

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 6501 OF 2022

Friends & Friends Shipping Private Limited
Having its Registered Office at
Mantri Bhavan, Plot No. 18,
Store No. 08, Gandhidham,
Kutch 370201

... **Petitioner**

VERSUS

Central Warehousing Corporation
Regional Manager, Regional Office,
Baldota Bhavan, 2nd Floor, M.K. Marg,
Churchgate, Mumbai – 400020

... **Respondent.**

...

Advocate for the Petitioner : Mr. R. F. Totla h/f Mr. Swapnil Lohiya
Advocate for the Respondent : Mr. R. P. Uttarwar

CORAM : MANGESH S. PATIL, J.

RESERVED ON : 30.06.2022

PRONOUNCED ON : 12.07.2022

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. With the consent of both the sides, the matter is heard finally at the stage of admission.

2. The petitioner which has suffered an arbitration award has challenged it under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter, 'the Arbitration Act') before the District Court. He is aggrieved by the common order passed on his applications (Exhibits 14 and 15) whereby it had prayed for amendment of the application preferred under Section 34 and also had prayed for stay to the execution of the award.

3. Learned advocate Mr. Totala would submit that the award was

passed on 31.03.2018. It has been challenged by the petitioner under Section 34 of the Arbitration Act. The respondent was prosecuting execution of the award which it had filed during the Covid period. No effective hearing in the execution was taking place. While preparing for the submissions on the said application it was realized that some important legal points to challenge the award were not taken and the petitioner is seeking amendment of the application under Section 34. Mr. Totala would submit that an additional ground raising objection regarding neutrality of the arbitrator in the light of the provision of Section 12(5) which was inserted by way of amendment in the year 2015 with effect from 23.10.2015, was sought to be raised. By referring to the decision in the matter of **Ellora Paper Mills Limited Vs. State of Madhya Pradesh; (2022) 3 Supreme Court Cases 1**, he would submit that even in pending arbitration proceeding, the provision has been applied and it is not merely a prospective one. He would further submit that an additional ground to demonstrate fraud was also sought to be inserted. Both these grounds go to the root of the legality of the award and the District Court should have allowed such amendment to be carried out.

4. Mr. Totala would refer to following decisions as well :

(i) PSA SICAL Terminals Pvt. Ltd. Vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and others; A.I.R. 2021 Supreme Court 4661.

(ii) Bharat Broadband Network Limited Vs. United Telecoms Ltd.; (2019) 5 Supreme Court Cases 755.

(iii) Perkins Eastman Architects DPC and Another Vs. HSCC (India) Ltd.; (2020) 20 SCC 760.

(iv) Bharat Heavy Electricals Ltd. Vs. Sudhir Cranes Pvt. Ltd. in C.R.P.(PD) No. 3790 of 2019 decided on 04.01.2022 by the Madras High Court.

(v) TRF Limited Vs. Energo Engineering Projects Limited; (2017) 8 Supreme Court Cases 377.

(vi) State of Maharashtra Vs. Hindustan Construction Company Limited; (2010) 4 Supreme Court Cases, 518.

(vii) State of Chattisgarh & Anr. Vs. M/s. Sal Udyog Private Limited; (2022) 2 SCC 275.

5. Learned advocate Mr. Totala also submitted that since admittedly there was a proceeding challenging the award under Section 34 which was pending before the District Court, even the District Court ought to have allowed the application for stay which was preferred under Section 36 (2) and (3) of the Arbitration Act.

6. Mr. Uttarwar learned advocate for the respondent would support the order of the District Judge. He would submit that absolutely new grounds to challenge the award in a pending proceeding under Section 34 of the Arbitration Act were being sought to be inserted by way of the proposed amendment. He would submit that it is during execution, even according to the petitioner, that it realized absence of such grounds which clearly demonstrates that under the garb of the proposed amendment absolutely new grounds having no foundation in the application under Section 34 are now being sought to be inserted. This cannot be permitted to happen. He would submit that the decisions cited on behalf of the petitioner are not applicable to the fact situation of the matter in hand. There is no illegality in the order and the petition be dismissed.

7. I have carefully considered the rival submissions and perused the decisions cited at the bar and the papers.

8. At the outset it is necessary to bear in mind that by way of the proposed amendment the grounds which are now being sought to be

inserted have absolutely no foundation in the petitioner's application preferred under Section 34 of the Arbitration Act. As has been rightly noticed by the learned District Judge at no point of time any objection about neutrality of the Arbitrator was raised by resorting to Section 12, 13 or 15 of the Arbitration Act. This needs to be emphasized for the sole reason to ascertain as to if, the proposed amendment merely intends to add some facts to the pending challenge to the award or is it that it is intended to put forth absolutely new challenge.

9. In the matter of **Hindustan Construction Ltd (supra)** it has been held that in an appropriate case amendment of an application under Section 34 can be allowed even beyond the period provided that is three months under sub Section 3 of Section 34 and a further period of one month as provided under the proviso to that subsection. However, it has also been made clear that such amendment cannot be allowed if it constitutes a fresh challenge. While interpreting the ratio in the matter of **Hindustan Construction Ltd (supra)** it has been observed in the matter of **M/s. Sal Udyog Private Limited (supra)** as under :

“24. Reliance placed by learned counsel for the respondent-Company on the ruling in the case of Hindustan Construction Company Limited (Supra) is found to be misplaced. In the aforesaid case, the Court was required to examine whether in an appeal preferred under Section 37 of the 1996 Act against an order refusing to set aside an Award, permission could be granted to amend the Memo of Appeal to raise additional/new grounds. Answering the said question, it was held that though an application for setting aside the Arbitral Award under Section 34 of the 1996 Act had to be moved within the time prescribed in the Statute, it cannot be held that incorporation of additional grounds by way of amendment in the Section 34 petition would amount to filing a fresh application in all situations and circumstances, thereby barring any amendment, however material or relevant it may be for the consideration of a Court, after expiry of the prescribed period of limitation. In fact, laying emphasis on the

very expression “the Courts find that” applied in Section 34(2)(b) of the 1996 Act, it has been held that the said provision empowers the Court to grant leave to amend the Section 34 application if the circumstances of the case so warrant and it is required in the interest of justice. This is what has been observed in the preceding paragraph with reference to Section 34 (2A) of the 1996 Act.

25. To sum up, existence of Clause 6(b) in the Agreement governing the parties, has not been disputed, nor has the application of Circular dated 27th July, 1987 issued by the Government of Madhya Pradesh regarding imposition of 10% supervision charges and adding the same to cost of the Sal seeds, after deducting the actual expenditure been questioned by the respondent-Company. We are, therefore, of the view that failure on the part of the learned Sole Arbitrator to decide in accordance with the terms of the contract governing the parties, would certainly attract the “patent illegality ground”, as the said oversight amounts to gross contravention of Section 28(3) of the 1996 Act, that enjoins the Arbitral Tribunal to take into account the terms of the contract while making an Award. The said ‘patent illegality’ is not only apparent on the face of the Award, it goes to the very root of the matter and deserves interference. Accordingly, the present appeal is partly allowed and the impugned Award, insofar as it has permitted deduction of ‘supervision charges’ recovered from the respondent-Company by the appellant-State as a part of the expenditure incurred by it while calculating the price of the Sal seeds, is quashed and set aside, being in direct conflict with the terms of the contract governing the parties and the relevant Circular. The impugned judgment dated 21st October, 2009 is modified to the aforesaid extent.”

Understood in the light of the above observations it is abundantly clear that under the garb of amendment of the application preferred under Section 34, absolutely new grounds to challenge the award are being sought to be incorporated without there being any foundation, beyond the statutory period prescribed under Section 34(3) of the Arbitration Act. This certainly cannot be permitted to happen.

10. True it is that in the matter of **Ellora Paper Mills Limited (supra)**, the Section 12(5) which is inserted in the year 2015 has been held to govern a pending arbitration proceeding. However, it is to be borne in mind that it was a proceeding which was initiated under Sections 11, 14 and 15 and although the Arbitral Tribunal was constituted many years ago it had never commenced its proceeding. This is not the fact situation in the matter in hand. In this matter, without raising any objection at any earlier point of time on account of neutrality of the arbitrator by resorting to Sections 12, 13 and 14, an award has been passed and even it has been put to execution. Therefore, the petitioner is not entitled to derive any benefit from the decision in the matter of **Ellora Paper Mills Limited (supra)** as well.

11. Same is the case with another clause sought to be inserted by the proposed amendment to make out an additional ground of fraud. Again, even the fact sought to be inserted do not have any foundation and was never raised till the award was passed. Even this ground has been sought to be added beyond the period of limitation prescribed by Section 34(3).

12. The observations and the conclusions of the learned District Judge in the impugned order refusing the proposed amendment are clearly unassailable. The award in the matter was passed way back on 31.03.2018. Though the proceeding to challenge it was initiated on 26.06.2018, simultaneously, the execution was filed. At no point of time an attempt was made to raise the additional grounds immediately after the application under Section 34 was filed. The application seeking amendment was filed in November 2021, after a lapse of two and half years of preferring a proceeding under Section 34 and when the petitioner was served with a notice in the execution. I find no illegality in the order passed by the learned District Judge.

13. However, the learned District Judge has refused to decide the application (Exh. 15) preferred under Section 36(2) and (3) under an erroneous belief that by way of such application the interim relief/stay has been sought only till the decision on the application (Exhibit 14) whereby the petitioner had prayed for amendment of the application, when the prayer in the application (Exh. 15) clearly shows that the petitioner was seeking stay to the execution of the award till decision of the arbitration application. Therefore, the learned District Judge has clearly erred in refusing to decide the application for stay (Exhibit 15) on its own merits. It would, therefore, be appropriate that the District Judge is now directed to decide the application (Exhibit 15) on its own merits by hearing the parties.

14. The Writ Petition is partly allowed.

15. The Writ Petition to the extent of putting up a challenge to the order rejecting application (Exh. 14) is dismissed.

16. The order passed by the District Judge to the extent of rejection of application for stay (Exh. 15) is quashed and set aside, to that extent the matter is remitted back to the District Judge who shall now decide the application for stay (Exh. 15) on its own merits after hearing the parties as early as possible.

17. The Rule is made absolute in above terms.

(MANGESH S. PATIL, J.)

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