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IN THE HIGH COURT OF JUDICATURE OF BOMBAY BENCH AT AURANGABAD

ARBITRATION APPEAL NO. 1 OF 2017

The Executive Director APPELLANT
The Godawari Marathawada Irrigation
Development Corporation, Aurangabad
Through its Executive Engineer,
Majalgaon Canal Division No. 7,
Gangakhed, District - Parbhani

VERSUS

1. M/s Shinde & Sons RESPONDENTS
A/4, Shanti Niwas, Ambika Nagar
Ahmednagar – 414 005

2. Shri Madhukarrao Dattatraya Deshmukh
(Retired Secretary & Sole Arbitrator)
15-A/2, Erandwana, Karve Road,
Pune – 411 004

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Mr. Ashutosh Dharmadhikari, a/w Mr. B. R. Surwase, Advocate for the appellant

Mr. G. K. Naik Thigale, Advocate for the respondent

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 21st JULY, 2022
PRONOUNCED ON : 6th DECEMBER, 2022

JUDGMENT:

1. By this appeal, filed under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter for short "Arbitration Act"), the appellant has impugned order passed by the District Court dismissing the application filed by the appellant under section 34

of the said Act and confirming the Award passed by the Arbitral Tribunal.

2. For the sake of convenience, hereinafter, the appellant will be referred as "*Department*", respondent No.1 will be referred as "*Contractor*" and respondent No.2 will be referred as "*Arbitrator*".

3. Some relevant facts, for the purpose of deciding the appeal are as under :

4. Contract for construction of earth work, structures, lining and setective lining of Kothala Branch Canal, of which estimated cost was Rs.97,99,240/-, was allotted to the Contractor at 2.86% above tender cost i.e. Rs.1,00,79,000/-. Accordingly, work order was issued on 14th December, 1991 and the contract period was of thirty months i.e. 1993. Since, the work was not completed within the time stipulated in the contract, extension was granted till 1994. In the year 1994, notice was issued by the Department to the Contractor for damages. On 28th May, 1994, the Contractor appointed Arbitrator. The Department, by filing Regular Civil Suit No. 222 of 1994 in the Court of Civil Judge, Senior Division, Parbhani, challenged the appointment of the Arbitrator. The Civil Court granted *status quo*. In view of the compromise arrived at between the Department and the

Contractor, the suit came to be withdrawn on 27th November, 1996 and as per the compromise, the Department granted extension to the Contractor from 1st January, 1997 to 30th June, 2001.

5. As per the Department, instead of complying with clause 52.3, the Contractor, by invoking clause 52 of the contract preferred second appeal before the Chief Engineer. The work was completed on 30th June, 2001 and final bill was paid to the contractor on 26th July, 2002.

6. According to the Department, after accepting the final bill, the Contractor, all of a sudden, issued notice under clause 52 of the contract and raised a dispute on 30th September, 2002. The notice was replied by the Executing Engineer vide reply dated 8th October, 2002, thereby rejecting all the claims of the Contractor. The Contractor, thereafter, approached the Superintending Engineer and requested to settle the dispute. The Superintending Engineer rejected the claims of the Contractor stating that the claims are time barred and the Contractor has accepted final bill amount, without protest and undertakings were given by the Contractor and he has waived / relinquished the claim, by compromise before the Civil Court in RCS No. 222 of 1994 dated 27th November, 1996 and 6th June, 2000.

7. Second appeal filed by the Contractor before the Chief Engineer is rejected. The Contractor, thereafter, appointed sole arbitrator, by letter dated 19th February, 2003. The Department objected the appointment of the Arbitrator. After arguments of both the sides were over, the Department filed counter claim before the Arbitrator. The Arbitral Tribunal passed award on 7th March, 2006 and awarded Rs.33,15,29,515/- plus future interest @ 15% p.a. to the Contractor.

8. The Department challenged the Award, by filing MARJE No. 62 of 2006 under section 34 of the said Act, before the District Court, Parbhani. The District Court dismissed the application with costs and confirmed the Arbitration Award. Hence, the present appeal.

9. Heard learned advocate for the Department, learned advocate for the Contractor and learned advocate for the Arbitrator.

10. Learned advocate for the Department challenged the impugned Award on the following grounds :

I) In view of clause 53 of the contract, the Arbitrator, who was appointed by the Contractor, was not competent and officer of the Department ought to have been appointed as an Arbitrator. Since, the sole Arbitrator is not the officer of the Department, the Arbitrator was incompetent to act as the sole Arbitrator. In support of this contention, he relied on an unreported decision of the learned Single Judge of this Court in Second Appeal No. 1074 of 2004.

II) In view of clause 52 of the contract, the Contractor could not have raised arbitration dispute after receipt of final payment. The Contractor never objected to the extra work, when the work was in progress. Therefore, according to the learned advocate, in view of the language of clause 52 of the contract, the Contractor could not have raised arbitration dispute after accepting the final payment.

III) The District Judge has failed to consider that the Arbitrator has sanctioned idle machinery claims without any evidence, contrary to clause 52 of the tender. As per the tender clause 1.16, interest cannot be paid, still the same is directed to be paid by the Arbitrator.

IV) According to him, the Contractor has failed to follow the procedure as per tender clause 52 and, therefore, the tender clause 53 cannot be made applicable. The further submission is that the appointment of the Arbitrator is one sided and it was never accepted by the Department. The bills were not submitted by the Contractor within the stipulated time, as per clause 53 of the tender.

V) The Arbitrator is bound by the clauses, conditions and rates of the contract. In terms of sub section (2) of Section 34 of the Arbitration Act, the Court can set aside the Award, if the composition of the Arbitral Tribunal is not in accordance with the agreement of the parties.

VI. The rates awarded by the Arbitrator cannot be accepted. The rates must be mutually agreed by the parties, as per the contract clause No.38. The Arbitrator has travelled beyond the tender conditions while passing the impugned award.

VII) The Contractor had, from time to time, filed undertakings that it would not claim any enhanced amount and is ready to complete the work as per the earlier contract. It is submitted that without there being any material on record, the Arbitrator wrongly held that those undertakings were filed due to insistence and coercion of the officers of the Department.

VIII) The Arbitrator has awarded rates beyond the contract. By referring to the amounts awarded at serial No. 1 and 5 in the claims table, he submits that substantial amounts are awarded under these heads, contrary to the undertakings furnished by the Contractor. These amounts were beyond the terms of the contract and, therefore, the same could not have been awarded by the Arbitrator. As per clause 38 of the contract, the rates so awarded must be mutually agreed by both the parties.

IX) In terms of tender clause 46, interest on any debt is not liable to be paid as per the contract.

X) The Arbitrator has accepted the claims without any supporting evidence and record and the same is contrary to the terms of the contract. The arbitrator, in the Award, has granted higher rates to the Contractor, contrary to the terms of the contract and which were not certified by the competent authority of the Department. Further submission is that extra quantity of the work is done by the Contractor as per the agreed rates, therefore, the Contractor is not entitled for any additional payment, which is erroneously awarded by the Arbitrator.

XI) The Award is declared after two years from the last meeting, which should have been declared within one year from the last meeting. The reasons assigned by the Arbitrator for delay in passing the Award are unacceptable and the Award is liable to be set aside, in view of the ratio in ***"Ashwinkaur V/s State of Maharashtra"***.

XII) The Arbitrator has failed to follow the procedure while conducting inquiry. No evidence is recorded as required. No cross-examination is conducted by either parties. Therefore, the evidence before the Arbitrator is not proved. Hence, the Award is liable to be set aside.

XIII). The Contractor has accepted the rates given in EIRL,which were prepared as per the then prevailing norms and the same is already paid to the Contractor. According to the learned advocate, the rates given by the Arbitrator are exorbitant and they do not exist even after 22 years. They are more than even today's prevailing DSR rates.

XIV) The learned advocate, therefore, by relying on ***"ONGC Limited V/s Saw Pipe Ltd" (2003) 2 Arbitration Law Reporter (SC)*** submits that the Award needs to be set aside, since it is unfair and unreasonable and it shocks the conscious of the Court and hence, the Arbitral Award is in conflict with the public policy and, therefore, is liable to be set aside. According to him, the Award is vitiated by the patent illegality appearing on the face of the Award. In support of his submissions, he relied on following citations :

i. *"Union of India V/s Manraj Enterprises" Civil Appeal No. 6592 of 2021*

ii. *"Union of India V/s Ambica Construction" 2016 (5) Mh.L.J. 210*

iii. *"M/s M.R. Mutha V/s The State of Maharashtra and Another" (Second Appeal No. 1074 of 2004)*

iv. *"Anglo American Metallurgical Coal Pty Ltd,. V/s MMTC Limited" (2021) 3 SSC 308*

v. *"Reliance Cellulose Products Ltd V/s Oil and Natural Gas Corporation Ltd" (2018) 9 SCC 266*

vi. *"Raveechee and Company V/s Union of India" (2018) 7 SCC 664*

vii. *"Associate Builders V/s Delhi Development Authority" (2015) 3 SCC 49*

11. Per contra, learned advocate for the Contractor supports the Award. He submits that since the Department has failed to comply with the order of the Apex Court dated 2nd April, 2018, the appeal is liable to be dismissed on that ground alone. Though the Department obtained conditional stay, it failed to obey the conditions imposed therein and enjoyed the stay. Therefore, this appeal is liable to be dismissed on that ground in terms of order XXXIX, Rule 11 (Maharashtra Amendment) of the Civil Procedure Code. To buttress this submission, he relied on ***"Ganpat Shankar Waghmare V/s Anjalibai Rao Waghmare and***

Another" 2001 (2) Mh.L.J. 756 and ***"Pacific Basin Handymax Uk Ltd. V/s Ashapura Minechem Ltd.," 2013 (7) Bom. C.R. 21***.

12. By relying on clause 31 of the tender, he submits that till the mutually agreed rate is fixed, the Contractor had to continue with the work. Seven extensions were granted to the Contractor and work continued for twelve years. The delay in executing the work is not attributable to the Contractor. There is no dispute about the quality and quantity of the work done by the Contractor. He has relied on written say of the Contractor filed before the Arbitrator.

13. By referring to the letter dated 16th October 2001, addressed to the Contractor by the Executive Engineer of the Department, he submits that the Contractor was coerced to give undertakings. There were no mutually agreed rates.

14. By relying on ***"Municipal Corporation of "Delhi V/s Jagan Nath Ashok Kumar and Another" 1987 (4) SCC 497***, he submits that the provisions of the Indian Evidence Act are not applicable to the Arbitration proceedings.

15. By relying on the documents, he submits that administrative sanction was granted for the extra work, therefore, the Arbitrator has not granted additional charges and

those are excluded in view of the undertakings given by the Contractor.

16. According to him, the record indicates that in respect of the undertakings it is observed by the Arbitrator that the payments under various extra items rate list are made some time in 2000 to 2001, they are of the period from 1990-91 onwards, till the end of the contract. Thus, it is obvious that the amounts due to the Contractor were delayed for more than 10 to 12 years, due to which the Contractor was in financial difficulty and was constrained to accept whatever was offered to him at that point of time. Fact remains that all the undertakings are undated. Therefore, contention of the Contractor that the undertakings were obtained under coercion needs to be accepted.

17. He submits that contention of the Department that claims No. 6 and 8 are barred in view of the undertakings and acceptance of EIRL, also cannot be accepted as in terms of EIRL on record, the Department failed to consider the question of payment for execution of extra items of the work, executed by the Contractor for a long period of more than 10 years. The tender condition stipulates that the same has to be paid soon after execution of the work, within reasonable time. The tender

clause also provides payment of RA bills in at least once in a month. As per clause 32 of the agreement, the Department was to make payment to the Contractor at tender rate till the mutually agreed rate was fixed and the Department was duty bound to prepare extra item rate list within a month. He submits that in spite of repeated requests by the contractor, the Department neither fixed mutually agreed rates nor prepared extra item list for years together. He, therefore, submits that in view of these facts, the Arbitrator was justified in coming to the conclusion that undertakings given by the Contractor at the time of sanction of EIRLS were not voluntary and they were due to financial hardships and were given under coercion, undue influence by the Department and they are not binding on the Contractor.

18. According to him, the Department has misinterpreted clauses 52 and 53 of the tender and the contention of the Department that the Arbitration can be invoked only when the contract was subsisting, is unacceptable. Further submission is that in appeal memo, the Department has admitted that there was abnormal increase in tender quantities. He submits that the Department is relying on DSR rates of 1988-89, whereas the work continued till 2006.

19. He submits that retired officer of the Government was given Arbitration work, which is proper. By relying on the decision of the learned Single Judge in Arbitration No. 12 of 2014 and in writ petition No. 1704 of 2010, he submits that the reliance placed by the department in ***"M. R. Mutha's"*** case in second appeal No.1074 of 2004 is misplaced, as the said case was governed by the Act of 1940 and not by the Act of 1996. In the said case, issue of limitation was being considered. The two decisions of the learned Single Judges, in Arbitration Application No. 12 of 2014 and Writ Petition No. 1704 of 2010 were not brought to the notice of the Court while deciding the second appeal No. 1074 of 2004.

20. By relying on ***"K. N. Satyapalan V/s State of Kerala" (2007) 13 SCC 43,*** he submits that taking into consideration the long period of 16 to 17 years, the Arbitrator was justified in granting claim of the Contractor. According to him, the Arbitrator is right in considering Regional Schedule of the rates. He submits that out of 16 claims, the Arbitrator has allowed only 9 claims.

21. Further submission is that after final arguments, the Department filed counter claim before the Arbitrator, so the stand of the Department that for deciding the claim of the

Contractor, the Arbitrator has no jurisdiction and the Arbitrator has jurisdiction to decide their counter claim, cannot be accepted.

22. By referring to various paragraphs in the Award, he submits that the Arbitrator has considered each and every aspect and argument and the relevant record and was justified in passing the Award.

23. He submits that the Department is also responsible for the delay in passing the Award, as on 3rd April, 2004, the Department had filed an application requesting the Arbitrator that final Award may not be passed until the District Judge decides application for removal of Arbitral Tribunal. Therefore, it does not lie in the mouth of the Department that the Arbitral Award is vitiated on account of delay. He submits that due to death of wife, the Arbitrator had to travel outside India so also due to the application filed by the Department, delay is caused in passing the Award.

24. According to him, a possible view is taken by the Arbitrator and the Award is confirmed by the learned District Judge, in application under section 34 of the said Act. Therefore, there is no substance in the challenge raised by the Department in the

present appeal and the appeal is liable to be dismissed with costs.

25. In reply, learned advocate for the Department submits that while granting stay, condition was imposed on the Department, therefore, Order XXXIX, Rule 11 of the Civil Procedure Code has no application in the present case. The said provision cannot take away the right of the Department to prosecute the appeal.

26. Further, by relying on the undertakings signed by the Contractor, he submits that on every EIRL sheet, undertaking of the Contractor is there, it specifies rates and the undertaking of the Contractor, accepting the said rate, and hence, it cannot be said that there was any coercion. In fact there was no proof of any coercion before the Arbitrator.

27. By referring to ***"K. N. Satyapalan"*** (*supra*), he submits that, the citations, relied upon by the Contractor, are not applicable to the facts of the present case.

28. By referring to ***"Union of India V/s Ambica Construction" 2016 (5) Mh.L.J. 210***, on the point of *pendente lite* interest, he submits that the clause in the present agreement and the clause mentioned in the said rulling is different and hence the same is not applicable to the case of the Contractor.

29. By referring to ***"Union of India V/s Manraj Enterprises" MANU/SC/1082/2021***, he submits that, no interest has been awarded in the present case. He further submits that the Arbitrator has exceeded his jurisdiction in awarding exorbitant rates. The appeal and the grounds stated therein are within the ambit of sections 34 and 37 of the said Act and hence, the Award is liable to be set aside.

30. Heard learned advocate for the Department and learned advocate for the Contractor, at length. Perused the grounds raised in the appeal, Award and the impugned judgment of the District Court. I have given anxious consideration to the rival submissions made by the learned advocates for the parties. I am of the view that there is no merit in the appeal and the appeal is liable to be dismissed for the following reasons.

31. The first ground of challenge is that the dispute is not arbitrable, as in view of clauses 52 and 53 of the agreement, the dispute should have been raised when the contract was subsisting and since the Contractor has accepted final bill, Contractor could not have appointed the Arbitrator. Clauses 52 and 53 of the agreement read as under:

"52. SETTLEMENT OF DISPUTES :

If the contractor considers any work demanded of him to be outside the requirements of the contract, or considers any drawings record of ruling of the Engineer in charge on any matter in connection with or arising out of the contract or the carrying out of work to be unacceptable, he shall promptly ask the Engineer-in-charge in writing for written instructions or decision. Thereupon the Engineer-in-charge shall give his written instructions or decision within a period of twenty days of such request.

Upon receipt of the written instructions or decision the contractor shall promptly proceed without delay to comply with such instructions or decision.

If the Engineer-in-charge fails to give his instructions or decision in writing within a period of twenty days after being requested, or if the contractor is dissatisfied with the instructions or decision of the Engineer-in-charge, the contractor may within twenty days after receiving the instructions or decision appeal to the Superintending Engineer, who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal, to the requirement of department. The Superintending Engineer shall give a decision within a period of twenty days after the contractor has given the said evidence in support of his appeal.

If the contractor is dissatisfied with the decision of the Superintending Engineer the contractor may within twenty days after receiving the decision, appeal to the Chief Engineer, who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal. The Chief Engineer shall give decision within a period of twenty days after the contractor has given evidence in support of his appeal.

If the contractor is dissatisfied with this decision, the contractor within a period of twenty days from receipt of decision shall indicate his intention to refer the dispute to Arbitration, failing which the said decision shall be final and conclusive.

53. ARBITRATION:

All disputes or differences in respect of which the decision is not final and conclusive, shall be referred for arbitration to a sole arbitrator appointed as follows.

Within thirty days of receipt of notice from the contractor of his intention to refer the dispute to arbitration the Chief Engineer shall send to the contractor a list of three officers of the rank of Superintending Engineer or higher, who have not been connected with the work under this contract. The contractor shall within fifteen days of receipt of this list select and communicate to the Chief Engineer name of one officer from the list who shall then be appointed as the Sole arbitrator. If contractor fails to communicate his selection of name, within the stipulated period, the Chief Engineer shall without delay select one officer from the list and appoint him as the sole arbitrator. If the Chief Engineer fails to send such list within thirty days as stipulated, the contractor, shall send a similar list to the Chief Engineer within fifteen days, the Chief Engineer shall then select one officer from the list and appoint him as a sole arbitrator within fifteen days. If the Chief Engineer fails to do so the contractor shall communicate to the Chief Engineer the name of one officer from the list, who shall then be the sole arbitrator.

The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The decision of the sole arbitrator shall be final and binding on the parties thereto. The arbitrator shall determine the amount of costs of arbitration to be awarded to either parties.

Performance under the contract shall continue during the *arbitration proceedings and payment due to the contractor by the Department shall not be withheld, unless they are the subject matter of the arbitration proceedings.*

All awards shall be in writing and in case of awards amounting to Rs.1.00 lakhs and above, such awards shall state reasons for the amounts awarded.

Neither party is entitled to bring a claim to arbitration if the Arbitrator has not been appointed before the expiration of thirty days after defect liability period."

On plain reading of clause 52 of the agreement, it cannot be said that the dispute has to be raised during subsistence of the contract and once the final bill is accepted by the Contractor, he cannot appoint Arbitrator. The interpretation of clause 52 of the Agreement, sought to be advanced by the learned advocate for the Department cannot be accepted and this clause cannot be interpreted to defeat the legitimate claim of the Contractor.

32. Claim made by the Contractor is on the basis of change in scope of work and in respect of extra items with other components, which arose during the execution of work. It is a matter of record that the Department was responsible for the delay in carrying out the contract, hence from time to time granted extensions to the Contractor during the period from 1st January, 1997 to 30th June, 2001.

It is further clear from the record that there was abnormal increase in tender quantities of item Nos. 2A, 3, 4, 5, 16, 17 and 18 beyond 130% and these works were carried out by the Contractor. Admittedly, extra items were sanctioned for controlled blasting, removing seeds and weeds, rehandling of spoil bank and additional structures etc. Suitable material was not available from the quarries shown in the tender. But as per the tender condition, the Department failed to revise item rate list and fix mutually agreed rates.

33. Clause 32 of the agreement stipulates that extra items of work shall not vitiate the contract and the Contractor was bound to execute extra quantities of work at the tender rate only to the extent of +30 of the tender quantities and rates for the quantities beyond that limit were required to be arrived at and mutually agreed upon. During the contract period, in spite of requests on the part of the Contractor, revision of rates was never done. But the Contractor was made to sign EIRLS against his will. The Contractor was paid only extra lead charges, but the rates of the extra items were not mutually agreed and fixed.

34. Arbitrator, on the basis of record, has noted several instances of breach of contract on the part of the Department,

which led to the delay in execution of the contract, e.g. non supply of drawings of structures in time, delay in payments, encashment of bank guarantee etc, which has changed the scope of the work. In the light of these facts, there is no substance in the challenge of the Department to the arbitrability of the dispute.

35. It is a matter of record that the Contractor submitted claim before the Executing Engineer, who has rejected it but accepted the fact that there was abnormal increase in tender quantities of items No. 2A, 3, 4, 5, 16, 17 and 18, which was increased beyond 130% and that they were carried out by the Contractor. It is also accepted that extra items were sanctioned for controlled blasting, removing seeds and weeds, rehandling of spoil bank and additional structures. The fact of non availability of suitable material to the Contractor is also accepted, so also the fact that the material was required to be obtained from distant quarries. The Executive Engineer, has however, rejected the claim of the contractor. Appeal against the said decision filed by the Contractor before the Superintending Engineer is also rejected. Grounds raised by the Contractor before the authorities and the contention that the Department has not revised items rates on the basis of minimum wages prescribed from time to

time, and there was abnormal increase in the quantity of work etc, were not properly considered. Chief Engineer also rejected the claim of the contractor. In these facts, the Department cannot question appointment of Arbitrator by the Contractor.

36. The next ground of the Department is that the Arbitrator, being retired Government Officer, was not competent to be appointed as Arbitrator. It is a matter of record that the Department, in more than 30 cases, has appointed retired officers as Arbitrators. The Contractor has claimed that the Department made him to believe that retired officers can be appointed as Arbitrator. It is not in dispute that the Contractor had suggested names of retired officers to be appointed as Arbitrator to the Department, however, the Department, at no point of time, had taken any objection, therefore, the appointment of sole Arbitrator by the Contractor cannot be faulted with.

37. In the application, filed under section 34 of the said Act, the District Court, has properly appreciated this point raised by the Department and it is held that though the panel was suggested to the Chief Engineer, no objection on ground of competence of Arbitrator or want of some procedural steps has been alleged and he purposely omitted to select one of the said

panel and, therefore, it is not open to the Department to challenge the appointment of the Arbitrator and his jurisdiction.

38. Fact remains that the Department has filed counter claim before the Arbitrator. Thus, it has submitted to the jurisdiction of the Arbitrator.

39. The contention of the Department that the Award is vitiated on account of delay of two years in passing the same, is liable to be rejected at the thresh hold taking into consideration the fact that the Department itself had moved application to the Arbitrator making a request not to pass final Award before their application in the District Court is decided.

40. It appears that on account of death of wife of the Arbitrator, he was required to move out of India, which is one of the reason which caused delay in delivery of Award. Additionally, it has to be noted that there was voluminous record before the Arbitrator, which he was required to consider. The last meeting before the Arbitrator was on 3rd May, 2004 and in the said meeting the Arbitrator made it clear that he would be out of India between 15th May, 2004 and 15th August, 2004. Therefore,the ratio in ***"Ashwinikumar"*** (supra) would not be applicable to the facts of the present case. In this view of the

matter, the Award cannot be set aside on account of delay.

41. Learned advocate for the Department has strongly relied on the undertakings given by the Contractor and acceptance of EIRLs and that final bill was accepted towards full and final settlement of claim, without any protest by the Contractor.

42. Since the Contractor wanted to complete the contract, he had to succumb to the pressure of the Department and for payment of labour and machinery engaged for getting the work done, the Contractor was constrained to give undertakings, at the insistence of the Department. The Contractor had to succumb to the pressure of the Department as the Contractor was desirous of continuing the work to keep the labour and machinery engaged and get the work done to receive the payment on time. The Contractor was constrained to give undertakings at the insistence of the Department. It is a matter of record that on many undertakings no date is mentioned. In view of this fact, the Department cannot claim that the Contractor has waived his claim, by way of undertakings. Considering all these aspects, the Arbitrator has rightly not relied on the undertakings given by the Contractor. Aforesaid finding of the Arbitrator is confirmed by the District Court. I see no reason to take a different view and / or to interfere with the same.

43. It is to be noted that final bill produced produced by the Contractor, does not contain wording *"full and final settlement of claim"*, according to the Contractor, these words were added by the Executive Engineer later on, in his own handwriting. This fact is admitted by the Executive Engineer in his affidavit, wherein he has stated that this is general practice of the Department, which is followed. The Arbitrator, therefore, has recorded finding that this is an illegal act on the part of the responsible government officer amounting to fraud and the Department cannot reject the claim of the Contractor on that ground.

44. The ratio in ***"R. L. Kalathia and Company V/s State of Gujrath"*** in Civil Appeal No. 3245 of 2003, supports the case of the Contractor on this point. In view of the categorical admission by the Executive Engineer in the affidavit and considering the fact that said words were inserted behind the back of the Contractor and that there are no initials made after addition of the words "*full and final settlement of claim"*, and as the same is not accepted by the Contractor, the Arbitrator is justified in accepting the contention of the Contractor that this amounts to manipulation of the record in illegal manner and the Contractor has not received full and final settlement of his claim.

45. The argument of the Department that after accepting final payment, no arbitration dispute could be raised, is liable to be rejected in view of the ratio in ***"Durga Charan Rautray V/s State of Orissa and Another" (2012) 12 SCC 513***, wherein it is held that right to raise claim for arbitration survives even after receipt of payment of final bill, if not excluded by arbitration agreement and the contractor is entitled to seek reference of unsatisfied claims to arbitration even after receipt of payment of final bill.

46. So far as the argument that the claims raised by the Contractor were time barred is concerned, the said argument is unacceptable in the facts of the present case. In ***"M/s R. P. Souza and Co. V/s The Chief Engineer, PWD" 1999 (3) BCR 738***, this Court has held that the claim filed within three years from the date of final bill is within time.

47. Since the Contractor has filed the claim after payment of final bill, in the light of the ratio in ***"M/s T. N. State Construction Corporation V/s M/s Gardner Landscape Pvt. Ltd., Chennai" AIR 2005 Madras 236*** said claim can be said to be in time.

48. In ***"National Insurance Co. Ltd., V/s Boghara Ployfab Private Ltd" (2009) 1 SCC 267***, it is held that claim for arbitration cannot be rejected solely on the ground that the

settlement agreement or discharge voucher have been executed by the Contractor, if its validity is disputed by the Contractor.

49. The next argument of the Department that the Contractor has already been paid at tender rates with escalation and extra items rates, which are sanctioned and accepted by the Contractor, as stipulated in clause 31 of the agreement. It is further their case that in view of the undertakings given in EIRLS, the Contractor has executed extra items work on mutually agreed rates. It is also claimed the Arbitrator has committed patent illegality while awarding exorbitant amount to the Contractor.

50. Admittedly, the execution of work was prolonged for more than 10 years. Without imposing any penalty on the Contractor, extensions were granted by the Department, from time to time. It is clear from the record that the delay is attributable to the Department and not to the Contractor. The Arbitrator has held that the vast delay in execution of work was due to several causes attributable to the Department. Only 20% of the tender work could be completed within the contract period of 30 months. Two more extensions of six months and 35 months were given, without levying any penalty on the Contractor, as the Department has terminated the contract and recalled tender and

as there was litigation, which was compromised, the entire work was closed down and came to standstill for over a year. After the work re-started, during the extension, the Contractor was paid only original tender rates along with small amount as escalation.

The Arbitrator has held that there was delay in execution of work, in view of (a) abnormal increase in tender quantities; (b) additional work of extra items executed; (c) the quarries shown did not yield material like murum, soil, sand, rubble etc. and the material was required to be brought from distant quarries and (d) delay in supply of drawings, decisions and payments and these causes of delay have been accepted by the Department / Executive Engineer in letter dated 8th October, 2002, the Arbitrator proceeded to fix the revised rates.

The Arbitrator, considering tremendous increase in quantum of work to the extent of approximately three times and the period of construction which was nearly 10 years, held that the revision of rates demanded by the Contractor should have been considered by the Department from time to time. Since there was no legal and valid mutual agreement for revised rates, the Arbitrator has carried out the exercise about revision of rates, as provided in clause 31 of the contract.

51. While awarding the rates, the Arbitrator has held that the regional schedule of rates of the Department does not consider labour charges as are prescribed under the Minimum Wages Act. As per clauses 37 and 38 of the Tender Agreement, it is mandatory that the Contractor has to observe all labour laws, which includes the Minimum Wages Act. The Regional Schedule of Rates of the Department is never based on minimum wages of labour, prescribed under the Minimum Wages Act. The Arbitrator, therefore, felt it necessary to revise the rates of the executed items, appearing in claims No. 1 and 5. It is further observed that the rates for the executed items were not mutually agreed between the parties. The arbitrator thereafter proceeded to fix the revised rates, by taking into consideration the Contractor's contention about delay in execution of work, attributable to the Department

52. It is clear from the Award that the Arbitrator has worked out the rate analysis by taking into consideration the rate analysis submitted by the Department and has not accepted the rate analysis submitted by the Contractor.

The Arbitrator has worked out the rate analysis by taking into consideration the Minimum Wages Act and 10% for loss of profit and awarded an amount of Rs.17,58,31,202/-. The Arbitrator has not allowed 20% loss of profit as claimed by the Contractor, but has permitted only 10% loss of profit. The Arbitrator has given additional 10% on account of sundry and higher labour wages than considered in RSR of the Department, Thus, 10% for loss of profit and 10% towards sundry and higher labour wages, the Arbitrator has arrived at additional 20% rates in RST to be fair rates to be paid to the Contractor. While allowing it, it was directed to deduct the amounts already received to the Contractor. In this view of the matter, there is no substance in the argument of the Department that the Arbitrator has awarded exorbitant rates to the Contractor.

53. The argument of the Department that interest during the pendency of Arbitration proceedings cannot be granted in view of the ratio in ***"Union of India V/s Bright Power Projects (India) Private Limited" (2015) 9 SCC 695,*** is concerned, in ***"Mc Dermott International INC V/s Burn Standard Co. Ltd., and Others" (2006) 11 SCC 181*** it is held that section 31 (7) (a) provides that the Arbitral Tribunal may award interest at such rates, as it deems reasonable on the whole or in part of the period between the date on which cause of action has arisen and the date on which Award is made i.e. pre Award period.

54. In *“Reliance Cellulose Products Ltd”* (*supra*), the Apex Court has evolved the test of strict construction of the clauses which state that, no interest will be payable upon amounts payable to the Contractor, unless there is a clear and express bar to the payment of interest that can be awarded by the Arbitrator. The clauses which do not refer to claims before the Arbitrator or disputes between parties and clearly bar payment of interest, cannot stand in the way of Arbitrator awarding pre-reference or pendente lite interest. It is held :

> *“Unless a contractor agrees that no claim for interest will either be entertained or payable by the other party owing to dispute, difference, or misunderstandings between the parties or in respect of delay on the part of the engineer or in any other respect whatsoever, leading the Court to find an express bar against payment of interest, a clause which merely states that no interest will be payable upon amounts payable to the contractor under the contract would not be sufficient to bar an arbitrator from awarding pendente lite interest. Further, the grant of pendente lite interest depends upon the phraseology used in the agreement, clauses conferring power relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on what items the power to award interest has been taken away and for which period. Also, the position under S. 31 (7) of the 1996 Act is wholly different, inasmuchas S. 31 (7) of the 1996 Act sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered.”*

In view of the above observations, no fault can be found with the interest awarded by the Arbitrator in the present case.

55. The contention of the Department that the Arbitrator has not given any finding on merits on the counter claim filed by it, cannot be accepted as the Arbitrator has held that the Department has committed breach of contract and the Department itself was responsible for the delay in completion of the work and, therefore, the Department is not entitled for the counter claim.

56. As per the ratio of the Apex Court, in ***Mc Dermott International INC*** (*supra*), the Arbitrator is the master of quantity and quality of evidence. On going through the material on record and the Arbitral Award, it cannot be said that the findings recorded by the Arbitrator are perverse, capricious or arbitrary. Nothing is there on record to shock the conscious of the Court and no illegality is found in the Award, which goes to the root of the matter.

The Arbitrator has complied with the statutory procedure and has considered the provisions of the Indian Contract Act, terms of the agreements and the rullings cited by the parties before him. The approach of the Arbitrator appears to be fair and reasonable and the decision of the Arbitrator cannot be said to be actuated by extraneous considerations.

57. In the application filed by the Department, under section 34 of the Act, the District Court, after appreciating the record, has applied its mind and has passed a well reasoned order thereby upholding the arbitral award. All the arguments advanced by the Department in the present appeal were advanced in the appeal before the District Court and they are negatived by the District Court, by giving proper reasons. There does not appear any reason to interfere in the concurrent finding of facts recorded by the Arbitrator and the District Court.

58. Scope of the interference in the Arbitral Award is, by now, well settled by catena of judgments of the Hon'ble Apex Court. In ***"Associate Builders" V/s Delhi Development Authority" (2015) 3 SC 49,*** it is held that merits of the Arbitral Award can be assailed under section 34 of the said Act, only when the Award is in conflict with the public policy of India. By referring to the grounds contained in section 34 (2) (a) (b) (ii) of the said Act, it is held that -

> *"Grounds on which arbitral award may be assailed-*
>
> *Section 34 in conjunction with Section 5 of the Arbitration and Conciliation Act, 1996 (1996 Act) makes it clear that an arbitral award that is governed by Part I of the 1996 Act can be set aside only*

on the grounds mentioned under Sections 34 (2) and (3), and not otherwise. 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 minimise the supervisory roles of courts in the arbitral process."

Merits of arbitral award can be assailed only when it is in conflict with public policy of India.

None of the grounds contained in Section 34 (2) (a) of the A & C Act, 1996 deal with the merits of the decision rendered by an arbitral award. It is only when the award is in conflict with the public policy of India as prescribed in Section 34 (2) (b) (ii) of the A & C Act, 1996 that the merits of an arbitral award are to be looked into under certain specified circumstances."

59. The Hon'ble Supreme Court, in ***"MMTC Limited V/s Vedanta Limited" (2019) 4 SCC 163***,, has dealt with the scope of appeal under section 37 of the said Act. It is held :

> *"(i) in exercise of jurisdiction under S. 34 the Court does not sit in appeal over the arbitral award and may interfere on merits only on the well settled limited grounds, (ii) interference under S. 37 cannot travel beyond the restrictions laid down under S. 34, and (iii) in case an arbitral award has been confirmed by the Court under S. 34 and by the Court in an appeal under S. 37, Supreme Court must be extremely cautious and slow to disturb such concurrent findings – Further, while interpreting the terms of the contract, the conduct of parties and correspondences exchanged would be relevant factors and it is within the arbitrator's jurisdiction to consider the same"*

60. In ***"Haryana Tourism Limited V/s Kandhari Beverages Limited" (2022) 3 SCC 237,*** the Hon'ble Supreme Court has held :

> *"In an appeal under section 37, Court cannot enter into merits of claim. An award can be set aside under Ss. 34/37 only if the Award is found contrary to :*
>
> *(a) fundamental policy of Indian law;*
> *(b) interest of India; or*
> *(c) justice or morality; or*
> *(d) if it is patently illegal."*

In this case, the Arbitrator, by award directed the respondents to pay amount to the appellant. Counter claim filed by the respondents was dismissed by the Arbitrator. The objection petition filed by the respondents before Additional District Judge under section 34 of the said Act against the Award passed by the Arbitrator was dismissed. The respondents, therefore, preferred further appeal before the High Court under section 37 of the said Act. The High Court, entered into the merits of the claim and decided the appeal under section 37 of the said Act, as if High Court was deciding appeal against judgment and decree passed by the Trial Court. In these facts, it is held that the High Court exercised jurisdiction not vested in it under section 37 of the said Act and the judgment of the High Court was set aside.

61. From the ratio of the above rullings it is clear that re-appreciation of evidence is not permissible and interference is permissible only when finding of the Arbitrator is in conflict with the public policy of India as prescribed in Section 34 (2) (b) (ii) of the said Act. In the present case, the Department has failed to make out a case that the findings of the Arbitrator are in conflict with the public policy.

62. In ***"UHL Power Company Limited V/s State of Himachal Pradesh" (2022) 4 SCC 116***, the principle for exercise of jurisdiction under sections 34 and 37 of the said Act are summarized. It is held that the interpretation of relevant clauses of the implemention agreement as arrived by sole Arbitrator, were both possible and plausible. Merely because another view could have been taken can hardly be a ground for Single Judge to interfere with the Arbitral Award.

63. In *"Anglo American Metallurgical Coal Pty Ltd,. V/s MMTC Limited" (supra),* the Apex Court, by interpreting the documents, mails exchanged between the parties for performance of the Contract, held :

> *"Given the parameters of judicial review laid down in Associate Builders, it is obvious that neither the ground of fundamental policy of Indian law, nor the ground of patent illegality, have been made out in the facts of this*

case, given the fact that the majority award is certainly a possible view based on the oral and documentary evidence led n the case, which cannot be characterised as being either perverse or being based on no evidence"

64. In *"Union of India V/s Manraj Enterprises"* and *"Union of India V/s Ambica Construction" (supra)* the Apex Court has held that if the Contract expressly bars award of interest *pendente lite*, the same cannot be awarded by the Arbitrator. Whether an Arbitrator has the power to award *pendente lite* interest, in case the contract bars the same, would depend upon the nature of the ouster clause in each case. In case there is express stipulation which debars pendente lite interest, obviously, it cannot be granted by the Arbitrator. The award of pendente lite interest inter alia must depend upon the overall intention of the agreement and what is expressly excluded.

In the case in hand, interpretation of the Department of clause 52 of the Agreement is not acceptable and there is sufficient material on record to support the claim of the Contractor. Considering the facts and the terms of the agreement in the case in hand, this judgment is not applicable to the facts of the present case.

65. In *"Raveechee and Company"* (*supra*) it is held :

10. In fact, the Arbitrators have awarded amounts to the claimant on *account of the losses suffered by them for various reasons, mainly due to the ban on mining. These amounts are not awarded on account of any payment due under the contract but are awarded on losses determined in the course of arbitration or the 'lis'. A claimant becomes entitled to interest not as compensation for any damage done but for being kept out of the money due to him. Such damages could attract interest pendente lite for the period from the commencement of the arbitration to the award. 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 the 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. ….

16. Further, this Court considered an identical clause in the contract in the case of Ambica Constructions V. Union of India, wherein it observed that the Clause of the GCC did not bar the arbitrator from awarding interest pendente lite and affirmed the award passed by the arbitrator. The three Judge Bench of this Court held that the contention raised by the Union of India based on the Clause of the GCC that the arbitrator could not award interest pendente lite was not a valid contention and the arbitrator was completely justified in granting interest pendente lite. Relying on the three Judge Bench judgment in Union of India V. Ambica Construction (supra) and in Irrigation Deptt., State of Orissa (supra), this Court held that the bar to award interest on the amounts payable under the contract would not be sufficient to deny the payment of interest pendente lite.

These observations support the case of the Contractor.

66. In *“M/s M.R. Mutha V/s The State of Maharashtra and Another” (supra)*, the Arbitrator appointed was held to be not competent, as he was not officer in service and was retired from service. This challenge is already dealt with in foregoing paragraphs.

67. In ***“Associate Builders”*** (*supra*) it is held

> *“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.*

68. The Arbitrator has rightly taken into consideration the material on record and has considered each and every contention of the Department. The Arbitrator has referred the citations relied on by the parties and has arrived at a conclusion. Out of 15 claims, the Arbitrator has allowed only 9 claims, for which cogent reasons are given.

69. The District Court has confirmed the finding of facts

recorded by the Arbitrator. Applying the ratio in ***UHL Power Company Limited"*** **and** ***"Associate Builders"*** (*supra*), this Court is of the considered view that there is no patent illegality or perversity in the Award passed by the Arbitrator and in the judgment of the District Court.

70. For the aforesaid reasons, there is no merit in the challenge raised by the Department. The Arbitration Appeal being devoid of merit is dismissed. No costs.

71. In view of disposal of the appeal, all the pending civil applications also stand disposed of.

[NITIN B. SURYAWANSHI]
JUDGE

drp/Arbapel1-17