

THE HON'BLE SRI JUSTICE K.C. BHANU
AND
THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

C.M.A.No.238 of 2008

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JUDGMENT: (per Hon'ble Sri Justice M. Seetharama Murti)

This civil miscellaneous appeal filed by the appellant under Section 37 of the Arbitration & Conciliation Act, 1996 is directed against the order dated 20.02.2007 passed in OP.No.348 of 2005 by the learned III Additional Chief Judge, City Civil Court, Hyderabad.

2. We have heard the submissions of the learned Additional Advocate General appearing on behalf of the appellant (i.e., the respondent before the Tribunal) and the learned counsel appearing for the 1st respondent (i.e., the claimant). The other respondents herein are the learned Arbitrators.

3. The parties in this appeal shall hereinafter be referred to as the appellant and the claimant for convenience and clarity.

4. The introductory facts necessary for consideration, in brief, are as follows: - "The claimant and the appellant had entered into an agreement bearing No.1/1997-98 dated 26.03.1998 for the work of 'widening and strengthening of Warangal - Raipatnam Road'. Certain disputes and differences had arisen between them in respect of the said work under the said contract. As per the terms agreed to under the contract, the disputes were first referred to the Disputes Review Board ('the DRB' for short). The DRB had submitted recommendations on 04.02.2003 accepting one of the two claims and rejecting the other. Having not been satisfied with the recommendations of the DRB, the appellant had made a request for referring the parties to arbitration. Simultaneously, the claimant had also expressed its intention to have the

parties referred to arbitration as one of their claims was also rejected by the DRB. The claimant had nominated its Arbitrator; and the appellant had also nominated its Arbitrator. The said two Arbitrators by mutual agreement had nominated the third member of the Tribunal as the Presiding Arbitrator. Both the parties had submitted their documents and the same were exhibited.”

5. The final findings of the Tribunal as confirmed by the Court below are as follows: ‘The claim number 1 was allowed and interest was also awarded on the amount claimed. On claim no.2, which related to price adjustment of POL due to steep hike in prices, no separate award was passed as claim no.3 of the second set of disputes covered claim no.2 of the first set of disputes. The claim No.3 was stated to have arisen as a consequence of claim no.1. The recovery of Rs.19,02,465/- by the appellant was held not justified and the recovered amount is directed to be reimbursed to the claimant. The counter claim was not considered since withdrawn.’

6. Assailing the orders of the Arbitral Tribunal, the appellant had preferred an application under Section 34 of the Act. On merits the learned Additional Chief Judge had dismissed the said Original Petition viz., OP.No.348 of 2005 with costs of the claimant/1st respondent herein. Therefore, the appellant is now before this Court.

7. The learned Additional Advocate General appearing for the appellant would contend as follows: - ‘The Panel of Arbitrators had traveled beyond the reference and the scope of the agreement and had dealt with the claims, which are beyond the scope of the agreement. Thus, they had acted in the matter without jurisdiction. Hence, the Award is liable to be set aside. The Tribunal and the Court below have failed to see that advance works contract tax is to be deducted at 4% only in view of the change of the legislation. Therefore, the request of

the claimant for interest on the excess liability of 2% is untenable. The court below ought to have found that the Arbitral Tribunal should have seen that from 1.1.2000 the rates of works contract tax were revised and the rate of tax under Section 5(G) of the APGST Act was increased to 4% from 2% and the Department had started recovering at the rate of 4% as per the revised rates. The Court below ought to have seen that the Arbitrators ought to have taken note of the fact that the claimant was asked by the department/appellant to get the excess liability figures confirmed by sales tax authorities and that the actual amount to be refunded is communicated to the Department only on 18.03.2004 and that the excess liability was refunded to the Contractor on 24.07.2004 i.e., much prior to the passing of the Award. The court below ought to have seen that the claimant had produced the details/figures of excess liability through Sales Tax Department only on 18.03.2004 and the same was certified by the Commercial Taxes department; and as such the question of paying any interest and award of interest by the Panel of Arbitrators from 1.1.2000 does not arise. As per clause 70.1 price adjustment is to be made based on the indices prevailing at the time of tendering and those on the date of payment which the Court below had ignored. The price escalation is allowed on 85% of the value of the work done and the balance 15% is not allowed for price escalation as it comprises profits and overheads, which the Court below had failed to take note of. The Court below ought to have held that contract price includes works Contract Tax also and that amount is deducted from value of the work done and the price escalation allowed and therefore, any increase in the liability of the contract tax is being reimbursed to the claimant under clause 70.8 of the Agreement and therefore, the court below ought to have held that the original liability of the contractor is to be deducted from the value of the work done and then the price escalation allowed and hence, the escalation amount of Rs.19,02,465/- is not permissible. The Audit had also pointed out that seignorage charges

have to be deducted before allowing price escalation and therefore, on the same analogy works contract tax has also been deducted. The court below ought to have interfered with the Award which called for interference. The court below wrongly placed reliance on the decision in Oil and Natural and Gas Commission v. SAW Pipes Limited [2003(3) ALD 82] though the ratio in the precedent is not applicable to the facts of the case.'

8. On the other hand, the learned counsel for the 1st respondent/claimant would submit that the Arbitrators have interpreted the clause in the agreement with respect to escalation and Works Contract Tax in the light of the provisions under the APGST Act and applied the law accurately to the facts and that the appellant could not show that the findings of the learned Arbitrators are contrary to law of India or that the learned Arbitrators traveled beyond the reference or the scope of the agreement and that therefore, none of the contentions raised by the appellant merit consideration and that the well reasoned order of the court below confirming the award of the Arbitral Tribunal suffers from no factual and legal infirmities and that no grounds, much less valid grounds, are made out by the appellant and that therefore, the same deserves to be confirmed and the appeal, which is devoid of merit, is liable to be dismissed.

9. Now the point for determination is as to whether the appellant had made out valid and sufficient grounds for setting aside the order of the Court below confirming the Award of the Tribunal?

10. **POINT:**

10. (a) The introductory facts and the facts leading to the present stage of the matter are already stated supra, in detail. We have given earnest consideration to the facts, documentary evidence and the submissions and we have carefully gone through the cited decisions.

The following precedents were relied upon on the aspect of extent of judicial intervention or the scope of interference of the Court. (1) **Delhi Development Authority v. R.S.Sharma and Company, New Delhi**^[1]; (2) **Associate Builders v. Delhi Development Authority**^[2] and (3) **M/s.Navodaya Mass Entertainment Ltd., v. M/s.J.M.Combines**^[3].

The settled principles for interference with an arbitral award under Section 34(2) of the 1996 Act as per the decision of the Supreme Court in **Delhi Development Authority** (1 supra) are as follows:

(a) **An award, which is**

(i) **contrary to substantive provisions of law; or**

(ii) **the provisions of the Arbitration and Conciliation Act, 1996**
or

(iii) **against the terms of the respective contract; or**

(iv) **patently illegal; or**

(v) **prejudicial to the rights of the parties;**

is open to interference by the court under Section 34(2) of the Act.

(b) **The award could be set aside if it is contrary to:**

(a) **fundamental policy of Indian law; or**

(b) **the interest of India; or**

(c) **justice or morality.**

(c) **The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.**

(d) **It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.**

In the decision in **Associate Builders** (2nd cited), the Hon'ble Supreme Court referred to the ratios in various earlier decisions

including the decision 1st cited and further elucidated the law on the point and had further held that when a Court is applying the public policy test to an arbitral award, it does not act as a Court of appeal and consequently errors of fact cannot be corrected and that a possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quality and quantity of evidence to be relied upon when he delivers his arbitral award and thus, an award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score and that once it was found that the Arbitrator's approach is not arbitrary or capricious then, his word is the last word on facts.

In the decision in **M/s. Navodaya Mass Entertainment Ltd (3rd cited)** the scope of interference of the Court was considered and it was held that even if two views are possible the view taken by the Arbitrator would prevail.

10. (b) The claim No.1 relates to refund of 'Work Contract Tax' deducted at enhanced rates. The relevant factual matrix is as follows: - 'The value of the contract is Rs.90,02,29,699/-. The contract sub clause 60.1(i) and 60.2 of conditions of Particular Application stipulate that 'Advance Works Contract Tax' shall be deducted monthly at the rate of 4% of the value of the payments made. The claimant represented and opted for 'composition of tax' as per Section 5(G) of the APGST Act, which provides for deduction of 'Works Contract Tax' at 2%. The claimant had obtained permission from the Commercial Tax Officer, Secunderabad for composition of the tax and for adopting such a procedure on an year to year basis. The copies of such permissions were sent to the appellant from time to time. The scheme for composition of tax provided for deduction of works contract tax at 2%. The department accordingly deducted works contract tax at 2% in accordance with the approval given by the CTO in regard to payments

made up to October 1999. However, through a subsequent legislation i.e., by notification dated 31.12.1999 the Government had revised the 'Works Contract Tax' from 4% to 8% and under section 5(G) from 2% to 4% under the composition scheme. Therefore, the department began deducting the advance works contract tax at 4% from all the payments made after 31.12.1999. Therefore, placing reliance on sub clause 70.8, the claimant had contended that the difference on account of enhancement of tax from 2% to 4% should be added to the contract price and not deducted from their payments inasmuch as the enhancement had occurred much later than the '28 days prior to the latest date of submission of bids' stipulated in the above clause. The department justified their action on the ground that sub-clause 60.1 (i), wherein, the deduction of advance works contract tax at 4% is stipulated, states in the foot note that 'the percentages as indicated will be subject to change applicable according to law from time to time.' Therefore, the department/appellant contended that the deduction at 4% in the place of 2% hitherto made till IPC 13 is to be made for all the payments as per clause 60.1 (i). And accordingly the department claimed that an amount of Rs.58,06,642/- is to be recovered from the contractors as per the details in their defence. Therefore, the department/appellant had made a counter claim for Rs.58,06,642/-; whereas the claim of the contractor/claimant is that an excess amount of Rs.1,17,31,766/- has been recovered from them at 4% instead of at the rate of 2% from IPC 15 to 26, i.e., on the payments made after 31.12.1999 and consequently, the said amount is due to be refunded to them.

On merits, on claim no.1 including the claim for interest, the Arbitral Tribunal held as under:

'Both the parties agreed with the figures furnished by the CTO. We are, therefore, of the view that on the basis of the assessment completed by the CTO up to 30.03.2002 an amount of Rs.1,26,03,830/- is to be refunded by the appellant

to the claimant being the excess tax collected. For the further assessments to be done for the period from 01.04.2002 onwards, the tax liability for the claimant will be at the rate of 2% only. The balance 2% on account of subsequent legislation will be added to the contract price.'

'The claim arose because the Respondents deducted 'Works Contract Tax' at the rate of 4% from 1.1.2000 in place of the earlier 2% because of change in legislation, instead of adding the difference on account of change of legislation to the value of the contract as per C1.No.70.8 of the Agreement. It was this failure of the Respondents, in not adhering to the conditions of the agreement that gave rise to the claim. As the claimants have been denied the use of money that they were rightfully entitled to, they are entitled for the interest on the delayed payment from the date the amount was due.'

Finally, it was held that an amount of Rs.20,68,701.63 paise (claim limited to the said amount) is to be paid by the appellant to the claimant towards interest on the delayed excess amount of 'Works Contract Tax' deducted from the bills.

10. (c) During the course of Arbitral proceedings suggestions were made for settlement of the issue and both the parties had agreed to try and reach an agreement in regard to claim No.1 and also further agreed to approach the Tribunal by 15.12.2003 for further action in case of failure of settlement. The appellant wanted the claimant to furnish the break up for the two packages along with certificates of increased liability separately. Finally, after protracted efforts from both sides, the CTO by letter dated 18.03.2004 furnished figures for APSH-I and APSH-III related to the two projects as the claimants are having one APGST registration. The relevant figures were taken into consideration by the Tribunal.

10. (d) The claim No.2 is related to 'price adjustment of POL due to steep hike in prices'. The amount claimed under this claim is Rs.46,14,100/-. No separate award was passed in respect of this claim as the award on claim No.3 of the second set of disputes covered claim

No.2 of the first set of disputes.

10. (e) The claim no.3 is related to reimbursement of recovered amount of Rs.19,02,465/- from IPC 28 on 24.07.2004. The panel of Arbitrators considered the facts accurately and adverted to the issues which fell for consideration and had recorded the findings to the following effect: 'There is no specific provision in the agreement excluding 'Works Contract Tax' from the escalation calculations. The counter claim is an after thought and it was put forward after the submissions of the claimant. The respondents themselves are not convinced about the validity of audit objections as they have taken up the matter with the CAG and the same was referred to PAC. Both the parties have agreed that only 85% of the value of the work is considered while computing the 'R' value for price adjustment and the balance 15% comprises tax. The CAG's report deals with seigniorage charges. The relevant paragraph in the said report related to the said charges was questioned by the appellant.' Therefore, it was finally held that the recovered amount of Rs.19,02,465/- from IPC 28 on 24.07.2004 is to be reimbursed.

10. (f) The counter claim was treated as withdrawn by the appellant.

11. Thus, on an analytical examination of the award of the Tribunal which is a reasoned award, we are of the well considered view that the panel of Arbitrators who are experts in the field had considered all the clauses in the contract and also the change in the legislation revising 'Works Contract Tax' from 2% to 4% under the composition scheme before answering the reference. The learned Additional Advocate General appearing for the appellant could not show as to how the view taken by the Arbitral Tribunal and confirmed by the Court below can be said to be beyond the scope of the agreement. It could not also

be shown as to how the Tribunal traveled beyond the scope of reference and its jurisdiction. Except contending that the claims are made contrary to the terms of the contract and that the panel of Arbitrators exceeded the jurisdiction, the appellant could not point out any specific terms of the contract which are violated by the Arbitrators while passing the Award. It is not the case of the appellant that the panel of Arbitrators mis-conducted themselves or any part of the Award is contrary to the Public Policy of India. The appellant could not show that the facts were not accurately considered and that there is misreading or mis-appreciation of evidence and improper application of the evidence to the facts. Therefore, the material aspects on record also do not support any of the contentions now raised before this Court. There is nothing on record to show that the approach of the panel of Arbitrators is arbitrary or capricious. On the other hand, we find that the Arbitrators who are experts in the field had considered the issues properly having regard to the terms/clauses of the contract between the parties and the law applicable. The reasons assigned also could not be shown to be faulty. No grounds based on facts, much less, the required statutory grounds were made out and therefore, none of the grounds urged merit consideration. The point is accordingly answered against the appellant.

12. In the result, the Civil Miscellaneous Appeal fails and is, accordingly, dismissed. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this appeal, shall stand closed.

K.C. BHANU, J

M. SEETHARAMA MURTI, J

18.03.2015

NOTE: LR Copy to be marked.
(B/o)
Vjl

[\[1\]](#) (2008) 13 SCC 80
[\[2\]](#) 2014(13) SCALE 226
[\[3\]](#) 2014(9) SCALE 687