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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

APPEAL NO.685 OF 2005

IN

ARBITRATION PETITION NO.345 OF 2003

Union of India

... Appellant

Versus

M/s. Gordhandas Gobindram Engineers
and Contractors and Anr.

... Respondents

Mr. R.V. Desai, Senior Counsel a/w Mr. Pandian i/by Suresh Kumar for
the Appellant.

Mr. Udaya Sankar Samudrala a/w Ms. Brinda Barnes for the
Respondent No.1.

**CORAM : A.S. OKA &
ANUJA PRABHUDESSAI, JJ.**

DATE : 15th DECEMBER, 2016

ORAL JUDGMENT (A.S.Oka, J.)

1 The Appellant who is the Petitioner in a Petition under
Section 34 of the Arbitration and Conciliation Act, 1996 (for short “the
said Act”) has taken an exception to the judgment and order dated 28th
March, 2005 passed by the learned Single Judge on a Petition under
Section 34 of the Arbitration and Conciliation Act, 1996 (for short “the
said Act”). By the impugned judgment and order, that part of the Award
of the Arbitrator granting interest was set aside by the learned Single
Judge.

2 With a view to appreciate the submissions made across the Bar, we will have to advert to the factual aspects. The first Respondent was appointed as a Contractor for carrying out work of Narkher Amravati New B.G. Line Construction of Major Bridge on Pedhi R.W. The agreement is of 5th January, 1999. On the basis of an order made by the Division Bench of this Court dated 25th July, 2002, an Arbitrator was appointed. Accordingly, the learned Arbitrator made an Award. The learned Arbitrator partly granted the claims made by the first Respondent. He held that the first Respondent was entitled to total amount of Rs.1,71,01,987/-. He awarded interest at the rate of 12% per annum from 9th May, 2001 till the date of the Award. He also accepted the claim for interest under the heading of claim No.9 by granting interest at the rate of 12% per annum on the awarded amount on the claim Nos.1 to 5 from 3rd January, 2001 till 15th May, 2003.

3 The learned Senior Counsel appearing for the Appellant has taken us through the impugned judgment and order. He invited our attention to clause 39 of the standard General Conditions of Contract. Clause 39 deals with the rates for extra work carried out by the Contractor on instructions of the engineer which is not included in the accepted schedule of rates. He pointed out that the claim made by the

first Respondent for the extra work and especially claim No.4 could not have been gone into by the learned Arbitrator. He submitted that the claim Nos.1 and 4 could not have been considered in view of clause No.39 of the General Conditions. He urged that in view of clause 39, the learned Arbitrator could not have entertained the said claims. He submitted that merely because there was no ground taken in the Petition under Section 34 of the said Act based on clause 39, the submission based on the said clause could not have been discarded by the learned Single Judge. Inviting our attention to the Sub-Section (3) of Section 28 of the said Act he urged that in view of clause 39, the claim for extra work could not have been considered by the learned Arbitrator.

4 As regards the submissions which are specifically made before the learned Single Judge on claim Nos.4 and 6, he urged that the said submissions have been narrated and brushed aside without considering the same. He submitted that in fact the issue of maintainability of the claim of de-watering was agitated before the learned Single Judge. He urged that the argument made as regards claim Nos.4 and 6 will apply with full force to other claims of extra items. He submitted that in this Appeal, the Appellant can always urge the issue of jurisdiction of the learned Arbitrator which goes to the root of the matter.

5 The learned counsel appearing for the first Respondent supported the impugned order by contending that no interference can be made with the adjudication of the claims made by the Arbitrator on the basis of the evidence on record and the findings of fact recorded by him cannot be interfered with. He submitted that submission based on clause 39 was not agitated in the Petition under Section 34 of the said Act filed by the Appellant. Therefore, no interference is called for.

6 By way of rejoinder, the learned Senior Counsel appearing for the Appellant submitted that this is a fit case where an order of remand be made so that all contentions which the Appellant desires to raise can be urged before the learned Single Judge.

7 We have given careful consideration to the submissions. We have perused the impugned order. In paragraph 1, it is noted that the challenge canvassed was to the payment directed to be made on account of the additional work carried out of the foundation by the first Respondent. The learned Single Judge noted that finding of the Arbitrator was that the item was not covered by clause 42(2) of the Conditions of Contract. Further, the learned Single Judge observed that the Arbitrator has found on the basis of agreement between the parties

that M-25 concrete in raft foundation was not the part of the contract agreement, and therefore, additional work of foundation carried out was covered as an extra item. There is a specific observation recorded by the learned Single Judge that the learned counsel appearing for the Petitioner accepted this finding of fact. In view of this specific statement recorded by the learned Single Judge, we will have to proceed on the footing that the Appellant accepted before the learned Single Judge the finding recorded by the Arbitrator that the additional work of foundation carried out was covered as an extra item. After accepting the finding of fact, a submission was canvassed before the learned Single Judge by the Appellant based on clause 39 of the Conditions of Contract. The said argument was rejected by the learned Single Judge by observing that the said ground was not agitated in the Petition filed under Section 34 of the said Act. We have carefully perused the copy of the Petition filed under Section 34 of the said Act annexed to the Appeal Memo. We find that the learned Single Judge is absolutely right in observing that the factual contention based on clause 39 was not at all raised in the Petition filed under Section 34 of the said Act. As the said submission was sought to be canvassed across the Bar for the first time at the time of hearing of the Petition under Section 34, the learned Single Judge was justified in rejecting the said submission without considering the same.

8 Next submission canvassed was about the illegality of the award made on the claim No.4. The said claim was for the extra work of de-watering done by the first Respondent. Paragraph 2 of the impugned judgment and order reads thus :-

“2. The next ground urged was in relation to the Award made against claim no.4. Perusal of the ground raised in the petition, however, shows that according to the petitioner, the Award made against the claim no.4 which is on the finding of facts recorded by the learned Arbitrator that the work of de-watering was done during the relevant period, is not correct. Perusal of the Award and the claim, both shows that the finding has been recorded by the learned Arbitrator on the basis of statement made before the Arbitrator and at the oral hearing. It being a finding of facts which is based on the statement made before the Arbitrator in my opinion, that finding cannot be disturbed.”

9 In view of this finding, we have perused the impugned Award. Various issues were framed by the learned Arbitrator. After considering the issues in paragraph 14, he dealt with claim No.4 of excess de-watering done during excavation. In paragraph 14, he has noted that the claim in respect of the said item was in the sum of Rs.5,50,000/-. The learned Arbitrator observed that he has already

recorded his findings in paragraph 6. We have perused paragraph 6 under the heading “Facts of the Case”. In paragraph 6, the learned Arbitrator has not recorded any findings. In fact, in paragraph 7 he has framed issues or points for determination and thereafter, he has proceeded to consider the evidence on record.

10 In paragraph 14, the learned Arbitrator thereafter has concluded as under :-

“14. Claimant had shown said extra expenses in Annexure CA-5 of document CD-III amount to Rs.5,12,640.00. Said expenses appear to me on higher side. I, therefore, Award Rs.2,00,000.00 against this claim which will compensate Claimant's all financial loss suffered by him on this account which includes fuel and operating pump cost.”

(underline supplied)

11 The claim of the first Respondent under claim No.4 was set out in Annexure CA-5 amounting to Rs.5,12,640/-. There is a specific finding recorded by the Arbitrator that the said claim for expenses appears to be on the higher side. After recording the said finding, the Arbitrator has observed that he was awarding a sum of Rs.2,00,000/-. No reasons have been recorded as to why a sum of Rs.2,00,000/- was being awarded. The basis on which the said amount is fixed is not set out in the award. All this has been ignored by the learned Single Judge.

12 Claim No.6 of underutilization of machinery was dealt with in paragraph 16. The said claim was on account of the fact that due to non-payment for the work done, the work remained suspended for certain period. The relevant part of the paragraph 16 reads thus :-

“16. Due to non payment of work done work remained suspended from 15.7.2000 to 31.12.2000. The delay of 4.5 months is on part of Respondent, Claimant had claimed delay of period of 8 months from details shown in the Annexure CA-7 of documents CD-II. Amount claimed for delay of 8 months by the Claimant is Rs.6,96,000.00 against the claimed amount Rs.10,96,000.00. However, I feel that Rs.5,00,000.00 should adequately compensate the loss suffered. I therefore award Rs.5,00,000.00 payable to the Claimant by the Respondent.”

(underline supplied)

13 Thus, the learned Arbitrator did not accept the claim made by the first Respondent in Annexure CA-7 of the documents CD-II. There is no finding recorded by the learned Arbitrator that the claim of Rs.5,00,000/- to compensate the alleged loss was established on evidence. As in case of claim awarded against claim No.4, the quantum of amount awarded by the learned Arbitrator is not on the basis of any material or evidence but it is only on the basis of his personal opinion.

Taking the findings recorded by the learned Arbitrator as it is, there is no option but to hold that the said findings granting the claims under claim Nos.4 and 6 are patently illegal.

14 The learned Senior Counsel appearing for the Petitioner submitted that the same reasoning will apply to the other claims of other items or extra work and especially claim No.1. We find that the arguments canvassed before the learned Single Judge were confined to Award made on the basis of claim Nos.1, 4 and 6. There was only one other challenge to the Award of interest against claim No.9. That part of the Award has been set aside by the learned Single Judge by the impugned order. The argument for assailing the amount granted against claim No.1 was pressed only on the basis of clause 39 of the conditions of Contract which was not agitated in the Petition filed under Section 34 of the said Act. Hence, the argument based on claim No.1 cannot be accepted.

15 In the circumstances, we cannot permit the Appellant to agitate the grounds which were not admittedly agitated before the learned Single Judge. If the case of the Appellant was that certain grounds were agitated but were not noted by the learned Single Judge, the remedy was elsewhere. Accordingly, the Appeal must succeed in part and we pass the following order :-

ORDER

- (i) We set aside Award made by the learned Arbitrator on 15th May, 2003 against claim No.4 (a sum of Rs.2,00,000/-) and against claim No.6 (a sum of Rs.5,00,000/-);
- (ii) To that extent, the impugned judgment and order dated 28th March, 2005 is modified. As stated earlier, the learned Single Judge has already set aside the Award of interest against claim No.9. That part of the order has attained finality inasmuch as the first Respondent has not challenged the same;
- (iii) Appeal is accordingly partly allowed on above terms;
- (iv) There will be no order as to costs.

(ANUJA PRABHUDESSAI, J)

(A.S. OKA, J)