

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

FIRST APPEAL NO.240 OF 2007

State of Maharashtra
Through Executive Engineer,
Public Works Division No.1,
Chandrapur 442 401

... Appellant

-vs-

1. Khare & Tarkunde
Infrastructure Pvt. Ltd.,
1st Floor, Shivaji Complex
235, WHC Road, Dharampeth,
Nagpur 440 010

2. R. H. Tadvī,
Retd. Chief Engineer,
Sole Arbitrator,
r/o Wanawdi Clover's Village,
Pune-4

... Respondents

WITH

FIRST APPEAL NO.213 OF 2007

Khare & Tarkunde
Infrastructure Pvt. Ltd.,
1st Floor, Shivaji Complex
235, WHC Road, Dharampeth,
Nagpur 440 010

... Appellant

-vs-

1. State of Maharashtra
Through Executive Engineer,
Public Works Division No.1,
Chandrapur 442 401

2. R. H. Tadvī,
Retd. Chief Engineer,
Sole Arbitrator, Pune
r/o Wanawdi Clover's Village,
Pune-4

... Respondents

Shri P.K. Sathianathan, Special Counsel for appellant in F.A.No.240/2007 and for respondent No.1 in F.A.No.213/2007

Shri J. P. Pendsey, Advocate with Shri R. S. Charpe, Advocate for respondent No.1 F.A.No.240/2007 and for appellant in F.A.No.213/2007

CORAM : A. S. CHANDURKAR AND N. B. SURYAWANSHI JJ.

Date on which the arguments were heard : 1st February, 2021

Date on which the judgment was pronounced : 18th February, 2021

Judgment : (Per A. S. Chandurkar, J.)

These appeals filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, the Act of 1996) take exception to the judgment of the learned Principal District Judge, Chandrapur in Misc. Civil Application (Arbitration) No.63/2004 dated 15/12/2006. By that judgment the application filed by the appellant in First Appeal No.240/2007 under Section 34 of the Act of 1996 challenging the award passed by the sole Arbitrator on 04/03/2004 came to be partly allowed by maintaining the award of the Arbitrator dated 04/03/2004 on all counts except one. The only modification directed by the learned Principal District Judge was in the rate of future interest which was reduced from 25% per annum to 18% per annum from the date of the award till realization. The original applicant being aggrieved by the judgment of the learned Principal District Judge in so far as it maintained the award passed by the Arbitrator has preferred First Appeal No.240/2007. The original claimant being aggrieved by the reduction in the rate of interest from 25% per annum to 18% per annum has challenged that part of the judgment by preferring First Appeal

No.213/2007.

2. The facts in brief giving rise to these appeals are that the State of Maharashtra through its Public Works Department represented by its Executive Engineer (hereinafter referred to as the applicant) had invited tenders for construction of two bridges on BOT (Build, Operate and Transfer) basis. M/s Khare and Tarkunde Infrastructure Private (Ltd.) (hereinafter referred to as the claimant) submitted its bid which came to be accepted on 01/09/1997. As per the tender document the claimant was entitled to collect toll for a concession period of sixty one months. Accordingly on 01/10/1997 a Work Order was issued to the claimant under which two bridges were to be constructed within a period of twenty four months. While the estimated cost of construction was Rs.226.86 lakhs, the claimant had quoted the cost of construction to be Rs.340 lakhs. The work of construction was completed on 21/10/1998. On 07/08/2003 the toll booths were handed over to the applicant. In terms of the tender document the claimant raised a claim for grant of compensation as well as for extension of concession period on various grounds. This claim was considered by the applicant and it was found that the claimant would be entitled to compensation of an amount of Rs.1,99,24,313/-. In lieu of this amount of compensation the concession period of toll collection was extended for a further period of nine months and seven days. The claimant however was

not satisfied with the compensation as awarded by the applicant. The arbitration clause was accordingly invoked by the claimant and Shri R. H. Tadvī was appointed as sole Arbitrator on 11/09/2003. On the basis of the documentary material relied upon by the parties before the Arbitrator he passed an award on 04/03/2004. He found that the claimant was entitled to the amount of Rs. 5,71,03,932/-. This was after taking into consideration the extended period of concession of nine months and seven days. The amount of compensation determined was directed to be paid with interest at the rate of 25% per annum (compounded monthly). On the basis of the amount of compensation to which the claimant was found entitled the Arbitrator evaluated the same in terms of the concession period which was twenty four months and twenty seven days.

3. The applicant being aggrieved by the aforesaid award filed an application under Section 34 of the Act of 1996 before the District Court at Chandrapur. According to the applicant the arbitral award was contrary to the provisions of Section 34(2)(a)(iv) as well as Section 34(2)(b)(ii) of the Act of 1996. It was the grievance of the applicant that the Arbitrator had travelled beyond the scope of the dispute referred for arbitration and had thus exceeded jurisdiction. It was also stated that the award was liable to be set aside on the ground that it was in-conflict with the public policy of the country inasmuch as interest at the rate of 25% per annum (compounded

monthly) had been awarded. According to the applicant interest at the rate of 18% per annum at the highest could have been awarded.

The claimant opposed the aforesaid proceedings by filing a reply and supported the award passed by the Arbitrator. It was stated that while extending the initial period of concession of of fifty four months by a period of nine months and seven days the applicant itself had taken into consideration the rate of interest at 25% per annum. Reference was also made to a communication issued by the Chief Engineer of the applicant dated 20/03/2003 in which it had been stated that even on reduction of the rates of interest the bankers did not lower the rate of interest on the loans sanctioned by them. It was denied that the Arbitrator had travelled beyond the scope of the dispute referred to him. The claimant thus sought dismissal of the application filed under Section 34 of the Act of 1996.

4. The learned Principal District Judge after considering the material on record and after hearing the parties found that the parties had appointed an Arbitrator who was earlier a Senior Officer of the Public Works Department. He was having the requisite expertise and experience besides being familiar with the technicalities of the contract. The technical points raised by the parties had been considered by the Arbitrator and in absence of any patent illegality being pointed out there was no scope for interference. There was no material on record to hold that by granting the claim as made

the award as passed was against the public policy of India. Each claim as made was individually examined and the findings recorded by the Arbitrator were confirmed. On the aspect of payment of interest it was found by the learned Principal District Judge that while preparing the cash flow statement the claimant had shown the assumed rate of interest at 25% per annum. This assumed rate of interest was never objected to by the applicant and infact while extending the period of concession by nine months and seven days the same rate of interest had been applied by the applicant. It was thus held that the parties had entered into an agreement by accepting the rate of interest proposed by the claimant in absence of use of the expression “prevalent rate of interest”. It was held that the Arbitrator did not commit any patent illegality while granting the claim after applying interest at the rate of 25% (compounded monthly) per annum. The learned Principal District Judge however was of the view that insofar as grant of future interest was concerned the same could not exceed 18% per annum. Holding that this was the only lacuna in the award, the learned Principal District Judge proceeded to grant future interest at the rate of 18% per annum on the awarded claim from the date of the award till realization instead of 25% per annum. Except for this modification rest of the award came to be maintained. As stated earlier the applicant as well as the claimant have sought to challenge the judgment of the learned Principal District Judge dated 15/12/2006 by filing two separate appeals.

5. Shri P. K. Sathianathan, learned counsel for the applicant sought to challenge the judgment of the learned Principal District Judge passed under Section 34 of the Act of 1996 on the same grounds that were urged before the District Court. Principally he submitted that the Arbitrator was not justified in granting the claim along with interest at the rate of 25% per annum. There was no agreement between the parties under which the claim if any would be payable with interest at the rate of 25% per annum. The interest moreover was compounded monthly. He then referred to various clauses of the tender document to urge that such rate of interest had not been specifically mentioned in the tender notice. Referring to the decision in *Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 705* and especially paragraph 74(A)(2)(ii)(c) thereof it was submitted that since the grant of interest at the rate of 25% per annum was against the terms of the contract and also contrary to the provisions of the Interest Act, 1978 (for short, the Act of 1978), the same was liable to be set aside. By granting interest at the rate of 25% per annum with interest compounded monthly the award was liable to be set aside as it was in conflict with the public policy of India. Reference was made to the provisions of Section 34(2)(b)(ii) of the Act of 1996. He also referred to the decision in *State of Haryana and ors. vs. S.L. Arora and Company (2010) 3 SCC 690* to substantiate his contention. Drawing attention of the Court to the provisions of Section 3 of the Act of 1978 it was submitted that the prevailing rate of interest could not

have been ignored by the Arbitrator while passing the award. Since these aspects were not considered in the proper perspective by the learned Principal District Judge the award was liable to be set aside. He also referred to various grounds raised in the memorandum of appeal to submit that the appeal filed under Section 37 of the Act of 1996 by the applicant ought to be allowed.

6. On the other hand Shri J. P. Pendsey, learned counsel appearing for the claimant besides supporting the award submitted that the learned Principal District Judge was not legally justified in reducing the rate of interest from 25% to 18% per annum insofar as the same was directed to be paid from passing of the award till realization. He referred to the bid submitted by the claimant to urge that while submitting the financial details in the proposal made by the claimant, the assumed rate of interest on debt was taken as 25%. It was on that basis that the total cost of construction was bid at Rs.340 lakhs with a concession period of four years and six months which comes to fifty four months. While issuing the Work Order this concession period of fifty four months was increased to sixty one months by the applicant. He referred to the cash flow statement which was also part of bid of the claimant to submit that even therein interest at the rate of 25% per annum had been taken. He therefore contended that while submitting its bid in response to the tender notice issued by the applicant the interest had

been shown as 25% per annum and all calculations in the proposal were made accordingly. According to the learned counsel the construction of the bridges was to take about two years and as the contractor did not have any security to offer to the financial institutions while raising loan, the rate of interest was naturally high at 25% per annum. He then referred to the award as passed to urge that all objections raised by the applicant before the Arbitrator had been duly considered by the Arbitrator. Referring to the provisions of Section 4 of the Act of 1996 it was submitted that if a party failed to raise objection in the time prescribed before the Arbitrator, such right to object would stand waived. Reference was also made to the provisions of Section 16 of the Act of 1996 in that regard to urge that when specific grounds of challenge are not raised before the Arbitrator, the unsuccessful party is precluded from raising the same in proceedings under Section 34 of the Act of 1996. Further grounds not raised in proceedings under Section 34 of the Act of 1996 could also not be permitted to be raised in appeal under Section 37 of the Act of 1996. Thus in other words it was submitted that the Arbitrator having considered all objections raised before him, the award as passed could not be questioned on grounds that were never raised at the first instance. The applicant did not object to the rate of interest of 25% per annum that was quoted by the claimant and on the contrary after accepting the bid of the claimant the concession period was extended from fifty four months to sixty one months. This conduct of the

applicant indicated that it had voluntarily accepted the proposal and the bid of the claimant after which the Work Order came to be issued. In that regard reference was made to the decision in *MSP Infrastructure Ltd vs. M P Road Development Corporation AIR 2015 SC 710*.

7. The learned counsel then referred to the provisions of Section 31(3) as well as Section 31(7)(b) of the Act of 1996. Prior to the substitution of Section 31 (7)(b) of the Act of 1996 by the Amendment Act No.3 of 2016 it was only if future interest was not awarded by the Arbitrator that the Court could direct payment of 18% interest per annum. In the present case the Arbitrator himself having granted future interest at the rate of 25% per annum there was no jurisdiction with the learned Principal District Judge to reduce the future interest from 25% to 18%. This direction was contrary to the provisions of Section 31(7)(b) of the Act of 1996 prior to its amendment on 23/10/2015. Relying upon the decisions in *MMTC Ltd. vs. Vedanta Ltd. AIR 2019 SC 1168* and *State of Jharkhand & Ors. vs. M.s HSS Integrated SDN & Anr. 2019(9) SCC 798* it was submitted that the scope for interference by the Court under Section 34 and thereafter in appeal under Section 37 of the Act of 1996 was extremely limited and no such ground warranting interference was made out by the applicant. According to the learned counsel various grounds which were not raised before the Arbitrator as well as before the learned Principal District Judge were sought to be

raised for the first time in proceedings under Section 37 of the Act of 1996. The question of the award being contrary to the public policy of India did not arise. Infact the Act of 1996 was in the nature of a Code in itself and it was not necessary to refer to other enactments to seek to reduce the rate of interest. As the terms of a contract coupled with the documents that were part of the proposal submitted by the claimant itself stipulated interest at the rate of 25% per annum, the learned Principal District Judge misdirected himself by reducing the grant of future interest from 25% to 18% per annum. Reference was made to the decision in *M/s Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa through Chief Engineer AIR 2015 SC 856* to indicate the exact meaning of the expression “sum” in Section 31(7)(b) of the Act of 1996.

Attention was invited by the learned counsel for the claimant to the observations in paragraph 121 of the impugned judgment to indicate that the applicant could not rely upon Clause 3.6.11 of the tender notice in view of the fact that the applicant had never informed the claimant regarding change in the lending interest rate by the Reserve Bank of India. Similarly attention was invited to the communication dated 20/03/2003 that was written by the Chief Engineer to the Department of Public Works in which it was stated that the rate of interest that was charged by the financial institutions while lending was not reduced even if the rate of interest was changed by the financial institute. It was thus submitted that besides

dismissing the appeal preferred by the applicant the judgment of the learned Principal District Judge was liable to be modified and the award as passed by the Arbitrator was liable to be restored.

8. The learned counsel for the applicant in reply to the contention raised by the learned counsel for the claimant submitted that there was no document on record placed by the claimant to indicate that it was paying 25% interest to any financial institution and therefore the learned Principal District Judge rightly reduced the rate of future interest. Reference was made to the observations in paragraph 117 of the impugned judgment. Except for reference in the cash flow statement and Form-II submitted by the claimant such rate of interest was not indicated anywhere else nor in the Work Order also. The rate of interest was rightly reduced by the learned Principal District Judge and that direction did not call for any interference. It was thus submitted that the appeal preferred by the claimant was liable to be dismissed.

9. We have heard the learned counsel for the parties at length and we have given due consideration to their respective submissions. We have also perused the written notes of arguments that were relied upon by the learned counsel for the applicant in proceedings under Section 34 of the Act of 1996 and were placed on record alongwith Civil Application

No.350/2021. The present appeals having been filed under Section 37 of the Act of 1996 the scope for interference therein would have to be kept in mind. In this regard a useful reference can be made to the following observations in paragraphs 11 and 12 of the decision in *MMTC Ltd.* (supra) :

11. As far as Section 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) that is 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 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 precepts, 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, 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 possible view based on facts.

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.

10. Perusal of the order passed by the learned Principal District Judge under Section 34 of the Act of 1996 indicates that he has referred to the applicable principles with regard to the scope of interference in an arbitral award. It has been noted that the Court would not be justified in interfering the arbitral award merely because the interpretation with regard to certain terms of the contract were not in accordance with the interpretation of the Court. Thereafter the provisions of Sections 4 and 16 of the Act of 1996 have been referred to and on that basis he did not permit the parties to raise new grounds based on facts that were not raised before the Arbitrator. It was then found that no jurisdictional issues contemplated by Section 16 of the Act of 1996 were raised before the Arbitrator. On that count the award was examined in the light of provisions of Section 34(2)(b) and (ii) of the Act of 1996 to assess whether the award was in conflict with the public policy of India. Each claim considered by the Arbitrator was thereafter independently assessed and a finding was recorded that the award did not indicate any error apparent on record for being interfered with under Section 34 of the Act of 1996. Similarly no patent illegality was also found.

As the reasons given by the Arbitrator were found to be plausible the Court did not find it appropriate to interfere with the same.

On the question of grant of interest at the rate of 25% per annum it was found that till the passing of the award the Arbitrator was justified in awarding that rate of interest in the light of the fact that while preparing the cash flow statement the claimant had shown an assumed rate of interest at 25% per annum. This was never objected to by the applicant. Similarly by referring to Clause 3.6.11 of the tender document it was found that the same was never invoked by the applicant and therefore a finding was recorded that the Arbitrator did not commit any patent illegality while granting the claim of the claimant by taking into consideration the rate of interest at 25% (compounded monthly).

We thus find that the learned Principal District Judge has applied the correct legal principles while examining the award passed by the Arbitrator under Section 34 of the Act of 1996. By giving cogent reasons he has refused to interfere with the award to the extent it accepts the claim of the claimant and grants the same with 25% interest (compounded monthly) *pendente lite*. We therefore do not find any justifiable reasons to interfere with the impugned judgment to the extent the same has been challenged in First Appeal No.240/2007.

11. Coming to the challenge as raised by the claimant to the reduction in the rate of interest from 25% per annum to 18% per annum post award, we find that the learned Principal District Judge has misconstrued the provisions of Section 31(7) (b) of the Act of 1996. A finding has been recorded in the impugned judgment that grant of interest beyond 18% per annum after passing of the award would be contrary to Section 31(7)(b) of the Act of 1996 and therefore in conflict with the public policy of India. In our view this conclusion runs counter to the law laid down by the Honourable Supreme Court in *M/s Hyder Consulting (UK) Ltd.* (supra). In paragraphs 49, 50 and 82 of the said decision it has been observed as under :

“ 49. ... As noticed above, clause (b) is applicable for the period from the date of award to the date of payment. The applicability of clause (b) has also been qualified by the legislature. The said clause uses the phrase “ unless the award otherwise directs”, which would mean that in the even the Arbitral Tribunal, in its award, makes a provision for interest to be imposed in this second stage as envisaged by sub-section (7) of section 31 of the Act, 1996, clause (b) would become inapplicable. By the said award, the Arbitral Tribunal has the power to impose an interest for the post-award period which may be higher or lower than the rate as prescribed under clause (b). Even if the award states that no interest shall be imposed in the post-award period which may be higher or lower than the rate as prescribed under clause (b). Even if the award states that no interest shall be imposed in the post-award period, clause (b) cannot be invoked.

50. If the arbitral award is silent on the question of whether there would be any post-award interest, only in that situation could

clause (b) be made applicable. In the said situation, it would be mandatory as per law that the award would carry interest at the rate of 18% annum from the date of the award to the date of payment.

82. ... Pre-award interest is at the discretion of Arbitral Tribunal, while the post-award interest on the awarded sum is mandate of statute --- the only difference being that of rate of interest to be awarded by the Arbitral Tribunal. In other words, if the Arbitral Tribunal has awarded post-award interest payable from the date of award to the date of payment at a particular rate in its discretion then it will prevail else the party will be entitled to claim post-award interest on the awarded sum at the statutory rate specified in clause (b) of Section 31(7) of the Act that is 18%. ...”

From the aforesaid observations it becomes clear that if the Arbitrator has awarded interest payable from the date of award to the date of payment at a particular rate in his discretion then the same would prevail. Where the Arbitrator has not awarded any interest after the date of the award the party would be entitled to claim post-award interest on the awarded sum at 18% per annum as stipulated in Section 31(7)(b) of the Act of 1996. As noted above the Arbitrator in his award has specifically granted interest at the rate of 25% per annum (compounded monthly) from the date of the award up to its payment. Thus when the award itself directed the applicant to pay interest at the rate of 25% per annum from the date of the award there was no reason for the learned Principal District Judge to invoke the provisions of Section 31(7)(b) of the Act of 1996 for reducing the rate of

post-award interest. It was also not necessary to refer to the provisions of the Interest Act, 1978. As a result there was no jurisdiction to be exercised under Section 34 of the Act of 1996 to reduce the rate of interest awarded by the Arbitrator from 25% per annum to 18% per annum. To that extent the impugned judgment is liable to be interfered with.

12. Thus in the light of aforesaid discussion it is held that the judgment of the learned Principal District Judge dated 15/12/2006 to the extent it confirms the award of the Arbitrator dated 04/03/2004 stands confirmed. Consequently First Appeal No.240/2007 stands dismissed. That part of the impugned judgment reducing the rate of future interest from the date of the award till realization from 25% per annum to 18% per annum is set aside. The award passed by the Arbitrator stands restored. Consequently the claimant would be entitled to grant of future interest at the rate of 25% per annum (compounded monthly).

First Appeal No.213/2007 is allowed in aforesaid terms. Pending applications are also disposed of. Parties to bear their own costs.

JUDGE

JUDGE