

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 23.12.2019
Date of decision: 08.01.2020

+ **FAO(OS) (COMM) 376/2019 & CM APPL.54928/2019**

M/S. UBV INFRASTRUCTURE LTD.

..... Appellant

Through: Mr. Moni Cinmoy and Mr. Bipin
Parshant, Advocates

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIARespondent

Through: None

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ASHA MENON, J.

1. This appeal has been filed by the appellant/petitioner under Section 13 of the Commercial Courts Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') against the judgment dated 11.10.2019, passed by the learned Single Judge dismissing a petition filed by it under Section 34 of the Act, challenging the Award dated 15.12.2016 of the Arbitral Tribunal (for short, 'AT').

2. The relevant facts of the case may be noted at the outset. Tenders were invited by the respondent/National Highways Authority of India (for short, 'NHAI') for the work of four laning in the Lucknow – Kanpur Section of NH-25 in the State of U.P.. The appellant/petitioner, previously known as Rana Projects International Ltd., was the successful bidder and a formal

agreement was entered into between the parties on 12.08.1999, with the contract price of Rs.39,82,01,266/-. The work was to be completed within 24 months. However, the time for completion was subsequently extended upto 27.12.2001. On 11.10.2002, the respondent/NHAI terminated the contract and took over the Plant and Machinery lying at the site and pursuant to court orders in a petition filed by the respondent/NHAI under Section 9 of the Act, the Receiver appointed on 06.12.2004, took symbolic possession of the Plant and other Stores.

3. On termination of the contract, the respondent/NHAI invoked the arbitration clause and raised 10 Claims before the AT. The said Claims, as reproduced in the impugned judgment, were as follows: -

*“(a) **Claim No.1** - Repayment of balance mobilization advance of INR 1,98,37,753;*

*(b) **Claim No.2** - Repayment of balance secured advance of INR 7,06,422;*

*(c) **Claim No.3** - Deduction on account of sales tax on column 6 of INR 1,08,967;*

*(d) **Claim No.4** - Deduction of payments made to Dispute Re view Expert of INR 13,314;*

*(e) **Claim No.5** - Deduction on account of rain cuts and poor quality of INR 2,00,000;*

*(f) **Claim No.6** - Liquidated damages of INR 2,65,56,000 levied;*

*(g) **Claim No.7**- Other recoveries of INR 39,05,148.00;*

*(h) **Claim No.8** - Recoveries on balance 20 % work of INR 6,06,10,606.43;*

*(i) **Claim No.9** – Interest;*

*(j) **Claim No. 10** - Costs of arbitration and other legal expenses of INR 1,00,000.”*

4. The appellant/petitioner also filed 20 Counter-Claims, that have been reproduced in the impugned judgment, as below: -

*“(a) **Counterclaim No.1** -A sum of INR 3,55,30,000 in respect of the idling of men, staff and machinery from 1 October 1999 to 29 December 1999;*

*(b) **Counterclaim No.2** - A sum of INR 8,85,90,675 in respect of losses suffered on account of partial idling / underutilization of men, staff and machinery from 29 December 1999 to 13 January 2000, 14 January 2000 to 29 June 2000 (at 50%) and 30 June 2000 to 11 October 2002 (at 25%);*

*(c) **Counterclaim No.3** - A sum of INR 1,96,33,020 payable to the Petitioner in respect of work done but not paid, retention money not paid, amount encashed against performance guarantee, amounts withheld in respect of interim payments, amounts illegally deducted towards liquidated damages from 19th running account bill and other amounts.*

*(d) **Counterclaim No.4-** A sum of INR 4,92,34,115 being the loss of profit because of the wrongful termination;*

*(e) **Counterclaim No.5** - A sum of INR 17,15,480 being the market rate of the work executed beyond the time stipulated under the terms of the Agreement;*

*(f) **Counterclaim No.6** - A sum of INR 1,46,74,035 being the "forced acceptance of Bid";*

*(g) **Counterclaim No.7** - A sum of INR 5,00,00,000 in respect of damages to the business of the Petitioner caused by the wrongful termination and sudden invocation of the Bank Guarantee;*

*(h) **Counterclaim No.8** - A sum of INR 20,00,00,000 in respect of damages to the business of the Petitioner caused by blacklisting of the Petitioner;*

*(i) **Counterclaim No.9** - Return of plant, machinery and equipment confiscated by the Respondent alongwith compensation in respect of tentative cost for bringing the plant,*

machinery and equipment to the stage of operation;

*(j) **Counterclaim No.10** - A sum of INR 10,02,54,000 payable as compensation in respect of the rent lost by the Petitioner because of the confiscation of the plant, machinery and equipment by the Respondent;*

*(k) **Counterclaim No.11** - A sum of INR 5,64,30,520 being the loss due to depreciation of the machinery for the period in which the machinery was confiscated by the Respondent;*

*(l) **Counterclaim No.12** - A sum of INR 2,47,25,673 being the interest lost on loans obtained by the Petitioner due to the confiscation of the plant, machinery and equipment by the Respondent;*

*(m) **Counterclaim No.13** - A sum of INR 1,71,57,829 being the loss of profits suffered from the Stop Date till the date of wrongful termination;*

*(n) **Counterclaim No.14** - A sum of INR 5,22,880 payable towards extension of bank guarantee after the Stop Date;*

*(o) **Counterclaim No.15** - A sum of INR 10,45,761 payable in respect of losses suffered by the Petitioner for the margin money which remained unused after the Stop Date;*

*(p) **Counterclaim No.16** - A sum of INR 2,53,93,719 payable in respect of overheads for the prolonged / extended period of the Agreement;*

*(q) **Counterclaim No.17** - A sum of INR 22,08,750 payable in respect of the loss suffered by the Petitioner due to underutilization of the infrastructure because of the wrongful termination of the Agreement;*

*(r) **Counterclaim No.18** - A sum of INR 1,47,09,946 payable for the material lying at the site but illegally confiscated by the Respondent;*

*(s) **Counterclaim No.19**- Interest;*

*(t) **Counterclaim No.20**- Costs of the arbitration.”*

5. The AT allowed Claim Nos.1, 3, 4 & 5, rejected Claim Nos. 2, 6 and

10 and partly allowed Claim Nos. 7 and 8 of the respondent/NHAI. As for the appellant/petitioner, all its Counter-Claims were rejected by the AT save Counter-Claim Nos.3(i) and 3(iv) which were partly allowed and Counter-Claim Nos. 3(ii), 3(iii) and 3(v) were allowed in toto. Thus, the AT awarded a net amount of Rs.1,30,53,194/- in favour of the respondent/NHAI, in terms of Clause 60.1 of the contract with interest @ 9% w.e.f. 01.02.2006, till the date of the Award i.e. 15.12.2016, amounting to Rs.1,27,75,814/- and further interest @ 9% on the total sum of Rs.2,58,29,008/- w.e.f. 16.12.2016, till the date of actual payment.

6. It may be mentioned here that the respondent/NHAI did not challenge the Award dated 15.12.2016. On the other hand, the appellant/petitioner filed a petition under Section 34 of the Act challenging the Award on several grounds, but at the time of arguments, chose to press only the objections raised in respect of Claim No.8 that the AT had awarded in favour of the respondent/NHAI. Additionally, a grievance was raised against the rejection of its Counter-Claim Nos.9 & 10. After considering the pleas taken on behalf of the appellant/petitioner, the learned Single Judge dismissed its Section 34 petition which has brought it before us.

7. At the outset, we may delineate the scope of interference in a Section 37 petition, as was discussed by us in a recent judgment in Ministry of Youth Affairs & Sports vs. Swiss Timing Ltd., reported as **2019 SCC Online Del. 10934**, relevant paras whereof are reproduced herein below:-

“19. We are also mindful of the law on interference by the courts in respect of findings of facts based on appreciation of evidence, returned by the Arbitral Tribunal. In Sutlej Construction Limited Vs. Union Territory of Chandigarh reported as (2018) 1 SCC 718 the Supreme Court has held as follows: -

*“11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the Court and would not include what the Court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be “justice”. **Associate Builders v. DDA, (2015) 3 SCC 49.***

*12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of reappreciating the evidence as the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. **(Sudarsan Trading Co. v. State of Kerala [Sudarsan Trading Co. v. State of Kerala, (1989) 2 SCC 38; Harish Chandra & Co. v. State of U.P., (2016) 9 SCC 478 and Swan Gold Mining Ltd. v. Hindustan Copper Ltd., (2015) 5 SCC 739.***

13. The learned Single Judge ought to have restrained himself from getting into the meanderings of evidence appreciation and acting like a second appellate court. In fact, even in second appeals, only questions of law are to be determined while the first appellate court is the final court on facts. In the present case, the learned Single Judge has, thus, acted in the first appeal against objections dismissed as if it was the first appellate court against a decree passed by the trial court.”

20. In Ssangyong Engineering Construction Co. Ltd. vs. National Highways Authority of India reported as **2019 SCCOnline SC 677**, the Supreme Court has reiterated the aforesaid view in the following words: -

35. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental

policy of Indian law” as explained in paragraphs 18 and 27 of **Associate Builders (supra)**, i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the **Western Geco (supra)** expansion has been done away with. In short, **Western Geco (supra)**, as explained in paragraphs 28 and 29 of **Associate Builders (supra)**, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of **Associate Builders (supra)**.

36. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paragraphs 36 to 39 of **Associate Builders (supra)**, as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of **Associate Builders (supra)**, or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of **Associate Builders (supra)**. Explanation 2 to Section 34(2)(b)(ii)

*and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that **Western Geco (supra)**, as understood in **Associate Builders (supra)**, and paragraphs 28 and 29 in particular, is now done away with.*

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.”

*21. Reliance is also placed on a recent judgment dated 18.10.2019 passed by the Supreme Court in **SLP No.13117/2019, The State of Jharkhand and Ors. vs. M/s HSS Integrated SDN and Anr.**, wherein it has been emphasised that the Award passed by an Arbitral Tribunal can be interfered with in proceedings under Sections 34 and 37 of the A&C Act only in a case where the finding is perverse and/or contrary to the evidence and/or the same is against public policy. In the instant case, none of the above circumstances exist for interference.”*

8. Thus a scrutiny conducted under Section 37 of the Act is more in the nature of a judicial review, only to consider as to whether the learned Single Judge, in exercise of the powers under Section 34 of the Act has overlooked any patent error that may have crept in the Award or has taken a glaringly preposterous and legally unsustainable view, which would call for

interference.

9. While addressing arguments before us, Mr. Cinmoy, learned counsel for the appellant/petitioner did not lay any stress on the rejection of Counter-Claim No.10 by the AT, which was a matter of challenge in the Section 34 petition, but he submitted that the learned Single Judge has overlooked crucial material while upholding the Award qua Claim No.8 granted in favour of the respondent/NHAI. Learned counsel also submitted that though the respondent/NHAI had confiscated the Plant and Machinery and equipment of the appellant/petitioner, it had allowed it to deteriorate in value and had thereafter, auctioned the said equipment at a devalued price of Rs.73,52,333/-, but had failed to give any adjustment of the said amount to the appellant/petitioner. It was argued that a set off for the said amount ought to have been given to the appellant/petitioner.

10. Taking the latter contention first, when queried, learned counsel for the appellant/petitioner conceded that the issue of set off was neither raised, nor argued before the learned Single Judge. That being the position, the appellant/petitioner cannot be permitted to take the said ground before us for the very first time. We decline to examine the said ground. Even otherwise, we do not find any merit in the submission made by the learned counsel for the appellant/petitioner for claiming set off inasmuch as under Clause 61 of the GCC, it was agreed that the property lying at the site would vest with the respondent/NHAI as the contract was terminated on account of the fault of the appellant/petitioner. The AT as well as the learned Single Judge were therefore right in concluding that when the appellant/petitioner had no right, title or interest left in the Plant and Machinery at the site on termination of the contract, there was no occasion for granting it any amount towards the

tentative costs for making the Plant and Machinery and equipment operational.

11. Reverting to the first argument of the learned counsel for the appellant/petitioner that Claim No.8 had been partly awarded by the AT in favour of the respondent/NHAI against all principles of natural justice and that the learned Single Judge had overlooked the fact that the AT had followed an improper procedure to award the said amount, we find no reason to differ with the said conclusion drawn by the learned Single Judge. It may be noted that Claim No.8 of the respondent/NHAI was towards recovery of balance 20% work to the tune of INR 39,82,01,266/- which they had pegged at INR 6,06,10,60,643/-. According to the learned counsel for the appellant/petitioner, documentary evidence in support of additional costs incurred towards balance work remaining on termination of the contract, had not been produced before the AT and it was subsequently called for by the AT after orders were reserved, against which one of the arbitrators had recorded a dissent note. This Claim was based on serial No.40 of the Contract Data and Clause 60 of the GCC which entitled the respondent/NHAI to recover from the appellant/petitioner, a sum equivalent to 20% of the value of the work not completed towards additional costs for completion of the work. The respondent/NHAI had claimed a sum of Rs.6,06,10,60,643/- on the ground that the appellant/petitioner had committed a fundamental breach of the contract by providing forged bank guarantees. The AT as well as the learned Single Judge have observed that the appellant/petitioner had submitted forged bank guarantees and it could not claim ignorance or plead victimization by its agent as there were institutional requirements for opening, maintaining and renewing of bank

guarantees prescribed by the Bank, which the appellant/petitioner had to conscientiously comply with. Therefore, the appellant/petitioner could not wriggle out of its liability having committed a fundamental breach of the contract.

12. Conditions of termination have been provided for in Clause 59 of the GCC, as follows: -

“59. Termination.

59.1 The Employer or the Contractor may terminate the Contract if the other party causes at fundamental breach of the Contract.

59.2 Fundamental breaches of Contract include, but shall not be limited to the following:

- (a) xxx xxx xxx*
- (b) xxx xxx xxx*
- (c) xxx xxx xxx*
- (d) xxx xxx xxx*
- (e) xxx xxx xxx*
- (f) xxx xxx xxx*
- (g) xxx xxx xxx*

(h) if the Contractor, in the judgment of the Employer has engaged in corrupt or fraudulent practices in competing for or in the executing the Contract.

For the purpose of this paragraph: “corrupt practice” means the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement process or in contract execution. “Fraudulent practice” means a misrepresentation of facts in order to influence a procurement process or the

execution of a contract to the detriment of the Employer, and includes collusive practice among Bidders (prior to or after bid submission) designed to establish bid prices at artificial non-competitive levels and to deprive the Employer of the benefits of free and open competition.”

13. Under Clause 40 of the Contract Data, the percentage required to be applied to the value of the work not completed, representing the employers’ additional cost for completing the works, was agreed between the parties at 20%. The learned Single Judge upheld the unanimous view taken by the AT that by providing forged bank guarantees, the appellant/petitioner had caused a fundamental breach of the contract. A natural corollary to that was that the appellant/petitioner had to pay costs equal to 20% of the balance work. It is to be noticed that additional liquidated damages for which there was a separate provision, were not payable under Clause 60 of the GCC whereunder an amount became payable on account of termination of contract for committing a fundamental breach.

14. Thus, the contention of the learned counsel for the appellant/petitioner that evidence was required to be produced by the respondent/NHAI before any amount could be awarded under this head, cannot be accepted. In any case, ultimately, the AT did not look into the additional documents and evidence provided by the respondent/NHAI after conclusion of the hearing and therefore, no prejudice has been shown to have been caused even if such documents were sought by the AT. What was finally awarded by the AT, i.e. Rs.2,85,07,967.14/-, works out to be far below 20%, as was claimed by the respondent/NHAI under Claim No.8 that was raised for a sum of

Rs.6,06,10,60,643/-. The said claim was not allowed in entirety by the AT and only a part thereof was awarded. In this context, the learned Single Judge has observed as below: -

“31.In my opinion, the view of the Tribunal that once the petitioner had submitted forged Bank Guarantees, the respondent had rightly invoked Clause 59 and terminated the contract is not only a possible but a plausible view. Thus, Claim No.8 has rightly been allowed by the Tribunal in favour of the respondent. The Tribunal has interpreted the terms of the contract and based on the documents, has come to a finding holding the petitioner responsible for furnishing forged Bank Guarantees. It is a settled law that the Tribunal is the master of facts and evidence led before it.”

15. The aforesaid conclusion does not appear erroneous on the material before us. As discussed hereinabove, the scope of an appeal under Section 37 of the Act is far more restricted than the scope of a petition under Section 34 of the Act. There is no illegality in the procedure adopted by the learned Single Judge in the disposal of the petition filed by the appellant/petitioner under Section 34 of the Act and nor is there any perversity that shocks the conscience of the court.

16. In the light of the foregoing discussion, the impugned judgment is upheld and the appeal is dismissed *in limine* alongwith the pending application.

**(ASHA MENON)
JUDGE**

**(HIMA KOHLI)
JUDGE**

JANUARY 08, 2020/s