IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.12423 OF 2019

UNION OF INDIA REPRESENTED BY CHIEF ENGINEER PUNE ZONE
MILITARY ENGINEER SERVICES
VERSUS
M/S MUKUND ENTERPRISES PVT LTD THROUGH ITS DIRECTOR
...
Advocate for the Petitioner : Shri Deve S.S.
Advocate for the Respondent : Ms.Risha Mittal a/w Shri K.C.Sant
...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 04th December, 2019

Per Court:

1 On 02.12.2019, the submissions of the learned advocate for the respondent were recorded in view of the order dated 02.12.2019. Today, the extensive submissions of the learned advocates for the petitioner and for the respondent have been considered.

2 The issue before this Court is as regards whether, the application exhibit 14 filed by the petitioner, original applicant in Arbitration Application No.2/2018, seeking amendment by virtue of Order VI Rule 17 and the proviso thereunder of the Code of Civil Procedure, could have been entertained after the period of limitation of 120 days prescribed under Section 34 of the Arbitration and Conciliation Act, 1996. The Trial Court has rejected exhibit 14.

3 The learned advocate for the respondent has relied upon the following judgments :-

(a) ***Vastu Invest & Holdings Pvt.Ltd., Mumbai vs. Gujarat Lease Financing Limited, Mumbai, 2001 (2) Mh.L.J. 565.***

(b) ***Union of India vs. Popular Construction Company, AIR 2001 SC 4010***.

(c) ***Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd., (2011) 8 SCC 333.***

(d) ***Board of Control For Cricket in India vs. Kochi Cricket Private Limited and others, (2018) 6 SCC 287.***

(e) ***Mahanagar Telephone Nigam Limited vs. Applied Electronics Limited, (2017) 2 SCC 37***.

4 The learned advocate for the petitioner has not cited any judgment.

5 In ***Fuerst Day Lawson Ltd.*** (supra) and ***Mahanagar Telephone Nigam Limited*** (supra), the Honourable Supreme Court has concluded that since the Arbitration and Conciliation Act, 1996 is a special enactment, which has an inbuilt mechanism for the expeditious disposal of the proceeding within one year insofar as the application under Section 34 is concerned and the Code of Civil Procedure would not be applicable.

6 I find that the amendment to Section 34(2)(a) of the Arbitration and Conciliation Act, 1996 to the extent of the portion "*establishes on the basis of the record of the arbitral tribunal that*" in place of the words "*furnishes proof that*", introduced by the Act No.XXXIII of 2019 has caused a sea-change in it's scope and ambit within which the arbitral award can be set aside by the Court. Earlier, a party making an application under Section 34 was mandated to produce proof so as to establish the grounds set out in clauses (i) to (v) of Section 34(2)(a), which alone could enable the Court to set aside the arbitral award. The wisdom of the legislature in introducing the words "*establishes on the basis of the record of the arbitral tribunal that*" in place of the words "*furnishes proof that*", has expanded the scope of interference by the Court under Section 34. This amendment actually enables the Court to go through the record and proceedings of the arbitration threadbare and find out whether, the grounds set out in clauses (i) to (v) of Section 34(2)(a) are established on the basis of the record of the arbitral tribunal. The strictness emerging from the words "*furnishes proof that*", which eventually indicate that a party invoking any of the five clauses for setting aside the arbitral award, had to furnish proof as regards substantiating either of such grounds. In my view, the amendment introduced in 2019 would, therefore, enable the aggrieved party to consider the record and

proceedings and make out a case so as to attract any of the five clauses/ grounds on which the Court can set aside the arbitral award.

7 The learned advocate for the petitioner has read out exhibit 14 and the impugned order, in it's entirety.

8 I have perused exhibit 14 filed by the petitioner for seeking amendment to the grounds raised in the arbitration application under Section 34. The arbitration application under Section 34 runs into about 11 pages and the facts have been disclosed and the grounds have been formulated. The amendment application exhibit 14 runs into almost 07 pages. Extensive proposed grounds have been set out to be added to the arbitration application. With the assistance of the learned advocates for the respective sides, I have gone through each of the proposed paragraphs threadbare and I find that barring three portions, rest of the proposed paragraphs are completely in the form of arguments. It requires no debate that the arguments are not to be pleaded and need not be set out in the plaint or written statement, in any proceeding.

9 I find only three portions to be having a semblance of raising new grounds in the arbitration application. Such portions are found under the proposed ground 4-B (internal page 3), opening proposed paragraph 9-A consisting of six lines and proposed paragraph 9-B. I have marked those in exhibit 14 in the file and which read as under :-

(a) *"The Board of Officers by accepting to assess quantum of*

work executed at site, does not found any material of contractor laying at site which obviously have been removed by contractor (without taking any permission from Department) to other locations in same cantonment area where his other projects were under execution."

(b) "*9A. The Claim regarding "Watch and Ward" was not appropriately considered by the learned Arbitrator while giving finding and conclusion over the same as actual expenditure incurred by contractor in watch and ward of building during the period from October 2008 to May 2013.*"

(c) "*9B. All preparatory works of the project was done by the claimant before commencement of work and lumpsum rates quoted by claimant was deemed to include the same. Moreover, the cost of preparatory works or site establishment also covers establishment charges already claimed by claimant under claim No.4 previously and duplicate in nature.*"

10 Insofar as the other portions of exhibit 14 are concerned, they are argumentative in nature and the petitioner would be at liberty to advance such arguments strictly on the basis of the record and proceedings in arbitration.

11 Insofar as the three portions that I have marked in my file reproduced above, having a semblance of pleadings, are concerned, the issue is as to what restrained the petitioner from including these grounds in the memo of the arbitration application, which was filed under Section 34 on 30.01.2018. Even if it is presumed that Order VI Rule 17 with the proviso thereunder, which was introduced in 2002, is said to be applicable to such proceedings, the issue of due diligence would crop up and there is

not a whisper in exhibit 14 as to why these portions were not included in the pleadings in the arbitration application.

12 It requires no debate that the maximum period available for filing an arbitration application under Section 34 is 120 days and it is crystallized law that delay of even one day would be fatal to the proceeding. Insofar as the applicability of Section 5 of the Limitation Act, 1963 to the proceeding under the Arbitration and Conciliation Act, 1996 is concerned, the Honourable Supreme Court has dealt with the said issue in the matter of ***Union of India vs. Popular Construction Company*** (supra) by recording in paragraph 16 as under :-

> "16. *Furthermore, section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub section (2) and sub section (3). Sub section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub section (3) would not be an application "in accordance with" that sub section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that "where the time for making an application to set aside the arbitral award under Section 34 has expired.....the award shall be enforced and the Code of Civil Procedure, 1908 in the same manner as if it were a decree of a court". This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award and upon the judgment so*

> *pronounced a decree shall follow". Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the Court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the Court's powers by the exclusion of the operation of Section 5 of the Limitation Act.*"

13 In ***Fuerst Day Lawson Ltd.*** (supra), the Honourable Supreme Court has drawn it's conclusions in paragraphs 89 and 90, which read as under :-

> "*89. It is, thus, to be seen that Arbitration Act, 1940, from its inception and right through to 2004 (in P.S. Sathappan v. Andhra Bank Ltd., 2004 (11) SCC 672) was held to be a self-contained code. Now, if the Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self- contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a Letters Patent Appeal would be excluded by application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded.*
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> *90. We, thus, arrive at the conclusion regarding the exclusion of a letters patent appeal in two different ways; one, so to say, on a micro basis by examining the scheme devised by Sections 49 and 50 of the 1996 Act and the radical*

change that it brings about in the earlier provision of appeal under Section 6 of the 1961 Act and the other on a macro basis by taking into account the nature and character of the 1996 Act as a self-contained and exhaustive code in itself."

14 Considering the above, it would be apposite to refer to the conclusions drawn by the Honourable Supreme Court in the same judgment of ***Fuerst Day Lawson Ltd.*** (supra) in paragraph 36(vii), which reads as under :-

"*36. The decisions noticed so far lay down certain broad principles that may be stated as follows :*

(vii) The exception to the aforementioned rule is where the special Act sets out a self-contained code and in that event the applicability of the general law procedure would be impliedly excluded. The express provision need not refer to or use the words "letters patent" but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred."

(Emphasis supplied)

15 It is, thus, obvious that if it comes to introduction of a ground as a pleading or an averment in the proceeding under Section 34, any such introduction/ amendment beyond 120 days would not be entertainable and cannot be permitted in view of the judgments delivered in ***Union of India vs. Popular Construction Company*** (supra) and ***Fuerst Day Lawson Ltd.*** (supra).

16 I find that the submissions of the learned advocate for the respondent that the amendment introduced to clause (a) under Section

34(2) of the Arbitration and Conciliation Act, 1996, has resulted in making things easier for the parties, is well placed. As noted above, the amended portion introduced to clause (a) in place of the earlier portion "*furnishes proof that*", would virtually lay the parties on a broader canvas to refer to the record and proceedings threadbare and establish any of the five grounds which are necessary for interference of the court in the arbitral award. It would be obvious on account of the said amendment that the legislature has permitted the parties to invoke any of the five grounds by referring to the record and proceedings and establish on the basis of the record of the arbitral award that the arbitral award can be set aside under any of the said grounds.

17 In this crystallized position of law, though I am refusing relief to the petitioner to the extent of the three portions as they were sought to be introduced after seven months of the expiry of the limitation, it would still be open to the petitioner to go through the record and proceeding of the arbitral award and make submissions, which would establish any of the five grounds under Section 34(2) for seeking interference of the Court in the arbitral award. All the litigating sides are at liberty to advance their contentions in view of Section 34(2) of the Arbitration and Conciliation Act, 1996.

18 In view of the above, this Writ Petition is disposed off.

19 Considering the scheme of the law, which mandates the Court

to conclude the proceeding under Section 34 within one year and since pursuant to the impugned order dated 15.02.2019, the matter has not progressed, I deem it appropriate to direct the learned District Judge, Ahmednagar to decide Arbitration Application No.2/2018 as expeditiously as possible and in any case, on or before 29.02.2020 since it is only a matter of making submissions and the aspect of leading oral and documentary evidence is not enshrined in the scheme of the law. The litigating sides shall cooperate with the learned District Judge for the expeditious disposal and any request for adjournment, if found to be based on unreasonable ground, shall be rejected by the said Court. Liberty is granted to give priority to this matter and deal with the same as directed.

kps (**RAVINDRA V. GHUGE, J.**)