

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

WRIT PETITION NO. 4821 OF 2021

M/s. Western Coalfields Limited,
a body corporate registered under the
Companies Act having its office at Coal
Estate, Seminary Hills, Civil Lines,
Nagpur-1

.. Petitioner

Versus

1. M/s. Mahabeer Construction Company,
a registered partnership firm having its
office at B-5, Shastri Nagar, Mul Road,
Chandrapur, Tahsil and District
Chandrapur.

.. Respondents

2. A. G. Watwe, Sole Arbitrator,
R/o. 'Mayur', Flat No.43-A, Shivaji Nagar,
Hill Road, Nagpur 440010 (deleted)

Mr. C. S. Samudra, Advocate for petitioner

Mr. M. P. Khajanchi, Advocate for respondent

CORAM : MANISH PITALE, J.

DATE : 27/04/2022

ORAL JUDGMENT:

Rule. Rule made returnable forthwith. Heard finally with consent of the learned counsel appearing for the rival parties.

(2) By this petition, the petitioner- Western Coalfields Ltd. has challenged orders passed by the Court of Principal District Judge, Chandrapur, under the provisions of the Arbitration and

Conciliation Act, 1996 (herein after referred to as 'the said Act'), which according to the petitioner are not in consonance with the provisions of the said Act and the law laid down in that regard.

(3) In the present case, the parties were before the Court below in applications under Section 34 of the said Act, challenging an award dated 27.08.2005, passed by the arbitrator.

(4) By judgment and order dated 07.06.2017, the Court below disposed of both the applications by setting aside the award dated 27.08.2005. The Court below then remanded the matter to the arbitrator for decision afresh, in accordance with law.

(5) Pursuant thereto, a revised award was passed by the arbitrator on 02.10.2017, which was again made subject matter of proceedings under Section 34 of the said Act before the Court below. In the said proceedings, the Court below passed the impugned order dated 20.02.2021, purporting to exercise power under Section 34 (4) of the said Act. The proceeding under Section 34 was kept pending and the matter was sent back to the arbitrator, only for deciding the issue of limitation. It appears that, thereafter, the arbitrator expressed

difficulty in continuing with the arbitration proceeding, due to which the petitioner was constrained to approach the Court below for appropriate directions. By the impugned order dated 21.08.2021, the Court below directed that steps be taken for appointment of new arbitrator in terms of the arbitration agreement between the parties.

(6) On 03.12.2021, this Court issued notice for final disposal and granted ad-interim stay in favour of the petitioner. Upon service of notice the respondent has appeared through counsel.

(7) Mr. S. S. Samudra, learned counsel appearing for the petitioner, invited attention of this Court to the provisions of the said Act, particularly Section 34 thereof. He placed reliance on judgment of the Hon'ble Supreme Court in the case of ***Kinnari Mullick and Anr. .v/s.Ghanshyam Das Damani***, reported in ***(2018) 11 SCC 328***, to contend that power under Section 34(4) of the said Act could have been exercised by the Court below only upon a written application by either party and that such power could not have been exercised *suo motu*. It was further submitted that perusal of the impugned order dated 20.02.2021, would show that the Court below exercised power *suo motu* to remand the matter to the arbitrator, only on the question

of limitation, while keeping the application under Section 34 of the said Act pending. On this basis, it was submitted that the aforesaid impugned order deserved to be set aside. It was pointed out that if the aforesaid contention was accepted, the subsequent impugned order dated 21.08.2021, would have to be set aside. As regards the impugned judgment and order dated 07.06.2017, passed by the Court below, it was submitted that under the provisions of the said Act the Court could not have remanded the matter back to the arbitrator for decision afresh and at the most the award could have been set aside. On this basis it was submitted that the writ petition deserved to be allowed.

(8) Mr. M. P. Khajanchi, learned counsel appearing for the respondent submitted that in so far as the judgment and order dated 07.06.2017 was concerned, no interference was warranted, for the reason that the present writ petition was filed in the year 2021, by which time revised award was already passed by the arbitrator on 02.10.2017 and the parties were already before the Court below in the proceeding initiated under Section 34 of the said Act. Hence, it was submitted that even if, as per law, the judgment and order dated

07.06.2017 was not sustainable to the extent that the matter was remanded to the arbitrator for decision afresh, in view of the subsequent events, this Court may not interfere with the said order.

(9) As regards impugned order dated 20.02.2021, attention of this Court was invited to actions of the petitioner subsequent to passing of the said impugned order, including filing of pursis, joint pursis and applications before the Court below, indicating that the petitioner had acquiesced to the impugned order dated 20.02.2021. It was submitted that such material in all fairness ought to have been placed by the petitioner before this Court. But the same was suppressed. By relying upon the judgment of the Supreme Court in the case of *Shri K. Jayaram and Ors. .v/s. Bangalore Development Authority and ors., reported in, 2021 (14) SCALE 663*, learned counsel submitted that in these circumstances, since the petitioner had approached this Court in the present petition with unclean hands, the petition ought to have been dismissed. It was conceded that if the order dated 20.02.2021, was found to be unsustainable by this Court, the subsequent impugned order dated 21.08.2021, would have to be set aside.

(10) This Court has considered the rival submissions in the backdrop of material placed on record. Although it is found that the judgment and order dated 07.06.2017, passed by the Court below is unsustainable, to the extent that it remanded the matter back to the arbitrator for decision afresh, considering the subsequent events that have taken place, particularly in the light of the fact that a revised award is already before the Court below, this Court is not inclined to interfere with the said judgment and order dated 07.06.2017.

(11) In so far as the impugned order dated 20.02.2021 is concerned, the position of law laid down by the Supreme Court in the case of *Kinnari Mullick vs/ Ghanshyam Damani (supra)* is absolutely clear. It has been held in the context of the manner in which power can be exercised under Section 34 of the said Act as follows:

“16. In any case, the limited discretion available to the Court under Section 34(4) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear that the Court cannot exercise this limited power of deferring the proceedings before it suo motu. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings pending before it, then it is not open to the party to move an application under Section 34(4) of the Act. For, consequent to disposal of the main proceedings under Section 34 of the Act by the Court, it would become functus officio. In other words, the limited remedy available under Section 34(4) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court.”

(12) It is evident from the said position of law clarified by the Supreme Court that power under Section 34 (4) of the said Act can be exercised only upon a written application by a party to the arbitration proceeding and that such power cannot be exercised by the Court *suo motu*. Perusal of the impugned order shows that there was no application by either party to the arbitration proceeding for invoking Section 34 (4) of the said Act and the Court below erred in invoking the said power *suo motu*. On this short ground, the impugned order deserves to be set aside. In so far as the aspect of acquiescence on the part of the petitioner is concerned, when this Court has found that the impugned order could not have been passed by the Court below as a matter of law, mere acquiescence on the part of the petitioner would not take the case of the respondent any further. This Court is also of the opinion that in the facts and circumstances of this case, it cannot be said that the petitioner suppressed vital information from the Court to entail the serious consequence of not entertaining the petition.

(13) It is obvious that once the impugned order dated 20.02.2021 is found to be unsustainable, the impugned order dated

21.08.2021, can also not be sustained, as it is necessarily a consequential order. In view of the above, the writ petition is partly allowed.

(14) The impugned orders dated 20.02.2021 and 21.08.2021 are quashed and set aside. The Court below is directed to take up the application filed under Section 34 for consideration expeditiously on merits. It is made clear that the Court below shall decide all the points that arise for consideration in the said application, including the issue of limitation.

(15) The writ petition stands disposed of. Rule is made absolute in above terms.

[MANISH PITALE, J.]

Namrata