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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPEAL NO.15 OF 2020

Godavari Marathwada Irrigation Development Corporation through the Executive Engineer,
Majalgaon Project Division Kesapuri
Camp Majalgaon, District – Beed

APPELLANT

VERSUS

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|---|-------------|
| 1. M/s S. D. Shinde and Sons
Through Mr. S. D. Shinde
26, Parvati Niwas, Yashwant Colony,
Ahmednagar | RESPONDENTS |
| 2. Mr. O. G. Mudiraj | DELETED |

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Mr. Ruturaj C. Patil, Advocate for the appellant
Mr. J. N. Singh, Advocate for respondent No.1

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 6th JUNE, 2022
PRONOUNCED ON : 20th JUNE, 2022

JUDGMENT :

1. This appeal is directed against judgment and order dated 10th October, 2018 passed by the District Judge, Beed in Miscellaneous Civil Application (ARB) No. 91 of 2016 against the appellant.
2. The appellant is a body corporate established as per the State of Maharashtra Act No. XXIII of 1998 as "*Godawari*

Marathwada Irrigation Development Corporation Act, 1998". The appellant invited tender for construction of Ganga-Masla Branch-Canal KM 0 to 16 LCB-2 of 1986-87 and the amount of tender, as per estimate was Rs.1,16,08,533/-.

3. By accepting the bid of the respondent – contractor, the work was allotted to him by issuing work order on 8th September, 1986. The respondent failed to complete the work within the stipulated period. Hence, the appellant terminated the contract on 9th January, 1990.

4. After termination of the contract, the respondent submitted his claim, which was denied by the appellant. The respondent, therefore, went in arbitration. Shri. V. B. Shimpi was appointed as the sole Arbitrator to settle the dispute. The Arbitrator passed an Award on 29th January, 1995. The respondent then filed an application in Civil Court at Beed for getting the amount awarded by the Arbitrator, which was registered as Regular Civil Suit No.44 of 1995. The Civil Court passed an interim order directing the appellant to deposit Rs.26,62,856/- by order dated 21st November, 1995. Accordingly, the said amount was deposited by the appellant in the District Court on 16th December, 1995. The learned Civil Judge, Senior Division, Beed, after hearing the parties, by order dated 31st December, 1996, remitted the

matter back to the Arbitrator for conducting fresh arbitration proceedings in accordance with law.

5. The judgment of the Civil Court was challenged by the appellant, by filing Civil Revision Application No. 143 of 1997. After hearing the parties, the Civil Revision Application was dismissed by this Court. The said order of dismissal was questioned by the appellant before the Hon'ble Supreme Court in Civil Appeal No. 640 of 1998. The Apex Court, relegated the matter back to this Court for decision in the Civil Revision Application, on merits, by order dated 17th September, 2003. The Civil Revision Application came to be dismissed by this Court vide order dated 5th April, 2004.

6. Since, there was dispute about appointment of the arbitrator, by consent of the appellant and the respondent, on 17th January, 2006, Shri. O. G. Mudiraj was appointed as an arbitrator. In spite of the fact that, the appointment of the Arbitrator was by consent, the appellant unsuccessfully challenged the said appointment by filing Writ Petition No. 3562 of 2006. The sole Arbitrator Shri. Mudiraj, thereafter commenced the Arbitration Proceedings. The appellant again, after three dates of hearing before the Arbitrator, challenged his appointment by filing Writ Petition No. 11704 of 2010, which was

dismissed on 11th November, 2014. The Arbitrator, thereafter, passed an Award of Rs.93,05,800/-, including the earlier amount.

7. The appellant challenged the said award by filing Miscellaneous Civil Application (ARB) No. 91 of 2016 under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter for short, "the said Act") before the District Judge, Beed, on various grounds. The learned District Judge dismissed the Miscellaneous Civil Application of the appellant. The appellant is aggrieved by the Award passed by the sole Arbitrator and the order passed by the District Judge.

8. Heard learned advocate for the appellant and learned advocate for the respondent at length. Perused the documents.

9. Learned advocate for the appellant assailed the award of the Arbitrator and the decision of the District Court, contending that there is no evidence on record to substantiate the claim raised by the respondent before the Arbitrator. The claims raised by the respondent are mechanically granted, merely for asking. He further challenged the interest paid by the respondent on the bank guarantee, contending that it was only because this Court had directed the respondent to furnish bank guarantee for

withdrawal of the amount deposited by the appellant and on furnishing bank guarantee, the respondent had withdrawn the amount deposited by the appellant. Even the Apex Court has recorded in the order passed in Special Leave Petition (Civil) No. 8477 of 2020 that the respondent had shown willingness to furnish bank guarantee for withdrawal of the remaining amount. He further submits that since the respondent failed to furnish bank guarantee, the said Special Leave Petition was dismissed for non compliance of the order of the Apex Court. He, therefore, submits that it was improper on the part of the Arbitrator as well as the District Court to award interest on the bank guarantee. According to him, the findings recorded by the Arbitrator, while granting interest on the bank guarantee, are perverse and hence the impugned award of the arbitrator and the order passed by the District Court, are liable to be quashed and set aside.

10. On the other hand, learned advocate for the respondent strenuously urged that no ground for challenging the award, as contemplated under section 34 (2) of the said Act, is made out by the appellant. He supports the impugned order passed by the District Court. According to him, the grounds raised by the appellant in the application filed under section 34 of the said Act, are beyond the grounds provided under section 34 (2) of the

said Act and, therefore, the District Court is justified in rejecting the challenge raised by the appellant to the arbitration award. In support of this argument, he relied on **"Associate Builders V/s Delhi Development Authority" (2015) 3 SCC 49** and **"Anglo American Metallurgical Coal Pty. Ltd. V/s MMTC Limited" (2021) 3 SCC 308**.

11. He further submitted that the matter was prolonged by the appellant from time to time. In spite of the consensual appointment of the sole Arbitrator, twice the appellant challenged his appointment. According to him, therefore, the Arbitrator was justified in awarding interest paid by the respondent on the bank guarantee furnished by him for withdrawal of the undisputed amount deposited by the appellant.

12. By relying on **"Reliance Cellulose Products Limited V/s Oil and Natural Gas Corporation Limited" (2018) 9 SCC 266** and **"Raveechee and Company V/s Union of India" (2018) 7 SCC 664**, he submitted that the Arbitrator has power to award interest unless specifically barred from awarding it; and the bar must be clear and specific.

13. He urged that since the appellant prolonged the matter, the respondent had to pay interest to the bank on the bank

guarantee, which is rightly directed by the Arbitrator to be paid to the respondent and no fault can be found with the same. He, therefore, submits that there is no merit in the appeal and the appeal may be dismissed.

14. For appreciating the rival submissions, it is apt to consider the relevant provision. For ready reference, Section 34 (1) and (2) of this said Act is reproduced herein below:

*“34. **Application for setting aside arbitral award.**—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the

submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.— For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]”

15. Perusal of the application filed by the appellant under section 34 of the said Act in the District Court, more particularly the grounds raised in the same, reveals that the Arbitral Award was not challenged by the appellant on the grounds mentioned in section 34 (2) of the said Act. Vague and general grounds are taken while challenging the Award passed by the Arbitrator, before the District Court. Not a single ground, as set out in sub section (2) (a) (i) to (v) of section 34 of the said Act and its proviso is raised in the application filed by the appellant before the District Court.

16. In "**Associate Builders**" (*supra*), the Apex Court has held –
"Only when the award shocks conscious of the court, then interference on the ground of justice is permissible. Interference on the ground of 'justice' does not include what the court thinks it unjust on the fact of a case for which it then seeks to substitute its view for the Arbitrator's view and does what it considers 'justice'. The Court under section 34 of the said Act,

does not act as the first appellate court and cannot interfere with the errors of fact either, in absence of perversity.” It is further held that an Arbitral award can be set aside only on the grounds mentioned under section 34 (2) and (3) of the said Act and not otherwise. Merits of the Arbitral award can be assailed only when it is in conflict with ‘*public policy of India*’. Public policy of India and fundamental policy of Indian law is explained thus–

“It is settled law that where :

- (i) a finding is based on no evidence, or*
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.”*

It is also held that interference in the arbitral award is permissible only when findings of the Arbitrator are arbitrary, capricious and perverse and not when merely another view is possible.

17. In ***"Anglo American Metallurgical Coal Pty Limited"*** (*supra*), it is held that the Arbitral Award cannot be interfered with when the view taken by the Arbitrator is a possible view.

18. Coming to the facts of the present case, no ground, as

contemplated under section 34 (2) and (3) of the said Act are taken by the appellant in the application filed under section 34 of the said Act, in the District Court. It is not even the case of the appellant that the Award is based on irrelevant material or there is no evidence to support the findings of Arbitrator and vital evidence is ignored while passing the Award. Since the view taken by the Arbitrator is a possible view and the same is confirmed by the District Court, I do not find any merit in the challenge raised by the appellant in the present appeal.

19. By claim No.11, the respondent claimed the amount of interest paid by him on the bank guarantee. In the award, the Arbitrator has recorded a finding that the respondent (appellant) has not submitted any reply in respect of the said claim and there is absolutely no denial about this claim. The Arbitrator has further recorded that after passing of the first award, the respondent (appellant) sanctioned an amount of Rs.27,36,604/- by order dated 21st October, 1995, which was an undisputed amount and the Engineer, in charge, was instructed to settle the claim. Though this was an undisputed amount, the respondent (appellant) insisted for furnishing bank guarantee, even on this amount, due to which the claimant (respondent) was compelled to pay huge bank commission, without there being any fault on

the part of the claimant. The Arbitrator, therefore, held that the respondent is entitled for interest claimed under claim No.11. This finding of the Arbitrator is confirmed by the District Court.

20. By relying on the letter dated 21st October, 1995, issued by the Under Secretary of Irrigation Department, the learned advocate for the appellant has argued that it was already directed by the Government to disburse the amount of Rs.27,76,604/- to the respondent, as undisputed amount, on certain conditions. One of the condition in the said letter is that the contractor / respondent shall withdraw the suit filed for the amount awarded by the Arbitrator and before disbursement of the amount to the contractor / respondent, a joint *purshis* / agreement be filed in the court. The respondent / contractor was not agreeable to the conditions contained in the said order. Therefore, he has informed the appellant that he is willing to accept the said amount, without prejudice to his rights and contentions, under protest and subject to the decision of the court. In the light of these facts, it is not possible to accept the argument of the learned advocate for the appellant that the appellant was willing to pay the said undisputed amount to the respondent and, therefore, the interest on the bank guarantee should not be saddled on the appellant.

21. Even if the argument of the appellant that this court directed the respondent to furnish the bank guarantee for withdrawal of the amount is accepted for the sake of argument, it appears that only because of the insistence on the part of the appellant, this Court directed the respondent to furnish bank guarantee for withdrawal of the said undisputed amount. If the appellant was willing to pay this undisputed amount to the respondent, the bank guarantee should not have been insisted for. Considering the peculiar facts of this case, it is clear that but for insistence on the part of the appellant, this court would not have directed the respondent to furnish bank guarantee, in respect of the undisputed amount. Since the withdrawal of the undisputed amount was opposed by the appellant, this court has passed an order of furnishing bank guarantee. In that view of the matter, this court is of the considered view that the Arbitrator was justified in allowing the claim No.11 of the respondent and the District Court was right in sustaining the said finding of the Arbitrator.

22. In "*Reliance Cellulose*" (*supra*), the Apex Court was considering permissibility of award of pre-reference, pendente lite and future interest by the Arbitrator. In that case, there was a clause restricting payment of interest. Interpreting the said

clause, the Apex Court held - *"Clause which merely states that no interest will be payable upon amounts payable to the contractor under the contract, is not sufficient to bar the Arbitrator from awarding pendente lite interest"*.

23. In **"Reveechee and Company"** (*supra*), it is held thus-

"10. Thus, the liability for interest pendente lite does not arise from any term of the contract, or during the terms of the contract, but in the course of determination by the arbitrators of the losses or damages that are due to the claimant. Specifically, the liability to pay interest pendente lite arises because the claimant has been found entitled to the damages and has been kept out from those dues due to pendency of the arbitration i.e. pendente lite."

11. Undoubtedly, such a power must be considered inherent in an arbitrator who also exercises the power to do equity, unless the agreement expressly bars an arbitrator from awarding interest pendente lite. An agreement which bars interest is essentially an agreement that the parties will not claim interest on specified amounts. It does not bar an arbitrator, who is never a party to the agreement from awarding it....."

24. In catena of decisions, the Apex Court has held that bar to award interest payable under the contract would not be sufficient to deny the payment of interest pendente lite and the Arbitrator has power to award interest pendente lite where justified.

25. Applying the above ratio to the facts of the present case,

since the Arbitrator has found it proper to award interest paid by the respondent on the bank guarantee, which the respondent was required to furnish even for withdrawing the undisputed amount, in the peculiar facts of the present case, this court is of the considered view that the Arbitrator was justified in allowing claim No.11 in respect of the said interest and the District Court has rightly sustained the said finding of the Arbitrator.

26. For the aforestated reasons, there is no merit in the challenge raised by the appellant in the present appeal. The appeal, is dismissed. No costs. In view of disposal of the Appeal, pending Civil Application is disposed of.

[NITIN B. SURYAWANSHI]
JUDGE