

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE JURISDICTION**  
**ARBITRATION APPEAL NO. 15 OF 2008**

Pune Cantonment Board

... Appellant

v/s

1.Lalit Nirman Business

Development Pvt.Ltd.

2. The Director

Defence Estate, Southern Command

...Respondents

...

Mr.K.J.Presswala, Sr.Advocate with Mr.Sandeep Goyal for the Appellant.

Mr.S.S.Kulkarni for the Respondent No.1.

...

**CORAM : A.A. SAYED, J.**

**DATED : 20 APRIL 2015**

**ORDER:**

This Arbitration Appeal filed under section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as “ the 1996 Act”) impugns the judgment and order of the District Judge, Pune, dated 28 February 2008 rejecting the Misc.Application No.383 of 2006 filed by the Appellant/original Applicant under section 34 of the 1996 Act challenging the Award dated 13 February 2006. The operative part of the impugned Award reads as under:

“ ORDER/ AWARD

In view of what has been stated above the arguments of the parties, evidence placed on record, site inspection carried out by me in presence of representatives of the parties and the fact that the Opponent themselves allowed a concession of 25% of earlier occasions as is evident from Exh D-14 and D-15 - M/s Lalit Nirman Business Development Pvt Ltd - are entitled to get a concession of 25% p.d. on the daily bid amount of VET w.e.f. 22.8.05 till the date of restoration of normal traffic, the above said amount will be refunded to the disputant till date of award and thereafter the same will be deducted by disputant from the daily bid amount and balance will be deposited with the opponent as provided under condition No. 30 of the agreement. Concession for the period w.e.f. 16.8.05 to 21.8.05 is disallowed due to irregularity committed by the disputant as discussed above. The above said amount shall be refunded by the disputant to the opponent or alternatively shall be adjusted by the opponent while refunding the claim amount of the disputant.

Both the parties shall bear their own cost of arbitration.”

2. Pursuant to a tender process, an Agreement was signed between the Appellant and the Respondent No.1 (hereinafter referred to as “the Respondent” ), whereby the Appellant allowed the Respondent to collect vehicle entry tax at 13 Check Nakas/ Check Posts on behalf of the

Appellant for the financial year 2005-06. The Agreement was thus operative from 1 April 2005 to 31 March 2006. Under Clause 16 of the Agreement, the Respondent agreed to pay a sum of Rs.95,200/- per day to the Appellant. Clauses 27, 28 and 30 of the Agreement provided for granting of certain concessions to the Respondent in the event there was stoppage or diversion of traffic from the Check Posts/ Check Nakas. On 17 August 2005 and 28 August 2005, the Respondent addressed letters to the Appellant, inter alia, in respect of diversion of heavy traffic from Check Nakas Nos. 1 & 2. On 28 August 2005, the Respondent addressed a letter to the Appellant making a grievance about closer of heavy traffic through Check Nakas Nos. 1 & 2 and also partial diversion from some other Nakas and claimed certain discount in the daily charges which were payable by the Respondent to the Appellant.

3. By letter dated 30 August 2005 the Appellant rejected the claim of the Respondent. On 20 September 2005, the Respondent again addressed a letter to the Appellant making a grievance in respect of Check Nakas Nos. 1 & 2 and claiming discount in the amount payable by them. The Respondent, thereafter, invoked the Arbitration in terms of Clause 21 of the Agreement. Respondent No.2- the Director, Defence Estate, Southern Command, acted as an Arbitrator.

4. After hearing the parties, the Arbitrator passed the Award dated 13 February 2006, which was impugned before the District Judge, Pune, by filing the Misc.Application under section 34 of the 1996 Act. The Misc. Application came to be dismissed by order dated 28 February 2008 of the District Judge, which order has been challenged in this Appeal, as indicated earlier.

5. The learned Arbitrator in the Award framed the following issues:

- (i) Whether Arbitrator has jurisdiction to try and entertain the dispute in view of fact that Disputant has not filed certified copy of agreement as per Section 7 of the Arbitration and Conciliation Act 1996.
- (ii) Whether the Disputant proves that he has entitled to claim concession at 25% per day on daily bid amount of Rs.95,200/- w.e.f. 16.8.05 till diversion of traffic completely stopped from five check posts and the Road 3 Queens Garden is completely repaired.
- (iii) Does the Disputant prove that he has suffered 30% to 35% loss of revenue from five check posts Le. 1,2,3,4 & 9 from 16.8.05 till road is completely repaired and till diversion is stopped.

- (iv) Whether action of disputant of deducting 25% from the amount payable to the Board suo-motu towards weekly installment for the period from 16th Aug 05 to 21st Aug 05 at 25% without sanction of Board is justified and legal.
- (v) Whether action of the opponent by rejecting request of the Disputant for giving concession to Disputant as informed by the Opponent by their letter No.1/2ffax/VET/2005-06 dt 30.8.2005 is justified and legal.

6. Insofar as Issues Nos. ii & iii are concerned, the learned Arbitrator held as follows:

Issue No (ii) and (iii) -It is established beyond doubt based on the Exh D-4, D-5 and D-12 that heavy traffic was diverted for more than six hours by the traffic police w.e.f. 15.8.05 which still remain diverted. As per Exh D-12 traffic was diverted totally (for 24 hours) w.e.f. 15.8.05 to 30.9.05 and for 12 hours daily w.e.f. 1.10.05. Nothing has been placed on record by the Opponent to show that traffic has been restored to normalcy. It was also confirmed by the rep. of Cantt Bd Pune (opponent) during site inspection on 3.2.06 that bulk of heavy traffic used to pass through check posts 1, 2, 3, 4 & 9 . Since the diversion of traffic is for more than six hours p.d. The disputant is actually entitled for relief of 20% p.d. In terms of condition No 30 of the agreement irrespective of the quantum of loss actually suffered by him. Further as per para 5 of Exh D-13- B."other terms and

conditions of the tender notice will be applicable. According to terms and conditions of the tender notice Exh D-13-A the disputant is entitled to a concession of 25% p.d. if he is not able to proceed with the collection of VET for a period more of than six hour (condition No 39). Therefore Issue No (ii) and (iii) are decided in favour of disputant.

7. So far Issue No.iv is concerned, the learned Arbitrator held as follows: Issue No. iv: The action of the disputant on deducting and withholding and amount of 25% from the bid amount during the period of 16.8.05 to 21.8.05 without prior approval of the Opponent Board was not correct. The Issue is decided against the Disputant and they are directed to refund the withheld I deducted amount to the Opponent.

8. As regards Issue No.v, the learned Arbitrator held as follows: Issue No v : The disputant vide Exh D-6 to D-8 and D-11 represented to the Opponent for claiming concession at 25% p.d. from the daily bid amount. But the opponent rejected all his' representations summarily. As per conditions 27 and 28 of the agreement, a combined survey should have been carried out before coming to a logical conclusion. Unilateral decision of Opponent Board rejecting the claim of the disputant is arbitrary and illegal and hence the issue is decided against the opponent.

9. The District Judge in the impugned order while deciding the Misc.Application of the Appellant challenging the Award in paras 15 to 21 has observed thus:

“15. After considering these principles of law when I look at the challenges, I find that the learned Advocate of the Applicant has not pressed the following grounds:-

15-F- regarding the deduction of 25% concession by the Opponents for the period from 16-8-2005 to 21-8-2005.

15-I- The arbitral agreement and its terms.

15-K- The grievance that the arbitrator did not consider the fact that the Opponents suo moto deducted the 25% concession for the period from 16-8-2005 to 21-8-2005.

16. So the challenges which have been pressed by the Applicant are A & B namely, that the award passed was beyond the scope of the subject matter of the Agreement and the arbitrator decided the point which was beyond the scope of reference.

17. In this context I have gone through the agreement entered into by the parties on 16/6/2005. I do not find that the subject-matter of the dispute carried by the Opponent No.1 was beyond the scope of its subject-matter. I find that admittedly the Agreement had been entered into by the parties with regard to the bid of the Opponents in respect of VET, its mechanism and the resolution of dispute arising between the parties. There are clauses namely 27, 28 & 30 which contemplate the situation when the flow of the traffic is diverted for more than six hours, the Opponent No.1 is liable to pay the amount equivalent to the extent of daily 75% of the bid amount. The controversy arose between the parties because

according to the Respondent No.1 the traffic was diverted for more than six hours per day from 16/8/2005 till the conclusion of the scheme on 31/3/2006. Hence this matter could be brought to the sole arbitrator as mentioned in Clause 21 of the said Agreement. It is mentioned therein that in the case of dispute about the interpretation of any terms and conditions of the Agreement, the Director, Defence Estate, Southern Command Pune-I will be sole arbitrator and his decision would be conclusive, final and binding on the parties. Hence, I find that this challenge has no merits.

It is not in dispute that both the parties appeared before the learned arbitrator and with their consent the issues were framed by him. So, this shows that the matter was properly referred to the arbitrator and both the parties were knowing the nature, scope of it.

18. The Applicant has challenged that the arbitrator passed the award through the Opponent No.1 did not lead any reliable evidence. I find that the evidence can be oral as well as documentary. I find that there was reliable evidence of Opponent No.1 and hence I do not find any substance in this allegation. This Court cannot sit in appeal for reappraisal of the evidence, because it has very limited scope. The case law referred to above shows that the arbitrator is the sole person who can determine the quality and quantity of the evidence. It is seen from the award that sufficient material was pleaded before it to show that the traffic was diverted to other roads. The traffic did not come to normalcy even when the learned arbitrator visited the site in the presence of the representatives of the parties. Even after the said visit the same continued till the conclusion of the scheme on 31/3/2006. This conclusion can be drawn on the basis of the notice given by the Opponent No.1 which had not been controverted by the Applicant

that the hindrance remained till the end of the scheme.

19. It is challenged that the arbitrator wrongly interpreted the scope and terms of the Agreement. I have referred to Clause No.21 of the Agreement whereby the parties agreed that the decision of the arbitrator regarding the interpretation of the terms of the Agreement would be final. Moreover, it is the sole jurisdiction of the arbitrator to interpret the terms of the Agreement as held in the cases cited supra. So, one cannot interfere in this sphere of interpretation.

20. Moreover, the learned Advocate of the Applicant submits that even if it is taken for granted that the vehicular traffic was affected for more than 6 hours a day on few check posts, it was necessary for the arbitrator to give 25% concession in respect of the average income/earning derived from the affected check posts. I find that this is impossible, because the Opponent No.1 tendered the tender in respect of the entire vehicular traffic passing through the territorial jurisdiction of the Applicant and the Applicant also invited the bid for the entire traffic. The Agreement does not show the bifurcation of the check posts. Hence I do not agree with the learned Advocate of the Applicant that the awards suffers from this defect.

21. After perusal of the relevant papers, the award and after considering the submissions of learned Advocate of the parties, I do not find that the Applicant has made out any ground of challenge which can be entertained within the narrow compass of Section 34 of the Arbitration Act. Hence I do not find any merit in the Application. In the result, the following order.”

10. Before this Court, learned Counsel for the Appellant has firstly contended that the Award was not a reasoned Award and therefore liable to be set aside. I, however, find that there was no such ground taken before the District Judge in the Misc.Application for setting aside the Award. In the circumstances, it is now not open for the Appellant to raise this contention before this Court. Even otherwise, I find that the Arbitrator has given his reasons in the Award for arriving at his conclusion and it cannot be said that the Award was an unreasoned as sought to be suggested by the learned Counsel for the Appellant. The judgments cited by the learned Counsel for the Appellant of the Supreme Court in **Som Datt Builders Ltd. v/s. State of Kerala**,<sup>1</sup> and of the learned single Judge of this Court in **Devendra Shantilal Kothari vs. Mother India Securities Pvt.**<sup>2</sup>, to contend that the District Judge ought not have for the first time added reasons, which were missing in the Award, and that the reasons ought to have been given by the Arbitrator and not by the Court under section 34 of the 1996 Act would not be applicable as the Arbitrator in the present case has given his reasons in arriving at his conclusion, as stated earlier.

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1 (2009) 10 SCC 259

2 2013(2) All MR 340

11. Learned Counsel for the Appellant next contended that the Respondent was entitled to concession for partial stoppage/diversion of traffic from about 5 Check Nakas/Posts and not for a general concession for all 13 Check Nakas. However, the Arbitrator had granted discount on the entire tender amount for all 13 Check Nakas and therefore the Arbitral Award was beyond the scope of the dispute.

12. I do not find any merit in this contention. As rightly held by the District Judge, while referring to Clause 21 of the Agreement that the Arbitrator has interpreted the terms of the Agreement. **In McDermott International Inc. vs. Burn Standard Co.Ltd.**<sup>3</sup> a bench of three learned Judges of the Supreme Court held that interpretation of a contract is a matter for the Arbitrator to determine. In any event The District Judge has stated in the impugned order that the Agreement does not show bifurcation of the Check Posts/Nakas. The District Judge has referred to clauses 27, 28 and 30 of the Agreement, which contemplate the situation when the flow of traffic was diverted for more than six hours, the Respondent was liable to pay the amount equivalent to the extent of daily 75% of the bid amount. The Award has referred to two occasions when the traffic was completely stopped/diverted and the Appellant had given 25% concession to the Appellant. The Arbitrator has referred to Clause

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<sup>3</sup> 2006(2) Arb.L.R. 498 (SC)

30 of the Agreement for giving concession of 25% and has interpreted Clause 30 of the Agreement. The Agreement did not contemplate the separate Nakawise amount to be paid and it was only lump-sum amount of Rs.95,200/- per day. The Arbitrator himself had visited the Check Nakas alongwith representatives of both parties to assess the ground of reality as mentioned in the Award. The Arbitrator had, after assessing the evidence in the form of Exh.D-6 to D-15, arrived at his conclusions and the District Judge has rightly held that it was not sitting in Appeal against the impugned Award and it was not permissible for him to re-appreciate the evidence.

13. For all the aforesaid reasons, there is no merit in the Appeal. The Appeal is accordingly dismissed. No order as to costs.

14. At the request of the learned Counsel for the Appellant, the Bank Guarantee furnished by the Respondent No.1 is directed to be kept alive for a period of eight weeks from today.

**(A.A. SAYED, J.)**