THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER
AND
THE HON'BLE SRI JUSTICE NAGESH BHEEMAPAKA

CIVIL MISCELLANEOUS APPEAL No.641 OF 2006

JUDGMENT: (Per Hon'ble Dr. Justice Shameem Akther)

This appeal, under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act'), is filed by the appellants, who are the Union of India and BSNL, aggrieved by the judgment and decree, dated 10.11.2005, passed in O.P.No.915 of 2003 by the learned XIV Additional Chief Judge, City Civil Court, Hyderabad, whereby the subject O.P. filed by the appellants, under Section 34 of the Act seeking to set aside the Award, dated 30.12.2002, passed in Arbitration Application No.64 of 1999 by the respondent No.2/Arbitrator, was dismissed.

2. Heard Ms. T. Bala Jayasree, learned Standing Counsel for the BSNL, appearing for the appellants; Sri K. Vijaya Bhaskar Reddy, learned counsel representing Sri V. Seetharama Avadhani, learned counsel for respondent No.1, and perused the record.

3. The operative portion of the impugned Award, 30.12.2002, passed in Arbitration Application No.64 of 1999 by the respondent No.2/Arbitrator, reads as follows:

> "In the result, the Award is passed directing the Respondents to pay a sum of Rs.2,06,67,363.80 (Rupees Two Crores, Eight Lakhs Eighty Seven and Sixty Three and Paisa Eight only) @ (12%) (Twelve per cent) per annum from 28.1.2001 in the date of passing of this Award, i.e., 30.12.2002 and thereafter at 15% (Fifteen per cent) per annum till the date of payment and each party is directed to bear their own cost."
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> (Reproduced verbatim)

4. Learned Standing Counsel for BSNL appearing for the appellants would contend that as per the Purchase Order, dated 31.01.1994, the respondent No.1 has to supply 150 towers at the rate of Rs.9,08,026/- each. There was delay in supply of the towers in terms of the said Purchase Order. The respondent No.1 had supplied only 128 towers. In spite of extending the time several times, the respondent No.1 did not supply the remaining towers. Clause No.15 of the General Conditions of Contract is very clear in relation to the time stipulated to supply the goods. The respondent No.1 is not entitled for extension of time, unless there are circumstances warranting so. Extension of time to deliver the goods will be given only in exceptional circumstances. Even if delivery of goods is made after expiry of the period prescribed, it would not disentitle the appellants to recover the liquidated damages, as per Clause No.16.2 of the General Conditions of Contract. The appellant-BSNL is a public sector undertaking. As the respondent No.1 failed to supply the agreed quantity of 150 towers within the extended time, the appellants are justified in claiming liquidated damages and also encashment of the bank guarantee. The respondent No.2/Arbitrator as well as the Court below committed patent error in not adverting to Clause No.16 of the General Conditions of Contract. Further, no notice as contemplated under Clause No.18 read with Clause No.15 is necessary. The respondent No.1 has supplied only 128 towers out of the agreed quantity of 150 towers. These material facts were not adverted to by both the authorities below. In view of the manifest error and perversity in the impugned judgment, it is not sustainable and ultimately, prayed to set aside the impugned judgment, dated 10.11.2005, passed by the Court below as well as the Award, dated 30.12.2002, passed by the respondent No.2/Arbitrator. The learned Standing Counsel, in support of her submissions, has placed reliance over the decision rendered by the Honourable Supreme Court in **Oil and Natural Gas Corporation Limited v. Saw Pipes Limited**[1].

5. On the other hand, learned counsel for respondent No.1 would submit that both the authorities below have adverted to the facts in question and clearly recorded that there were laches and

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[1] (2003) 5 SCC 705

delay on the part of the appellants in finalizing the design. There was lot of correspondence in between the DOT, Calcutta and Structural Engineering Research Centre (SERC), Madras. In spite of the respondent No.1 addressing a letter, dated 19.07.1994, to the Director, New Delhi, designs were not given by the appellants within time. Therefore, the respondent No.1 was able to supply only 128 towers out of the agreed quantity of 150 towers. For non supply of rest of the towers, it is not proper to the appellants to claim liquidated damages as well as encash the bank guarantee. Further, the facts in question cannot be re-examined under Section 34 of the Act as well as under Section 37 of the Act, except on certain grounds, which were specifically mentioned under Section 34(2)(b)(ii) of the Act. As long as the findings are against the public policy, the impugned judgment cannot be set aside. Furthermore, the Court below while dealing with the subject matter shall not sit in appeal over the arbitration Award. Neither there is patent or manifest error nor perversity in the impugned judgment, so as to interfere with the same. The conclusions and the findings recorded by the respondent No.2/Arbitrator and the Court below are in consonance with the material placed on record and ultimately, prayed to dismiss the appeal. The learned counsel, in support of his submissions, has placed reliance on the decisions of the Honourable Supreme Court in **MMTC Ltd. v. M/s. Vedanta Ltd.**[2] and **Haryana Tourism Limited v. M/s. Kandhari Beverages Limited**[3].

6. In view of the above rival submissions, the points that arise for determination in this appeal are as follows:

> "1. Whether the findings recorded by the authorities below are perverse or there is any patent or manifest error apparent on the face of the record or they are against the public policy?
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> 2. Whether there are any grounds to interfere with the impugned judgment and decree, dated 10.11.2005, passed in O.P.No.915 of 2003 by the learned XIV Additional Chief Judge, City Civil Court, Hyderabad, and the Award, dated 30.12.2002, passed in Arbitration Application No.64 of 1999 by the respondent No.2/Arbitrator in view of the mandate given under Section 34(2)(b)(ii) of the Act?"

POINTS:

7. The material placed on record reveals that the appellants have placed an advance Purchase Order, dated 22.12.1993, for supply of 150 towers of 80 meters height. The respondent No.1 gave bank guarantee for the same. Thereafter, a detailed Purchase Order was placed on 31.01.1994 for supply of 150

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[2] 2019 4 SCC 163
[3] 2022 3 SCC 237

towers of 80 meters height at the rate of Rs.9,08,026/- each. The General Conditions of Contract is made as part of the contract. As conceded by the other side, the respondent No.1 has to supply 150 towers by 02.05.1994. Thereafter, the time was extended on mutual consent. Ultimately, the respondent No.1 has supplied 128 towers out of the agreed quantity of 150 towers. Alleging that the remaining towers were not supplied by the respondent No.1 within the time stipulated, the appellants proposed for claiming liquidated damages and encashing the bank guarantee. In view of the same, the matter was carried to the Arbitrator. The respondent No.2/Arbitrator, having examined the evidence on record, vide Award, dated 30.12.2002, observed that the appellants are not entitled to recover liquidated damages and also encash the bank guarantee and directed the appellants to pay an amount of Rs.2,08,87,363/- with interest to respondent No.1. Aggrieved by the same, the appellants filed the subject O.P. The Court below *vide* the impugned judgment, dated 10.11.2005, upheld the said Award. Assailing the same, the present appeal is filed by the appellants.

8. It is evident from the record that a question is raised with regard to maintainability of the arbitration proceedings. The

Court below, observing that the subject dispute is not an excepted matter and that the appellants did not raise such a question before the respondent No.2/Arbitrator, rejected the said contention. The contract between the parties to the litigation stipulates such a condition to proceed with arbitration. Further, the Court below, while dealing with the subject matter, had examined Clause Nos.15, 16 and 18 of the General Conditions of Contract. It observed that there is record to show that there were defects in the original design and that is the root cause for the delay in preparation and supply of the towers as agreed by the respondent No.1. There was correspondence in between the DOT, Calcutta and SERC, Madras, in relation to correction of the designs. Several deficiencies in the designs were pointed out. So much of correspondence took place in between the parties. The consignee details were communicated to the respondent No.1 at a later point of time. Several letters were exchanged in between the parties, which disclose that there was defect in the designs given by the Department itself and it is said to be rectified subsequently. The objections to the drawing were taken up by the Divisional Engineer, Bangalore, by letter, dated 09.05.1994, wherein it was mentioned as follows:

> "It is noticed that cross arms length is more than the prescribed measurements and unsuitable for construction of the Tower. The work is held up for want of suitable cross arms."

In the subsequent letters, it was noticed that the design or plan given by the Department itself was defective and there was no proper step at the height of 21 meters. It was noted in the minutes of meeting held between 10.07.1994 and 14.07.1994 that the design of the tower was made by DOT, Calcutta and the structural adequacy of the tower members were checked by SERC, Madras. However, the joints and detailed drawings were not checked by SERC as they were not furnished at that time and therefore, not included in the scope of the work. The material placed on record substantiates that the delay was caused by the appellants themselves. In the given circumstances, the claim of the appellants seeking liquidated damages and encashment of bank guarantee is unjust. Though Clause No.16 of the General Conditions of Contract deal with liquidated damages, it is of no significance, as the appellants themselves have committed the breach of contract. Therefore, the findings recorded by the respondent No.2/Arbitrator as well as the Court below that the appellants are not entitled for liquidated damages and encashment of the bank guarantee are sustainable.

9. Here, it is also pertinent to refer to the decision in **MMTC Ltd.**'s case (supra 2), relied on by the learned counsel for the respondent No.1, wherein the Honourable Supreme Court observed as follows:

> "11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii), i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.
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> It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA, (2015) 3 SCC 49). Also see ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705; Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445; and McDermott International v. Burn Standard Co. Ltd., (2006) 11 SCC 181).

> It is relevant to note that after the 2015 amendments to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence."

10. It is also appropriate to refer to the decision in **Haryana Tourism Limited**'s case (supra 3), relied on by the learned counsel for the respondent No.1, wherein the Honourable Supreme Court held as follows:

> "8. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to, (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial Court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable."

11. As per the aforesaid decisions, the settled position of law is that an award can be set aside under Sections 34/37 of the Act, if the award is found to be contrary to, (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. In the case on hand, there is delay and laches on the part of the appellants themselves. The material placed on record clinchingly establishes that the findings recorded by both the authorities below are in consonance with the material placed on record. There is neither manifest error apparent on the face of the record nor perversity in the impugned order. Even two views are also not possible. Further, it is not the case of the appellants that the decision rendered by the authorities below is opposed to public policy. None of the exceptions under Section 34(2)(b)(ii) of the Act exists in favour of the appellants to consider their request to interfere with the impugned judgment. The appellants cannot take advantage of their own laches and delay and seek liquidated damages as well as encashment of the bank guarantee. Further, the facts of the case on hand are distinct and different from the facts of the case in **Oil and Natural Gas Corporation Limited**'s case (supra 1), relied on by the learned counsel for the appellants. In the said case, there were no laches or delay on the part of the department therein, but there was delay with regard to supply of goods by the supplier in terms of the agreement entered into between the parties therein and therefore, the conditions in the agreement entered into the parties therein operated. Here, in the instant case, there were laches and delay on the part of the appellants themselves. Therefore, the aforesaid decision has no application to the facts of the case on hand. The appeal is lacking merits and is liable to be dismissed.

12. Accordingly, the appeal is dismissed confirming the judgment and decree, dated 10.11.2005, passed in O.P.No.915 of 2003 by the learned XIV Additional Chief Judge, City Civil Court, Hyderabad.

Miscellaneous petitions, if any, pending in this appeal, shall stand closed. There shall be no order as to costs.

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Dr. SHAMEEM AKTHER, J

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NAGESH BHEEMAPAKA, J

Date: 10-11-2022
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