



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04 /04 / 2019
DELIVERED ON : 27/ 05/ 2020

C O R A M

THE HONOURABLE MR.JUSTICE M. GOVINDARAJ

CMA NO.1094 OF 2019
&
C.M.P.No.3065 of 2019

The New India Assurance Co. Ltd.,
Divisional Office,
No.3, Main Road,
Dindigul-624 001.

....Appellant/Petitioner

Vs

1. Amarjothi Spinning Mills Ltd,
Rept. by its Joint Managing Director
Mr. R. Jaichander,
Gobi Main Road, Pudusuripalayam,
Erode-638 458,
Gobi Taluk, Erode District.
2. Justice K. Sampath, (Retired) since deceased),
Presiding Arbitrator
No.11, 2nd Street, Jegadambal Colony,
Royapettah, Chennai-600 014.
3. Mr. V. Ramasamy,
Member Arbitrator,
Mithila, Plot No.21,
Kalathumedu Street,
Kottivakkam, Chennai-600 041.
4. N. Veeraraghavan,
Member Arbitrator,
No.3, 1st Street, North Gopalapuram,
Chennai-600086 . Respondents/Respondents



Prayer: Civil Miscellaneous Appeal filed under Sec.37 of Arbitration and Conciliation Act of 1996, to set aside the judgment and decretal order passed in A.O.P.No.172 of 2016 dated 23.07.2018 on the file of the learned Principal District Judge, Erode, while confirming the Arbitral Award dated 15.06.2016.

For Appellant : Mr. S.R.Sundar, A.S.Subramanian

For Respondents : Mr. N.Manokaran

JUDGMENT

The respondent / Public Sector Insurance Company is the appellant.

2. Aggrieved over the dismissal of an appeal filed under Sec.37 of the Arbitration & Conciliation Act, 1996 (Act) in Arb.OP No.172/2016, dated 23.07.2018 on the file of Principal District Court, Erode, confirming the majority award of an arbitral tribunal dated 15/6/2016, the present appeal has been preferred.

3. The first respondent herein initiated a claim as per the agreement between it and the appellant. According to the Claimant the manufacturing unit in the name and style of Amarjothi Spinning Mills Limited was started in the year 1987 for the purpose of manufacturing Melange Yarn. It has the capacity of manufacturing 20 tons of yarn per day more particularly 37392 spindles exclusively for Melange Yarn having 100 varieties of colour. The appellant got his building, Plant and Machinery covered by an Insurance Policy number 7209001112010000234 and a Fire Declaration Policy bearing No.7209001112020000005 for a period between 01.06.2012 and 31.05,2013.

4. On 19.01.2013 fire broke in Finished Goods Godown(FGG-2) during the coverage period. It is not in dispute that there was no electricity connection to the godown and it was not caused due to electricity spark or any mischief. It is also not in dispute that five fire fighting operations carried out using one crore litres of water to douse the fire. It took about 16-24 hours to control the fire and the entire godown was devastated. The Claimant immediately informed the appellant -Insurance



WEB COPY

Company and a Preliminary Surveyor was appointed by the appellant and he had inspected the place on 20.01.2013, when fire was on. He had taken the stock list from the Electronic Resource Programme (ERP) from the computer of the Claimant at 9-15 am on the same day assessed the loss and submitted a report assessing damage of 4,40,000 kgs of Melange Yarn.

5. The next day i.e., on 21.01.2013, the Final Surveyor also inspected the spot and assessed the damages. Simultaneously, the Claimant engaged two reputed Assessors namely SITRA and PSG Technology for assessing the damage. The experts have given a report that paper cone will completely burn at the optimum temperature on 170-1180 degree centigrade, whereas the temperature during the said fire accident was 800-900 degree centigrade which capable of destroying entire stock. Appellant conducted Forensic Audit by engaging a expert from Bombay by name Nilesh Bhimani & Coon 25.11.20013. The investigation report of forensic audit estimated that 4,40,049 Kgs of yarn was destroyed and fixed the value of the yarn at the rate of Rs.166 per Kg as reported by the claimant to the stock exchange. After period of one year the appellant has issued Final Loss Adjustment Report on 15.07.2014 accepting the damage of 1,19,856 kgs valuing the same at Rs.216.74 per Kg and after deducting 25% of the value determined its liability at Rs.2,65,72,620/- The Claimant did not agree with the same. Hence, arbitration remedy was invoked vide Condition No.13 of the two contracts of insurance.

6. Both parties nominated their arbitrators, and a Presiding Arbitrator in late Justice K.Sampath (Retd) was appointed, to form the arbitral tribunal. After elaborate enquiry, the award came to be passed on 15.06.2016 directing the insurer to pay a sum of Rs.7,04,96,093/- along with interest at 18% p.a. on and from 15/9/2016, if award amount was not deposited within three months of the date of award, along with Rs.25,00,000/- towards costs.

7. Aggrieved by the award, both the appellant/Insurer and respondent/ Insured filed petitions under Sec.34 of the Act, before the lower court. By order dated 23/7/2018, Arb.OP.No.109/2016 filed by the Claimant and Arb.OP No.172/2016 of Appellant Insurer were dismissed, confirming the award of the Arbitral Tribunal.

8. The Claimant has accepted the order and filed an execution Petition for enforcement of the award. The insurer has filed this appeal under Sec.37 of the Act, against concurrent findings on fact and in law.

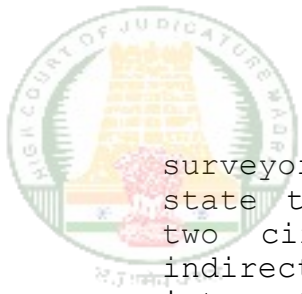


9. The grievance projected by the learned counsel for the appellant is that even though, the appellant has raised as many as 44 grounds, the Lower Court has considered only seven issues relating to ERP, Market Value of the Stock, Report of expert bodies SITRA and PSGCT, Removal of debris, inspection conducted by Arbitration Tribunal and violation of principles of natural justice, leaving out all other grounds as well as volumes of documents and materials justifying its stand.

10. The learned counsel has filed documents in 17 volumes and also List of Dates and Synopsis and list of citations and taken me to the length and breadth of the materials. Both sides were heard over several days and cited several decisions in support of their submissions and orders were reserved.

11. The appellant admits the coverage of insurance policy, fire accident and its liability. Only issue is quantum of liability ordered by the Tribunal. For defending the quantum of liability fixed, appellant has raised as many as 44 grounds before the lower court. It is well settled that scope of Section 34 of Arbitration and Conciliation Act (herein after called Act) is very limited. Admittedly, parties herein do not suffer any incapacity nor were prevented from participating in Arbitration proceeding as per the agreement or the award was made beyond the scope of reference. The award can be and is attacked only on the grounds provided under Sub Section (b) of Section 34 of the Act. More particularly, as per the amended provisions, on the grounds that it is affected by (i) fraud, corruption and bias; Convention with the fundamental policy of India and it is in conflict with basic notions of morality or justice.

12. Predominant argument of the learned counsel for appellant is that the petitions filed by the appellant u/s12 & 13 of the Act before the Arbitral Tribunal was totally ignored. According to him the Preliminary Surveyor was associated with one of the Arbitrators and the Arbitrator failed to disclose the same and therefore the award is tainted with fraud and malafides. He would rely on the topic "Duties of an Arbitral Tribunal" in a book named Russell on Arbitration (Twenty-Third Edition) and submit that in Sphere Drake Insurance Vs American Reliable Insurance Co. (2004EWHC1513) court removed an arbitrator, for having advised on the defense of non-parties where fraud was the central fact. Hence there is a risk of forming certain views, which may give rise to an appearance of bias. In the present case, the allegation is that one of the arbitrators had advised or opined or worked with the Preliminary



surveyor in some case. Therefore the award is bad. It is true state that the Sec 12 contemplates grounds of challenge under two circumstances where the arbitrator had any direct or indirect relationship with one of the parties present or past or interest in the subject matter or he does not have the ability or cannot devote time to complete the arbitration within twelve months. The argument falls under the first limb.

13. At the outset, it is very clear that there is no present or past relationship with any of the parties to arbitration nor there is allegation that he has any interest in the subject matter. At the time of appointment of arbitrators, predominantly, the disclosure would be with respect to the relationship with the parties concerned and no one would expect the arbitrator to look into the list of persons engaged by the parties in respect of the accident. In that view of the matter, there was nothing to disclose. In the case law relied on by the counsel, one of the arbitrators advised the defense in a similar claim and formed an opinion. But there is no such allegation here. Merely he advised or opined or worked in an assessment of fire accident, it cannot be said that the element of bias will creep into the mind of the said arbitrator. Even assuming he advised the preliminary surveyor, it is for the opposite party to raise such objection, but strangely the appellant is raising such objection. The circumstances narrated by the appellant do not raise any justifiable doubt or suspicion on the integrity or fairness of his independent discharge of the duties of the arbitrator.

14. In fact the Arbitral Tribunal has considered the issue and recorded at Page 3 of the Award as under:

"Upon completion of pleadings and the aforesaid inspection, proceedings were held for framing of issues. At this stage, the respondent filed a petition/memo dt.4/8/2015 for recusal of one of the tribunal members alleging that the preliminary surveyor Mr. P. Raju, appointed by the insurer in this claim had also functioned as deputy to the said arbitrator in his role as licensed surveyor of an insurance company. The claimant filed a memo rejecting any bias and the said arbitrator also brought on record his response.

The tribunal chose to hear the counsel for insurer in private (on 15/8/2015) after requesting the arbitrator member in question to rescue himself for this occasion and



WEB COPY

solitary purpose. The remaining two members of the tribunal could persuade the counsel for the insurer not to precipitate the issue and insist on orders being passed on this request on merits. It was pointed out to the insurer that the imputation of bias was lacking and it would be highly proper if the insurer withdrew the petition as not pursued. We acknowledge that the insurer and their counsel conducted themselves responsibly and acceded to the request. Thus the petition in question came to be closed as not pursued and with no need for orders and thus the matter proceeded to its further stages without any hindrance."

The above recording goes to show that the said arbitrator recused himself from the decision. The insurer and their counsel participated in the discussion. But the same was not disclosed during the arguments and the factum has been suppressed saying that no order has been passed on the petition and no minutes has been recorded and communicated to the appellant. In fact taking a ground after having accepted for not pressing the issue is highly unbecoming of a Public Sector undertaking in the service of public. It is further fortified by the conduct of the appellant of having participated in arbitration proceedings. The conduct of the appellant, as such, is not above board. The reputation of the Presiding Arbitrator, Late Mr. Justice K. Sampath, is well known and he need not record as above. Surprisingly, when the appellant has taken a stand against the particular arbitrator, has not alleged anything against the other two arbitrators of bias or malafides for recording as above, nor denied their participation in the meeting. If at all the appellant was taken by surprise, they should have immediately after the receipt of the Award dated 15.06.2016, filed an application for clarification or modification or correction or a petition under Section 33 for additional award on this aspect. But no such application was filed within thirty days, much less during the lifetime of the Presiding Arbitrator. Having kept silence for long, the appellant shall not take advantage of its own folly and make unethical allegations, that too against a departed soul. I consider it is an afterthought and unsustainable in the eyes of law. The right judgments of the Hon'ble Supreme Court are sought to be wrongly applied.

15. Further submission of non-application of mind in respect of Floor evidence method and Oxygen theory adopted by the Final Surveyor is concerned, the allegation is not



sustainable for a simple reason that the report of the Preliminary Surveyor, appointed by the appellant themselves, was not found fault with till date. The acceptance or reliance placed on the same only is found fault with. The report of the Preliminary Surveyor was filed immediately after inspection and after taking the stock records from the computer on the very same day. The said report is akin to the report of the Forensic auditor, again appointed by the appellant. Except the report of the Final Surveyor namely Velayutham & Co, all reports points towards the direction of total damage. The Final Surveyor alone was digging a lone furrow to suit the convenience of his paymasters by innovating theories. Final Surveyor did not even agree with the findings of the Forensic Auditor appointed by the Insurer himself by adopting Floor Evidence theory. The ashes of the burnt materials by fire at the temperature of 800-900 degree centigrade that was washed away by use of millions of liters of water has not been accounted for. The removal of debris was not taken into account by the Final Surveyor. It is focused on novel methods to restrict the claim on what was available on the floor after everything was burnt and washed away. This court is conscious of the restricted jurisdiction under Sec. 37 of the Act of reappraising the evidence, but is constrained to observe that the Final Surveyor, who filed the report after a period of one year seven months has not come out with the truth and it appears that it is manipulated for the purpose of restricting the liability of compensation. On ERP software, the tribunal ruled that there was 'freezing' of entries because on 20/1/2013 at 09.00 am, digitally recorded, downloaded statements were given. The tribunal has given more than one reason for its finding. This court has gone into the findings in respect of ERP software, expert reports, and the various manual lists from downloaded entries, including manual and physical counting of unaffected stocks by the surveyor, independent of the order of the lower court also, and is more than satisfied that the findings of the tribunal are flawless. The Arbitral Tribunal has rightly relied on the acceptable evidence and I do not find any irrationality or unreasonableness to interfere with the same.

16. All other grounds are purely touching upon the factual aspects such as Non appreciation of error of Preliminary Survey report; Grant of higher compensation; Non- consideration statement of defense contrary to Sec18; Non deduction of reinstatement premium contrary to terms and conditions of the policy; Non consideration of Floor Evidence theory based on remnants of fire and Oxygen theory; Non consideration of justification given not accepting the damage of 4,40,449 kgs of yarn; Arrival of market price of the stock; Ground regarding



debris removal in violation of condition No.6B; Not considering the irrelevancy of SITRA & PSGCT reports; Non consideration of intemperate language, imposition of costs; Violation of Sec 28 (3) of the Act, Or.XVIII Rule 18 of CPC; Failure to exercise of conferred under Section 19 of the Act; and non consideration of the judgments cited on those aspects by the lower court.

17. It is well settled that an appeal U/S 37 shall not be treated as a first appeal to re appreciate the evidence of factual aspects decided by the Tribunal. In respect of factual findings the tribunal would be the final authority. The purpose of arbitration as alternate remedy would be defeated if the grievance of insurer is accepted in treating the appeal as first appeal from a suit or this appeal as a second appeal etc. That is neither contemplated nor permissible.

18. The legal position in this regard is too well settled. Both sides have relied upon several judgments with regard to the scope of Sec.34 and Sec.37 of the Act. While the insurer has contended that as per ONGC -VS- Western Cenco in 2014 (9) SCC 263, the award was contrary to the principles in that judgment, the claimant has also referred to the same judgment for support. Apart from this decision, both sides have furnished several decisions in this respect. Upon reading all of them, this court is satisfied that the award of the tribunal dated 15.06.2016, as confirmed by the orders dated 23.07.2018 in Arb. OP No.172/2016, does not pass the test. The insurer has failed to make out a case under Sec.34 or under Sec.37, either in respect of claim for stocks or in respect of all the other issues raised by them. It may not be necessary to quote each and every judgment cited by either side.

19. It may suffice to refer to and rely upon the judgment of the Hon'ble Supreme Court made in MMTC Ltd., -vs- M/s. Vedanta Ltd, 2019 SCC Online SC 220, latest of the verdicts which has referred to all the earlier judgments and the scope of both Sections 34 & 37

"11. As far as Sec.34 is concerned, the position is well -settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii), i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the



WEB COPY

fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2) (b) (ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See *Associate Builders v. DDA*, (2015) 3 SCC 49). Also see *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705; *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 SCC 445; and *McDermott International v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181).

It is relevant to note that after the 2015 amendments to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2A) has been inserted in Section 34, which provides that in case of



WEB COPY

domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

12. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the Court under Section 34 and by the Court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.

13. Having noted the above grounds for interference with an arbitral award, it must now be noted that the instant question pertains to determining whether the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. However, this question has been addressed by the Courts in terms of the construction of the contract between the parties, and as such it can be safely said that a review of such a construction cannot be made in terms of re-assessment of the material on record, but only in terms of the principles governing interference with an award as discussed above.

.....

24. Based upon the above discussion, in our opinion, the view taken in the Majority Award, as confirmed by the High Court in the exercise of its powers under Sections 34 and 37 of the 1996 Act, is a possible view based upon a reasonable



construction of the terms of the agreement dated 14.12.1993 between the Appellant and the Respondent and consideration of the material on record”

WEB COPY

20. And to quote further from P.R. Shah Shares & Stock Brokers vs M/S. B.H.H. Securities (P) Ltd. & Ors. 2012 (1) SCC 594. It has been held thus:

“ A court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in section 34 (2) of the Act. The arbitral tribunal has examined the facts and held that both second respondent and the appellant are liable.

.....Therefore, in the absence of any ground under section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

21. In the case of Associate Builders -Vs- Delhi Development Authority, 2015(3) SCC 49, it has been held thus:

“ This Section 34 in conjunction with Section 5 makes it clear that an arbitration award that is governed by part I of the Arbitration and Conciliation Act, 1996 can be set aside only on grounds mentioned under Section 34 (2) and (3), and not otherwise. Section 5 reads as follows:

“5. Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”

It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimize the supervisory roles of courts in the arbitral process.”

Reference may be made to the following two decision also. Oil and Natural Gas



WEB COPY

Corporation Limited vs Western Geco International Limited, 2014 (9) SCC 263, the Hon'ble Supreme Court has observed at paragraph Nos.34 to 40 as follows:

It is true that none of the grounds enumerated under Section 34 (2) (a) were set up before the High Court to assail the arbitral award. What was all the same urged before the High Court and so also before us was that the award made by the arbitrators was in conflict with the public policy of India ground recognised under Section 34 (2) (b) (ii) (supra).

What then would constitute the Fundamental policy of Indian Law is the question. The decision in *Saw Pipes Ltd.* (supra) does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression Fundamental Policy of Indian Law, we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a judicial approach in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the for a concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner.



WEB COPY

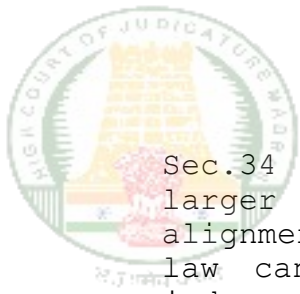
Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge.

22. In the case of Swan Gold Mining Ltd -Vs- Hindustan Copper Ltd, 2015(5) SCC 739, it has been held thus:

"Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal.

It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him."

23. From the above extracts this court is more than satisfied that it is only in very limited cases there is scope for interference with an award under Secs.34 and/or Sec.37.



WEB COPY

Sec.34 is restricted in its scope. If so, Sec.37 cannot have a larger scope. Sec.37 would therefore have to be considered in alignment with the limited scope of Sec.34. This position of law can be explained better on the basis of the following judgment relied upon by the claimant.

24. In the case of NHAH vs M/S. BSC-RBM-PATI JOINT VENTURE ON 24 JANUARY, 2018 (DEL) - 2018 SCC Online SC Del 6780. It has been held thus:

"10. Before proceeding to examine the various claims - to the extent such examination would be warranted or justified in exercises of our jurisdiction under Section 37 of the Act, - we may reproduce the following passages, from our earlier decision in M.T.N.L. v Finolex Cables Ltd, MANU/DE/2818/2017, wherein we have, after examining the law laid down in by various judgments rendered by the Supreme Court in this regard, delineated the contours of the jurisdiction of this Court, under Sections 34 and 37 of the Act, thus:

"40. The extent of jurisdiction of the court while dealing with the challenge to an arbitral award, by now, stands authoritatively examined by a plethora of pronouncements of the Supreme Court, which travel from the judgment reported at 1994 Supp (1) SCC 644, Renuagar Power Co. Ltd. v. General Electric Co. to (2015) 3 SCC 49, Associated Builders v. DDA. On an analysis of all the said decisions, this court has, in a recent judgment reported at MANU/DE/2699/2017, NHAH v. Hindustan Construction Co. Ltd., delineated the following propositions :

"36. Associated Builders v. DDA, (2015) 3 SCC 49, may justifiably be christened as the high watermark in the law relating to Section 34 of the Act, and any attempt to paraphrase the decision is fraught with the risk of mutilation. The decision is, almost entirely, definitively authoritative, and brooks no ambiguity or anomaly. Nonetheless, in view of the proliferation of litigation, challenging arbitral awards, in recent times, we have, in a recent decision, dated 10th August 2017, in Shiam Cooperative Group



WEB COPY

v Kamal Construction Co. Ltd., extracted, in extenso, the relevant paragraphs from the said decision, and respectfully culled, there from, the following clear principles:

(i) The four reasons motivating the legislation of the Act, in 1996, were

(a) to provide for a fair and efficient arbitral procedure,

(b) to provide for the passing of reasoned awards,

(c) to ensure that the arbitrator does not transgress his jurisdiction, and

(d) to minimize supervision, by courts, in the arbitral process.

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if

(a) it is contrary to the fundamental policy of Indian law, or

(b) it is contrary to the interests of India,

(c) it is contrary to justice or morality,

(d) it is patently illegal, or

(e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.

(iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if

(a) it disregards orders passed by superior courts, or the binding effect thereof, or

(b) it is patently violative of statutory provisions, or

(c) it is not in public interest, or

(d) the arbitrator has not adopted a "judicial approach", i.e. has not acted a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or

(e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or

(f) the arbitrator has drawn an inference,



WEB COPY

from the facts, which, on the face of it, is unreasonable, or

(g) the principles of natural justice have been violated.

(v) The "patent illegality" had to go to the root of the matter. Trivial illegalities were inconsequential.

(vi) Additionally, an award could be set aside if

(a) either party was under some incapacity, or

(b) the arbitration agreement is invalid under the law, or

(c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

(d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

(e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(g) the award contravenes the Act, or

(h) the award is contrary to the contract between the parties.

(vii) "Perversity", as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which

(a) the findings, in the award, are based on no evidence, or

(b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or

(c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) At the same time,



WEB COPY

(a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse",

(b) if the view adopted by the arbitrator is a possible view, it has to pass muster,

(c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.

(ix) "Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.

(x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.

(x) The court cannot sit in appeal over an arbitration award. Errors of fact cannot be corrected under Section 34. The arbitrator is the last word on facts."

41. It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the ld. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at MANU/DE/0459/2015, MTNL v. Fujitshu India Pvt. Ltd. (FAO(OS) No. 63/2015), the Division Bench of this court has held that "an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34". Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous



WEB COPY

on facts or in law, or manifestly perverse."

"19. Our Findings 19.1 We have already highlighted, hereinabove, the limited arena of the jurisdiction of this Court, in the matter of interference with arbitral awards, under Sections 34 and 37 of the Act. The position that emerges from the law, as it stands crystallized today, is, clearly, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. It is only where the finding is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is necessary. The arbitrator/Arbitral Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. Insofar as the ultimate view of the learned arbitrator/ Arbitral Tribunal, on any issue is concerned, so long as the view is plausible, and not merely possible, this Court would be loath to interfere therewith. We may usefully make reference, in this regard, to the following postscript, entered by this Court in its judgment in P.C.L Suncon (JV) v N.H.A.I., MANU/DE/3364/2015:

"As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petition before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to



WEB COPY

submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost".

"We are of the view that the impugned award of the learned Tribunal suffers from no infirmity whatsoever and, in fact, exhibits commendable effort, on the part of the learned Tribunal to resolve the controversy. There can be no question, therefore, of any interference therewith, by this Court, either under Section 34 or under Section 37 of the Act. Any such interference would be a gross disservice to the very institution of arbitration, and the laudable purposes for which the Act was enacted, superseding the earlier Arbitration Act of 1940, under which such challenges were the norm."

"20. A Final Word 20.1 Before parting with this judgment, we are constrained to note that, in case after case, we find that factual findings, in respect of which the learned Arbitral Tribunal is the final authority, are being successively challenged, under Section 34 and thereafter, under Section 37 of the Act. This has effectively reduced the exercise of arbitration to the civil trial, and petitions under Sections 34 and 37 of the Act to first appeals and second appeals. In fact, while second appeals under Section 100 of the Civil Procedure Code, 1908, would lie only on questions of law, we find that arbitral awards are being challenged, even on facts, under Section 37 of the Act. Despite wealth of judicial authority on this point, and repeated disapproval voiced by the Supreme Court and as well as several High Courts including this Court thereon, it is almost invariably seen that every award passed by the arbitrator/Arbitral Tribunal, especially, where the awards are commercial in nature, are challenged, first before the



WEB COPY

Single Judge. Before proceeding to examine the various claims - to the extent such examination would be warranted or justified in exercises of our jurisdiction under Section 37 of the Act, - we may reproduce the following passages, from our earlier decision in M.T.N.L. v Finolex Cables Ltd, MANU/DE/2818/2017, wherein we have, after examining the law laid down in by various judgments rendered by the Supreme Court in this regard, delineated the contours of the jurisdiction of this Court, under Sections 34 and 37 of the Act, thus: of the material on record."

25 . In the light of the above referred judgments, the legal position is very clear that interference with factual findings of the Arbitral Tribunal u/34 & 37 of the Act would amount to gross disservice to the very institution of Arbitration itself. The award of the Tribunal is very detailed and comprehensive. When the Tribunal has applied its mind and given a reasoned award and the Lower Court has accepted the said findings in paras 15 to 23 of its order dated 23.07.2018, there is no case for the insurer to insist on further appreciation of the evidence or re-appreciation of it. Merely because there can be another point of view, the insurer cannot challenge the award. Both the award dated 15.06.2016 and the orders dated 23.07.2018 are in order and there is no merit in this appeal.

26. In view of the discussions above the quantum awarded need not be interfered, since the appeal is found to be not fit for interference. Once the award dated 15.06.2016, as upheld by the Lower Court in orders dated 23.07.2018, is accepted as legal, there is no requirement to examine whether the award under each head is correct or not. The insurer shall be liable for the principal award amount with interest liability at 18% p.a. on and from 15.09.2016 till date of realisation along with costs Rs.25,00,000/- awarded by the Tribunal.

27. On interest liability, award carries interest at 11% p.a. from 01.01.2014 till date of award. Thereafter, the award shall carry interest at 18% p.a. if the insurer failed to pay the same within three months. The accident happened in the year 2013 and it is submitted that the Claimant is continuously covered by the policy of insurance by the appellant. The Claimant would have suffered severe financial loss due to the fire accident. In such an event the insurance claims deserve to be settled early. If the insurer failed to settle it in time,

20/21



the claimants would suffer further financial prejudice. 11% p.a. is very reasonable till date of award. Thereafter, the insurer having had the benefit of stay till date, cannot avoid paying interest liability at 18% p.a., that too with a default clause. Accordingly, there is no scope for interference on interest liability also. On costs, the Tribunal has granted a lumpsum of Rs.25,00,000/-, which considering the nature of the dispute, the stakes involved, the present day costs and expenses in arbitration proceedings, is fair and just. Insurer cannot avoid the same.

28. On a combined consideration of the factual and legal matrix, in this appeal, this court is satisfied that the insurer has not made out a case for interference either under Sec.34 or under Sec.37. In fine, this appeal doesn't merit consideration and accordingly dismissed The award dated 15.06.2016 of the Arbitral Tribunal and the orders dated 23.07.2018 made in Arb. O.P. No.172/2016, on the file of Principal District Court, Erode are confirmed.

29. Accordingly, the insurer shall pay the sum of Rs.7,04,96,093/- being loss/damage to stock, building, plant and machinery in fire accident dated 19.01.2013 under two contracts of insurance along with interest at 18% p.a. from 15.09.2016 till date of realisation and cost of Rs.25,00,000/- as awarded by the Arbitral Tribunal within four weeks hereof.

There shall be no orders as to costs in this appeal.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

To
The Principal District Judge, Erode

Pre-delivery order in
CMA NO.1094 OF 2019
&
C.M.P.No.3065 of 2019

pp(co)
aa08/07/2020