

IN THE HIGH COURT OF BOMBAY AT GOA
APPEAL UNDER ARBITRATION ACT NO.16 OF 2017

Bharat Sanchar Nigam Limited,
A Company wholly owned by
The Government of India,
represented by its Executive
Engineer (Civil), BSNL Civil Division, Appellant.

Versus

Mr. M.N. Ninan,
Aged about 63 years, Office No.31,
Trionora Apartments, 1st Staircase,
3rd Floor, near Municipal Market,
Panaji, Goa 403 001. Respondent.

Mr. P.P. Singh, Advocate for the Appellant.

Mr. Rui Gomes Pereira, Advocate for the Respondent.

Coram : N.M. Jamdar, J.

Date : 24 November 2017.

ORAL JUDGMENT :

Heard Mr. P.P. Singh, learned Advocate for the Appellant
and Mr. Rui Gomes Pereira, learned Advocate for the Respondent.

2. By consent of the learned Counsel, the Arbitration
Appeal is admitted and is taken up for hearing forthwith.

3. The Appellant, by way of this Appeal under Section 37 of the Arbitration and Conciliation Act, 1996, has challenged the Judgment and Order dated 14 March 2016 passed by the learned Principal District Judge, North, Goa in Petition No.20/2012 filed under Section 34 of the Act.

4. The Respondent-Claimant, a Proprietorship Firm, carried on the business of Engineers and Contractors. The Appellant issued a tender for construction of 12 type IV Staff Quarters at Alto Porvorim, Goa. The Respondent submitted its tender in February 1999, which was accepted and the work order was issued. Dispute arose between the parties and the Respondent invoked the arbitration clause contained in the Agreement. An Arbitrator was appointed by this Court in an application moved under Section 11 of the Act. The Respondent Claimant raised ten claims. The learned Arbitrator allowed the claims, except Claim No.1, and the Claim No.8 was partly granted. An Award was passed on 7 August 2009.

5. The Respondent filed a Petition under Section 34 of the Act in the District Court. As regards the claims granted against the Appellant, the Appellant did not file any petition under Section 34 of the Act. The learned Principal District Judge allowed the Arbitration

Petition by the following operative order :

“The Petition stands allowed. Arbitral Award dated 7.8.2009 as far as finding on claim No.1 and 8 are concerned stand quashed and set aside. Claim No.1 for ₹ 14,00,000/- and Claim No.8 for ₹ 8,26,036/- is hereby stands allowed/awarded in favour of claimant together with rate of interest which is already awarded by the Ld. Arbitral Tribunal on other claims.”

Being aggrieved, the Appellant, the Respondent before the Arbitrator has filed this Appeal under Section 37 of the Act.

6. Heard Mr. P.P. Singh, learned Counsel for the Appellant and Mr. Rui Gomes Pereira, learned Counsel for the Respondent.

7. As regards the finding on claim No.1 which concerns claim of ₹ 14,00,000/- which was stated to be due to the Respondent-Claimant in the final bill, the learned Arbitrator found that the material on record was not sufficient, as no joint inspection was carried out and it was not possible to consider the claim. As regards the claim No.8 of the Respondent-Claimant for ₹ 18,00,000/-, the learned Arbitrator observed that an amount of ₹ 7,46,325 /- was already paid to the Respondent-Claimant and the Respondent would at the most, be entitled to ₹ 79,711/-.

8. The learned Principal District Judge found that, as far as

findings of the learned Arbitrator on claim No.8 was concerned, it was solely based on the oral statement of the Executive Engineer during the course of the hearing before the Arbitrator. Mr. Singh, the learned Counsel for the Appellant contended that this finding of the Arbitrator was correct and ought not to have been set aside by the learned Principal District Judge. I have gone through the reasoning of the learned Arbitrator. The learned Arbitrator has accepted the oral statement made by the Executive Engineer during the course of the hearing and has not looked at the evidence available on record. Founding the discussion solely on the basis of an oral statement, without looking at the material on record is an illegality that went to the root of the adjudication. The Apex Court in the case of *Associate Builders vs. Delhi Development Authority*¹ has stressed that the Arbitrator must adopt a judicial approach. In the said decision, the Apex Court emphasized on the aspect of perversity. If a conclusion is reached without looking at the material on record and only on the basis of one oral statement, then such finding stands vitiated. Therefore, the learned District Judge was not in error in setting aside the findings of the learned Arbitrator on claim No.8.

9. As far as claim No.1 is concerned, the learned Arbitrator himself had not adjudicated the claim, which remained therefore, unadjudicated. The learned Principal District Judge was right in

¹ (2015) 3 SCC 49.

holding that claim No.1 was not adjudicated.

10. Mr. Singh, however, is right in contending that having reached to the conclusion that the learned Arbitrator was in error in respect of claim No.8 the learned Principal District Judge could not have granted the claim by himself, as it has been done. So also that after the learned Arbitrator had come to the conclusion that there was no material to grant claim No.1, in the Petition under Section 34 the District Court could have been either confirmed or set aside the Award and the learned District Judge could not have proceeded to grant this claim in a petition under Section 34 of the Act. This contention is correct. The learned District Judge in a petition under Section 34 of the Act cannot grant a claim at the first instance. This position of law has been made clear by the Apex Court in the case of *MCDermott International Inc. Vs. Burnt Standard Co. Ltd. and others*,¹. Reliance placed by the learned Counsel for the Respondent on the decision of the Full Bench of this Court in *R.S. Jiwani (M/s.) Mumbai vs. Ircon International Ltd., Mumbai*,² will not assist the Respondent. In this case, the Full Bench was called upon to consider whether an award can be sustained in part and set aside in part, which the Full Bench answered. There is nothing in the decision of the Full Bench to indicate that the law laid down by the Apex Court

1. 2006((11) SCC 181

2. 2010(1) Mh.L.J. 547

in *MCDermott International Inc.* was being distinguished to the effect that a Court under Section 34 of the Act can take the course of action taken in the impugned order. The learned District Judge thus could not have granted the claim, as if what was being decided was a First Appeal.

11. In these circumstances, the Appeal will have to be allowed and it is disposed of as under :

(I) The findings in the arbitral Award dated 7 August 2009, so far as Claims No.1 and 8 are concerned, are confirmed and the order passed by the learned Principal District Judge to that effect is sustained.

(II) The directions by the learned Principal District Judge granting ₹ 14,00,000/- for claim No.1 and ₹ 8,26,036/- for claim No.8, are quashed and set aside.

12. It is open to the parties to take appropriate course of action, as per law.

N.M. Jamdar, J.