work would be reckoned from July 5, 1955. Both the trial court as well as the High Court have found that mentioning of July 5, 1955 as the date for starting the work was not nominal but was real date intended to be acted upon by the parties. It is, therefore, clear that 12 months' period mentioned for the completion of the work was to expire on July 4, 1956. The question is whether this period of 12 months so specified in the contract was of the essence of the contract or not? On the one hand, counsel for the appellant-plaintiff contended that the contract being analogous to a building contract the period of 12 months would not ordinarily be of the essence of the contract as the subject-matter thereof was not such as to make completion to time essential, that an agreement to complete it within reasonable time would be implied and that reasonable time for completion would be allowed. On the other hand counsel for the respondent-defendant contended that time had been expressly made of the essence of the contract and in that behalf reliance was placed upon cl. (2) of the "Conditions of Contract" where not only time was stated to be of the essence of the contract on the part of the contractor but even for completion of proportionate works specific periods had been specified and, therefore, the appellant-plaintiff's failure to complete the work within the stipulated period entitled the respondent-defendant to rescind it. In the latest 4th edn. of Halsbury's Laws of England in regard to building and engineering contracts the statement of law is to be found in Vol. 4, Para 1179, which runs thus:-

"1179. Where time is of the essence of the contract. The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim payment. The parties may expressly provide that

time is of the essence of the contract and where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental, time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion.

Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed."

(Emphasis supplied)"

8. In **Hind Construction Contractors** (supra), the Supreme Court has quoted from Halsbury's Laws of England wherein parties may expressly provide that time is of essence of the contract but where completion of work by a particular date is fundamental, time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion.

9. The question has been examined in another Supreme Court judgment in **Chand Rani (Smt) (Dead) by LRS. v. Kamal Rani (Smt) (Dead) by LRS., (1993) 1 SCC 519**, that time is not essence of the contract in the case of sale of immovable property. In another judgment rendered in **M.P. Housing Board v Progressive Writers & Publishers, (2009) 5 SCC 678**, the dispute arose in respect of a contract of construction of a building. It was held, thus:-

"27. It is fairly well settled that the time is not normally an essence of any agreement qua immovable properties and even there was an express

covenant of time being an essence, the overall agreement have to be looked at to determine whether the time was the essence. Whether the time is the essence of the contract would, therefore, be a question of fact to be determined in each case and merely expression of the stipulated time would not make time an essence of the contract.

28. The finding arrived at by the arbitrator in this regard is not even challenged by the Board in the proceedings initiated by it under Section 30 of the Act. It is fairly well settled and needs no restatement that the award of the arbitrator is ordinarily final and the courts hearing applications under Section 30 the Act do not exercise any appellate jurisdiction. Reappraisal of evidence by the court is impermissible.

30. Interpretation of a contract, it is trite, is a matter for the arbitrator to determine. Even in a case where the award contained reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or award is based on wrong proposition of law.

“4.An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering.....”

(See *Sudarsan Trading Co. vs. Govt. of Kerala (1989) 2 SCC 38* and *State of U.P. vs. Allied Constructions (2003) 7 SCC 396*.)”

10. In view of the aforesaid judgments, the question whether time is essence of contract or not, depends upon the intention of the parties. The petitioner understood that the time was essence of the contract, therefore, it sought the modification of the work order so as to take out nine minors from the scope of work so that the petitioner is able to complete the work within the time granted. The petitioner itself has chosen to determine the contract on 05.05.2009. From such conduct of the petitioner as well as on behalf of the respondents when the extension in time was recommended to complete

the work up to 31.03.2009 but thereafter, after receipt of determination of the contract by the petitioner, the contract itself was rescinded by the respondents on 29.07.2009, shows that the parties intended to complete the contract within time frame. The contract could not be completed, firstly; the petitioner terminated the contract and later, the respondents rescinded the contract. Still further, the argument that parties never intended that the time should be essence of the contract was not raised before the Tribunal. It is a finding of fact, which was required to be raised and determined before the Tribunal.

11. In a judgment rendered in **McDermott International Inc. v. Burn Standard Co. Ltd. and others, (2006) 11 SCC 181**, in the matter of examining the contract for structural and progress fabrication and material procurement, the Supreme Court has held that the construction of the contract agreement is within the jurisdiction of the Arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement. The interpretation of a contract is a matter for the Arbitrator to determine. Once the Arbitrator had the jurisdiction, no further question shall be raised and the Court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award. The relevant excerpts from the decision in **McDermott International Inc.** (supra) are reproduced as under:-

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into

consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [*see Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission, (2003) 8 SCC 593 and D.D. Sharma v. Union of India (2004) 5 SCC 325*].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.

114. The above principles have been reiterated in *Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Buildres & Contractors (2004) 2 SCC 663; Union of India v. Banwari Lal & Sons (P) Ltd. (2004) 5 SCC 304; Continental Construction Ltd. v. State of U.P. (2003) 8 SCC 4; and State of U.P. v. Allied Constructions (2003) 7 SCC 396.*”

12. In the present case, the petitioner has not invited decision of the Arbitral Tribunal on the question as to whether time was essence of the contract or not. The Arbitral Tribunal is a master of fact. Since on the question of fact no finding has been invited and the Tribunal has examined all the documents produced by the parties in the context of terms of the contract, it cannot be said that the time was not the essence of the contract.

13. As per facts on record, the petitioner terminated the contract on 05.05.2009 vide Exhibit P-19 when it requested for recording of joint measurement as well. It is, thereafter, on 29.07.2009, the contract was rescinded by the respondents. Once the contract was terminated by the petitioner itself, therefore, the consequences on account of termination of contract would follow. It was not the case of the petitioner before the Arbitral Tribunal that the time was not the essence of the contract. The fact is that the petitioner has sought extension of time to complete the work, which was granted as well. The nature of the work was to provide irrigation

facilities to the farmers. Such work of public interest could not be continued for years together so as to defeat the very purpose of getting the work executed from the petitioner.

14. Still further, under Section 19 of the Act, the Revisional Court has jurisdiction if the Tribunal has exercised a jurisdiction not vested in it by law; or has failed to exercise its jurisdiction so vested; or has acted in exercise of its jurisdiction illegally, or with material irregularity; or has misconducted itself or the proceedings; or has made an award which is invalid or has been improperly procured by any party to the proceedings. We find that none of such conditions are satisfied by the petitioner to invoke the revisional jurisdiction of this Court. The Tribunal has the jurisdiction to decide the dispute in relation to the works contract. It has examined all the evidence and the documents produced on record to return a finding that the petitioner is not entitled to the amount claimed but a sum of Rs.21,757/-.

15. In respect of an argument that the Tribunal has acted in exercise of its jurisdiction illegally or with material irregularity or that the Tribunal has misconducted itself or the proceedings, is again not tenable, as on the question of fact the opinion of the Tribunal is final. It is not the case of the petitioner that any of the document produced by the parties have been misled or not taken into consideration. Therefore, it cannot be said that the Tribunal has exercised the jurisdiction illegally or with material irregularity. There is no allegation that the Tribunal has misconducted itself or the proceedings.

16. The next ground raised is that the Tribunal has made an award which is invalid or has been improperly procured by any party to the proceedings.

It is not a case of improperly procurement of the award as the Arbitral Tribunal has exercised the statutory functions. The fact that the award is invalid is only on the ground that the time was not the essence of the contract but no such argument was raised before the Arbitral Tribunal, which was the appropriate stage to decide such question of fact.

17. Consequently, we do not find any merit in the present revision petition. The same is hereby **dismissed**.

(Hemant Gupta)
Chief Justice

(Atul Sreedharan)
Judge

S/