

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

**REVIEW PETITION (L) NO. 2 OF 2020
IN
COMMERCIAL ARBITRATION PETITION NO. 50 OF 2016
IN
COMMERCIAL ARBITRATION PETITION NO. 218 OF 2017**

R.J. Shah & Co. Ltd.

...Petitioner

vs

State of Maharashtra & Ors.

...Respondents

Mr.Atul Chitale, Senior Advocate with G.C. Mohanty i/b. Kirit N. Damania & Co. for Petitioner.

Mr.Dinesh B. Khaire with Uma Palsuledesai, AGP for Respondents.

CORAM : S.C. GUPTE, J.

DATE : 2 MARCH 2020

P.C. :

This review petition challenges an order passed by this court in these two commercial arbitration petitions. These are cross petitions, both parties challenging different aspects of the same award. The award considered various claims of the Petitioner, who was a contractor of the Respondent employer. After hearing the parties, this court held that the petitions should partly succeed. The arbitrator's award on Claim Nos.1, 6, 13, 16C, 20, 21 and 23 was set aside, whilst the rest of the award was sustained. The rest of the award *inter alia* included the Petitioner's contractor's claims, being Claim Nos.4, 5 and 15. This court, in particular, considered these three claims; and held that no interference was warranted with the impugned award under Section 34 of the Arbitration and Conciliation Act, 1996.

2 So far as Claim No.4 is concerned, it is submitted by the Review Petitioner that the damage, which was treated by the learned Arbitrator as damage arising out of flood during monsoon was, really speaking, not a damage on account of flood, but resulting from encroachment of an existing nalla, which was wrongly allowed by the Respondent employer to the dam agency, who had established a construction plant at the earlier camp site. This contention was indeed considered by this court whilst passing its order under review. The court considered the Respondent's answer to the claim on the basis that the allegation of the contractor was that this damage had resulted from unlawful encroachment. In the context of this argument of the contractor, the court considered the employer's answer that as per the stipulations in connection with the work and site conditions in the contract, it was the contractor's responsibility to observe and maintain in safe condition all works, materials, machinery, tools and plants, etc. from the flood and rains and no compensation was payable on that account. The arbitrator's rejection of this claim on the ground that the contract required the contractor to be watchful and protect his works and premises, was found to be based on a reasonable construction of contract. This court particularly observed that the view could not be termed either as an impossible view or a view which no fair or judiciously minded person would take, or a view that would shock conscience of the court. So far as this assessment is concerned, the Review Petitioner has been unable to show any new or important material or evidence, which he was not in possession of or which could not be produced by him before the court when the order under review was passed. So also, there is no mistake or error apparent on the

face of the record, which could be pointed out by the Review Petitioner. Submissions of learned Counsel for the Review Petitioner in this behalf, really speaking, amount to alternative arguments and practically require the court to reconsider the matter in a new light. That, I am afraid, is not permissible within the review jurisdiction of this court. So also, there is no other sufficient reason calling for review of the order.

3 So far as Claim No.5 is concerned, it is submitted that the arbitrator's assessment, which was *inter alia* based on a sequence of work, does not emanate from the contract itself. This again was a submission which was squarely made before the court when the order under review was passed and was duly considered and debated and found against the Review Petitioner. For the reasons discussed above in case of Claim No.4, even this claim and its assessment by this court in its order under review do not call for any review.

4 So far as Claim No.15 is concerned, it is submitted by Mr.Chitale, learned Senior Counsel appearing for the Review Petitioner, that there was nothing to support the Respondent's case, which was accepted by the arbitrator and not found fault with by this court in its order under review, or suggest that there was any contract as between the Petitioner and the contractors of the Respondents, who were engaged for clearance of link tunnel and TRT after the disaster struck. This court did find that there was material in support of the Respondent's case. The initial payment for the machinery made available by the Petitioner to the contractors was received by the Petitioner directly from these third party agencies and that it was well within the Petitioner's knowledge that the

agencies were engaged in the clearance work by the Respondents. If on the basis of this material the arbitrator had held that it was the Petitioner's responsibility to claim the balance payment directly from the agencies, the conclusion cannot be found fault with within the limited scope of interference warranted under Section 34 of the Act. Once again, it does not call for any review. There is no new or different material before this court, which calls for a different view. So also, there is no error apparent on the face of the record and there is no other reason to review the order on this aspect.

5 Coming now to the assessment of the arbitrator's award on Claim No.16C, this court agreed with the assessment of the arbitrator in principle so far as the payability of the claim is concerned. This court, however, found fault with the arbitrator's assessment of the quantum of damages payable to the Petitioner. This court particularly noted that the additional rate awarded to the Petitioner towards its purported extra efforts for total executed quality of reinforcement plus escalation was without indicating how this rate was worked out. There is nothing on record to suggest that the arbitrator has applied its mind to this aspect. Learned Counsel for the Petitioner submits that both rate analyses, i.e. the Petitioner's analysis and the Respondent's analysis, were considered by the learned arbitrator. No doubt, the arbitrator does refer to both rate analyses, but he does not indicate how he arrives at this particular rate. It is not merely that the material before him should be referred to by the arbitrator, the award must reflect the arbitrator's application of mind to this material. And that, as I have noted in my order under review, was missing from the award. Thus, even this part of the order does not call for any review.

6 Accordingly there is no merit in the review petition. The review petition is dismissed.

(S.C. GUPTE, J.)

Sanskruti
A.
Thakur

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by Sanskruti A.
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