

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO.9 OF 2008

Navnirman Development Consultants (I) Pvt. Ltd. ... Appellant
Vs.

Divisional Commissioner and President District
Sports Complex and others ... Respondents

Dr. Uday Warunjikar a/w. Mr. Sumit Kate for Appellant.

Mr. A. R. Patil a/w. Ms. Tanaya Goswami, AGP for Respondent No.1-State.

CORAM : MANISH PITALE, J.

Reserved on : NOVEMBER 29, 2022

Pronounced on : DECEMBER 8, 2022

JUDGEMENT:

. By this appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996, the appellant has challenged judgment and order dated 16.11.2007, passed by the District Court at Pune, whereby an application filed under Section 34 of the said Act by respondent No.1 was allowed and the arbitral award was interfered with. It is the case of the appellant that the District Court failed to appreciate the narrow scope of jurisdiction available under Section 34 of the said Act to interfere with the arbitral award and that there is a jurisdictional error committed by the District Court in the present case.

2. The facts, in brief, leading to filing of the present appeal are that the appellant, being a company involved in the profession of architectural designing and other consultancy services, was engaged by respondent No.1 for the project of construction of a Sports Complex at Pune, consisting of a stadium, various playgrounds, gymnasium and swimming pool. An agreement was executed between the appellant and respondent No.1, in connection with the said project and for availing the services of the appellant. The said agreement contained clause No.3.8,

pertaining to arbitration for resolution of disputes that may arise between the parties. Although the appellant has referred to a series of developments during the course of providing services to respondent No.1, what is relevant for the present appeal is that, disputes arose between the parties, leading to the termination of appointment of the appellant as architect for the said project. The parties levelled allegations and counter-allegations against each other.

3. In August, 2004, the appellant filed an application before the District Court under Section 9 of the aforesaid Act, praying for an order to restrain respondent No.1 from appointing any other architect for the said project, till disposal of arbitration proceedings. The said application was rejected, whereupon the appellant invoked the arbitration clause and proposed appointment of an arbitrator. Since respondent No.1 failed to respond to the said letter of the appellant, it was constrained to approach this Court under Section 11 of the aforesaid Act by filing Arbitration Petition No.7 of 2005, for appointment of arbitrators. On 12.08.2005, this Court appointed an arbitral tribunal consisting of three members.

4. The arbitral tribunal took up the arbitration proceedings and eventually, on 03.11.2006, passed an award partly allowing the claims of the appellant. Aggrieved by the same, respondent No.1 filed application under Section 34 of the said Act to challenge the award before the District Court. The said application was registered as Civil Miscellaneous Application No.36 of 2007. The principal contention raised on behalf of respondent No.1 before the District Court was that the arbitral tribunal had erred in concluding that the work had reached stage 5.2 in terms of the agreement executed between the parties and that due to the aforesaid error, the quantum of the awarded amount was more than what could have been granted to the appellant. It was also specifically raised as a ground of challenge on behalf of respondent No.1 that the corrigendum issued by the arbitral tribunal correcting

ostensible typographical errors, was wholly unsustainable, for the reason, firstly, that the errors could not be said to be typographical in nature, and secondly, the correction was carried out without even issuing notice to respondent No.1.

5. By the impugned judgement and order dated 16.11.2007, the District Court accepted the contentions raised on behalf of respondent No.1 and partly allowed the application, by holding that insofar as the correction carried out by way of corrigendum was concerned, the same was not justified and that a proper appreciation of the terms of the agreement executed between the parties, particularly the clause pertaining to mode of payment at various stages, would show that the arbitral tribunal had committed an error, thereby rendering the award open to interference. As a consequence, the amount payable to the appellant stood reduced.

6. The present appeal was heard and stood dismissed on 13.09.2013 by a learned Single Judge of this Court, when none of the parties were represented by counsel. A review application was preferred on behalf of the appellant, which was also dismissed. Aggrieved by the said orders, the appellant filed Special Leave Petition before the Supreme Court, wherein leave was granted. The consequent Civil Appeal No.8408-09 of 2017, was allowed by an order dated 05.07.2017. The Supreme Court set aside the order of this Court, primarily on the ground that the facts leading to filing of the appeal were not even discussed in the order dated 13.09.2013, passed by this Court. Accordingly, the matter was remanded and the present appeal stood restored before this Court. It has come up for final hearing.

7. Mr. Uday Warunjikar, learned counsel appearing for the appellant raised one specific ground to claim that the impugned judgment and order passed by the District Court deserved interference. It was

submitted that when the opinion of the arbitral tribunal rendered in the award as corrected by the corrigendum, was a reasonable view, based on a proper interpretation of the clauses of the agreement, there was no scope for exercising jurisdiction under Section 34 of the said Act to interfere with the award of the arbitral tribunal. It was further submitted that none of the grounds available under Section 34 of the Act could be said to have been made out in the application filed by respondent No.1 before the District Court and that therefore, the District Court ought not to have interfered with the award of the arbitral tribunal. Learned counsel relied upon the following judgments of the Supreme Court: -

- a. *Mcdermott International Inc. Vs. Burn Standard Co. Limited and others*, **(2006) 11 SCC 181**;
- b. *Steel Authority of India Limited Vs. Gupta Brothers Steel Tubes Limited*, **(2009) 10 SCC 63**;
- c. *Associate Builders Vs. Delhi Development Authority*, **(2015) 3 SCC 49**;
- d. *Parsa Kente Collieries Limited Vs. Rajasthan Rajya Vidyut Utpadan Nigam Limited*, **(2019) 7 SCC 236**; and
- e. *UHL Power Company Limited Vs. State of Himachal Pradesh*, **(2022) 4 SCC 116**.

8. By referring to the aforementioned judgments, learned counsel appearing for the appellant submitted that by now the law is well settled as to the limited grounds on which an arbitral award can be interfered with and so long as the view adopted by the arbitral tribunal is a reasonable and possible view, the Court ought not to interfere with the award, as the Court does not exercise appellate jurisdiction in the matter.

9. On the other hand, Mr. A. R. Patil, Assistant Government Pleader (AGP) appeared on behalf of respondent No.1 and vehemently opposed the contentions raised on behalf of the appellant. He submitted that there could be no quarrel with the propositions laid down in the judgments

relied upon by learned counsel for the appellant, but, a proper application of the position of law would show that in the present case, no interference is warranted in the impugned judgment and order passed by the District Court. It is submitted that as per the law laid down by the Supreme Court in various judgments, one of the grounds for interference is that the award is against the terms of the agreement / contract executed between the parties. It is submitted that in the present case, the clause pertaining to the mode of payment i.e., clause No.5 specifically provided the stages at which fees was payable to the appellant. The said clause consisted of sub-clauses 5.1 to 5.9, each of which specified the completion of a particular stage, leading to payment of fees in specific proportion to the appellant. The learned AGP relied upon the award of the arbitral tribunal before issuance of the corrigendum and submitted that the reasoning in paragraph 4.01 of the award clearly recorded that as per the arbitral tribunal, the appellant claimed to have submitted designs and outlay of costs, but there was nothing to show acceptance of the same on behalf of respondent No.1. While discussing the aforesaid aspect of the matter, at one place, the arbitral tribunal referred to stage 5.2 and then recorded that as per the said stage, the appellant was entitled to 15% of the total fees payable. It was then recorded that since the material on record indicated only partial professional work having been done by the appellant, only 75% of the payment could be granted to the appellant. On this basis, it was recorded that the appellant would be entitled to 75% of 15% of the total fees payable, relatable to clause 5.1 of the stages of payment.

10. The learned AGP emphasized that, considering the reasoning of the arbitral tribunal, typographical error, if any, was with regard to the mentioning the stage of payment as clause 5.2 instead of 5.1. Yet, in the corrigendum, the arbitral tribunal proceeded to hold that the typographical error pertained to mentioning the fees payable as 15%

instead of 25%. The learned AGP was at pains to point out that the arbitral tribunal clearly erred in treating the same as a typographical error and proceeding to make the corrections, without even issuing notice to respondent No.1. This, according to the learned AGP, was an error, which demonstrated that the award as corrected by way of the corrigendum was in the teeth of the terms of the agreement itself, thereby justifying interference at the hands of the District Court, exercising jurisdiction under Section 34 of the Act. On this basis, it was submitted that the appeal deserved to be dismissed.

11. This Court has considered the rival submissions in the backdrop of the material placed on record. A perusal of the judgments brought to the notice of this Court shows that the court, while exercising jurisdiction under Section 34 of the Act, does not act as an appellate court and it ought not to re-appreciate the evidence to examine as to whether the findings of the arbitral tribunal are sustainable or not. In the case of **Mcdermott International Inc. Vs. Burn Standard Co. Limited and others** (*supra*), the limits of jurisdiction of the Court under Section 34 of the aforesaid Act have been specified and the heads under which the Court can interfere have been specifically analyzed and commented upon. It has been held that, so long as the findings rendered by the arbitral tribunal are based on material available on record, such findings that can be termed as 'reasonable', ought not to be interfered with.

12. In the case of **Steel Authority of India Limited Vs. Gupta Brothers Steel Tubes Limited** (*supra*), it is further held that the court would not interfere with the findings rendered by the arbitral tribunal even with regard to construction of a contract, if a possible view is adopted by the arbitral tribunal.

13. In the case of **Associate Builders Vs. Delhi Development**

Authority (*supra*), it was held that when it comes to setting aside an arbitral award on the ground of violation of public policy, the Court must conclude that the award shocks the conscience of the Court. The Court cannot substitute its own view for that of the arbitral tribunal to do what it considers to be amounting to justice.

14. In the case of **Parsa Kente Collieries Limited Vs. Rajasthan Rajya Vidyut Utpadan Nigam Limited** (*supra*), the Supreme Court has commented upon what can be said to be a patent illegality, for setting aside an arbitral award. It is reiterated that if the arbitral tribunal construes the term of a contract in a reasonable manner, no interference would be warranted and only in a case where the Court concludes that no fair minded or reasonable person could have construed the contract in the manner in which the arbitral tribunal had done, that interference would be warranted. In the case of **UHL Power Company Limited Vs. State of Himachal Pradesh** (*supra*), the Supreme Court held that when it comes to the scope of an appeal under Section 37 of the aforesaid Act, the jurisdiction of the appellate court is all the more circumscribed.

15. It would be relevant to refer to the law laid down by the Supreme Court in the case of *Delhi Development Authority Vs. R. S. Sharma & Co.*, (2008) 13 SCC 80, wherein the Supreme Court, after reviewing earlier decisions, has laid down the principles that emerge for interfering with arbitral awards. It is, *inter alia*, laid down that when the arbitral award appears to be against the terms of the agreement / contract executed between the parties, it gives rise to a good ground for interfering with the arbitral award. Since the learned AGP appearing on behalf of respondent No.1 emphasized upon the aforesaid aspect of the matter, this Court considers it necessary to examine the said contention in the light of the agreement executed between the parties and the view adopted by the District Court in the impugned judgment and order.

16. The relevant portion of the clause pertaining to the mode of payment as per the agreement executed between the parties reads as follows: -

“5. **MODE OF PAYMENT**

The employer shall pay fees to the Architects in stages as follows :

	STAGES	FEES PAYABLE
5.1	On submitting Conceptual designs and Preliminary estimates of Costs	15% of the total fees payable
5.2	On submitting the final preliminary drawings/designs along with modified estimates of cost	25% of the total fees payable less payment already made
5.3	On submitting preliminary drawings for obtaining approval from statutory bodies and after obtaining building permission from P.M.C.	35% of the total fees payable less payment already made
5.4	On submission of Working drawings	55% of the total fees payable less payment already made
5.5	On submission of detailed specifications, bill of quantities, detailed architectural working drawings, structural designs together with estimates of costs sufficient to invite tenders and on finalisation of tender	70% of the total fees payable less payment already made
5.6	On submission of complete set of drawings and details sufficient for the work to commence at site	80% of the total fees payable less payment already made
5.7	During the course of construction of work at site along with R.A. Bills of Contractors	15% of the total fees payable to be paid in installments consistent with the value of work from time to time
5.8	On completion of of the work and obtaining completion certificate from P.M.C.	5% balance payment payable after completion of all billing activities and other rectifications if any.

5.9 Every bill should be paid after the approval of the Divisional Commissioner & President, Divisional Sports Complex Executive Committee, Pune. ”

17. In the arbitral award, at paragraph 4.01, while examining the contentions of the rival parties, in the backdrop of the above quoted clause, the arbitral tribunal held as follows: -

“4.01 ***

The agreement states at stage 5.1 that 15% of the total fees payable will be due on mere submission of drawings and estimates.

In the context of complex nature of the project overall scope of design and parameters of the project and substantial cost outlay, the Tribunal has arrived at a conclusion that concept level drawings need to have more professional inputs than actually present in submission.

There is no acceptance in writing by the Respondents of the work submitted by the Claimants as is available for the revised project work at Exhibit No.C-24.

There is also an evident urgency and speed present in the project implementation when the drawings need to have more technical inputs than are seen in the submitted drawings.

The Claimants have submitted acknowledgment of drawings and estimates but there is no reciprocal acceptance in writing by the respondents of their submission at technical level from the Competent Authority such as Govt. Architect, or Senior Engineer of PWD.

Tribunal has reached to the conclusion that though under the terms of agreement as covered by Stage 5.2 submission of drawings and estimates entitled the Claimants 15% of total fees payable had to be more detailed even as a concept submission.

Tribunal also accepts the Claimants submission of drawings and estimates as partial professional work and hence allow 75% of 15% as claimed by the Claimants.”

18. A perusal of the above quoted portion shows that in the initial part of the reasoning, the arbitral tribunal has specifically referred to stage 5.1 of payment and it is recorded that at that stage, 15% of the total fees was payable to the appellant. In the above quoted portion, it is recorded

that as per the tribunal, on the basis of the material available on record, the concept levelled drawings, which the appellant was required to submit at the stage of clause 5.1, were required to have more professional inputs. It was also recorded that although the appellant submitted acknowledgments of drawings and estimates, there was no reciprocal acceptance in writing by respondent No.1. Such reasoning and observations clearly bring out the fact that as per the arbitral tribunal, even the requirement of the stage contemplated under clause 5.1, was not satisfactorily achieved by the appellant. Yet, in the above quoted portion, towards the end, the arbitral tribunal referred to stage / clause 5.2, while referring to payment of 15% of the total fees payable to the appellant.

19. It is in this backdrop that the appellant moved the arbitral tribunal to issue a corrigendum, claiming that the tribunal had erred in mentioning 15% of the total fees payable, instead of stating that 25% of the total fees was payable.

20. This Court is of the opinion that the reasoning contained in the above quoted portion of the award of the arbitral tribunal, on the face of it, indicates that reference to 15% of the total fees payable, was in tune with the reasoning and at worst, the typographical error was with regard to a reference to stage 5.2 of clause 5 pertaining to mode of payment, instead of stage 5.1, as correctly stated in the initial part of the reasoning. Yet, the arbitral tribunal proceeded to correct the purported two typographical errors in the arbitral award and directed that instead of 15% of total fees payable, it would be corrected to 25% at the relevant places.

21. The District Court, while exercising jurisdiction under Section 34 of the aforesaid Act, correctly found that such issuance of corrigendum, which substantially affected the contents of the award, could not have

been issued without first issuing notice to respondent No.1. This was completely in violation of the principles of natural justice and militated against public policy. Secondly, it was correctly held that in the facts and circumstances of the case, when the tribunal itself found that the appellant did not even professionally satisfy stage / clause 5.1 of the agreement, there was no question of referring to 25% of the total fees payable, which was relatable only to stage / clause 5.2.

22. This Court finds that the analysis of the material on record by the District Court in the impugned judgment and order is fully justified and that when the same is found to be correct, no interference is warranted under Section 37 of the aforesaid Act. This is for the reason that the manner in which the arbitral tribunal issued the corrigendum to make the corrections, not only militated against its own reasoning in the above quoted portion of the award, but it also amounted to rendering findings in the teeth of the specific clauses of the agreement executed between the parties. The material placed on record before the arbitral tribunal, even as per the findings of the tribunal, demonstrated that concept levelled drawings submitted by the appellant needed to have more professional inputs, thereby showing that even stage / clause 5.1 was yet to be achieved by the appellant. In this situation, to hold by way of corrigendum that 25% of the total fees was payable, relatable to stage / clause 5.2 of the agreement, demonstrated that the final findings rendered by the tribunal were in the teeth of the agreement executed between the parties. It is a different matter as to whether the arbitral tribunal could have granted 75% of the fees payable for work done in respect of stage/clause 5.1 of the agreement. The said opinion of the tribunal can be said to be a possible view in the matter and it is for this reason that the District Court thought it fit to partly allow the application of respondent no.1.

23. It is in these circumstances that the District Court, by its well-

reasoned judgment and order, interfered with the arbitral award. While doing so, the District Court simply restored the position as was rendered by the arbitral tribunal in its award before issuance of the corrigendum. In other words, the District Court partially set aside the award. An attempt was sought to be made by the learned counsel appearing for the appellant to demonstrate that the District Court had modified the arbitral award and that it had substituted its own award, which is impermissible as per settled law. But, as per the law laid down by the Full Bench of this Court in the case of *R. S. Jiwani v. Ircon International Ltd.*, **2010 (1) Bom.C.R. 529**, the Court can certainly exercise jurisdiction to partially set aside the award. Therefore, even the said contention sought to be raised on behalf of the appellant is without any substance. As noted above, the Supreme Court in the case of **UHL Power Company Limited Vs. State of Himachal Pradesh** (*supra*) has specifically held that the scope of jurisdiction under Section 37 of the Act while considering an appeal is even more circumscribed and that therefore, this Court would interfere with the impugned judgment and order of the District Court, only if appropriate ground is made out for such interference.

24. This Court is of the opinion that no fault can be attributed to the District Court in passing the impugned judgment and award, particularly because the order is in tune with the reasoning of the arbitral tribunal itself on the question of entitlement of the appellant for payment in terms of clause 5 of the agreement executed between the parties. Hence, the impugned judgment and order cannot be said to be erroneous and no valid ground is made out by the appellant for interfering with the same.

25. In view of the above, the appeal is dismissed. No order as to costs. Pending applications, if any, stand disposed of.

(MANISH PITALE, J.)