

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO-CARB-34-2022 (O&M)
Date of decision :16.09.2022

INDER KUMAR GUJRAL PUNJAB TECHNICAL UNIVERSITY

..... APPELLANT

VS

M/S MINDLOGICX INFOTECH LTD AND ORS.

..... RESPONDENTS

CORAM : HON'BLE MR.JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR.JUSTICE ALOK JAIN

Present :- Mr. Anand Chhibber, Sr. Advocate with
Mr. Shikhar Sarin, Advocate for the appellant.

Mr. Amit Jhanji, Sr. Advocate with
Ms. Nikita Garg and Mr. Jasraj Singh, Advocates
for the respondent.

ALOK JAIN, J. (Oral)

CM-98-FACRB-2022

The present application is for condonation of delay of 90 days in filing the present appeal by taking concession of the exemption granted by the Hon'ble Supreme Court of India in its order dated 10.01.2022 in *suo moto* Writ Petition(C) No.3 of 2020 and for the reasons averred in the application that the appellant had approached the wrong Court in bona fide belief. Learned counsel of the appellant, at the outset, has clarified that FAO No.3364 of 2022 had been filed, however, the same was withdrawn on 24.08.2022 to assail the impugned order before the Commercial Appellate Division of this Court under Section 13 of the Commercial Courts Act. Therefore, the provisions of Section 14 of the Limitation Act have been relied upon to seek the condonation of delay.

For the reasons recorded in the application, the delay is condoned and the application stands disposed of.

FAO-CARB-34-2022

The present appeal raises challenge to the award dated 13.01.2017 passed by respondents No.2 to 4 allowing claim of respondent No.1 and has also impugned the order dated 25.08.2021, whereby the objection petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been dismissed.

Coming to the merits of the present case, counsel for the appellant has briefly narrated the facts as under:

The applicant-university was established in the year 1997 under the Punjab Technical University Act, 1996. In order to achieve its objectives, the appellant decided to proceed with the introduction of Distance Education Program (DEP for short) under which learning centers were to be opened across the country. Accordingly, the appellant invited sealed offers/tenders from various organization to function as support service providers for its distance education programs for providing e-Governance and Tele-education on revenue sharing basis.

Admittedly, the claimant was the successful bidder and General Service Agreement dated 19.08.2003 was executed between the parties in pursuance to the works order issued on 05.08.2003 for a period of five years. The broad mandate of the project was twofold: (i) to provide tele-education solutions for students of DEP of PTU so that its students at various Learning Centers across the country can watch, listen and respond to queries through a central studio located at the campus of PTU in Jalandhar and to interact by two-way simultaneous communication with the faculty on real time basis. By

its DEP, PTU seeks to provide quality content and delivery of education; (ii) to provide an e-governance solution to the University which included a file management system and all other administrative and governance related functions of the University to be done electronically by officials of the University so as to emerge as a paperless University.

That the counsel for the appellant submitted that the agreement had three distinct mandate and obligation upon the respondent, which are as under:

“(1) To deliver hardware network for various tele-education solutions/activities. Reference here is made to Sr. No. 4 of the work contract at page 12 of the documents attached with the claim petition.

(2) To deliver a web portal for use of the students and learning centres. Reference here is made to the Work Contract at page 15-16 of the documents attached with the claim petition.

(3) To create a comprehensive software solution for University and administrative activities (E-governance). Reference here is made to the Work Contract, under the title 'University Administrative Activities', at page 14-15 of the documents attached with the claim petition.”

To summarize the project comprised of three major components viz (i) Tele-education; (ii) e-Governance of the University; and (iii) Web Portal.

The said GSA was amended and an addendum was also executed between the parties on 06.09.2004 which recorded certain changes qua the fact that the infrastructure including computer hardware, networking,

communication setup, software, database and studio equipment; being the assets created by MLX; will become the property of PTU.

Subsequently, the dispute arose between the parties when the Vice-Chancellor terminated the contract vide letter dated 11.10.2005. The respondent invoked the arbitration clause and the Arbitration Tribunal passed the award on 13.01.2017 and granted the following claims:

- “i. Directing the respondents to pay the Claimant the sum of Rs. 7,54,27,000/- (Rupees Seven Crores Fifty Four Lacs Twenty Seven Thousand Only) within two months from the date of the Award.*
- ii. Directing the Respondents to pay to the claimant interest @9% p.a. on Rs. 7,54,27,000/- for 114 months from July, 2007 to the date of the Award amounting to Rs. 6,44,90,000/-.*
- iii. Directing the Respondents to pay Rs. 25,00,000/- towards costs.*
- iv. Directing that the Respondent will pay interest to the Claimant @ 9% after two months from the date of the Award till the date of the payment on the gross amount of Rs. 14,24,17,000/-, being the total of (i), (ii) and (iii) above and if the Respondents fail to make the payment within two months from the date of the Award then they will be liable to pay interest from the date of the Award itself.”*

The appellant being aggrieved by the said award, preferred the objection petition under Section 34 raising challenge on the ground mentioned therein, which also came to be dismissed on 25.08.2021 by holding that the award does not suffer from any illegality which could be liable to set aside

under Section 34 of the Arbitration and Conciliation Act and hence this present appeal.

Learned senior counsel for the appellant has vehemently argued that the impugned award is against the “public policy” and the said issue has not been dealt with, by the First Appellate Court in the objection petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short ‘The Act’). To substantiate his argument, reliance has been placed upon the report of the Kalsi Committee as well as the Independent Expert Committee, and it is submitted that a wrong inference has been drawn by the Arbitral Tribunal which has led to passing of the award and subsequently dismissal of the objections under Section 34 of the Act. Counsel for the appellant has further contended that once the Arbitral Tribunal had observed that some of the answers to their questions are found in the report of the Kalsi Committee as well as Independent Expert Committee, the Tribunal could not have disregarded the same and fell in patent error. Counsel for the appellant has contended that the Kalsi Committee was constituted within a period of one month of the project and was required to do technical and cost analysis study of the project and its domain was to look into different aspects of operation of the project after holding discussions with all the stake-holders. It has been contended that the Kalsi Committee had examined the claimant/ respondent, though the said examination of Dr. Mukund Raj of the claimant was denied. Be that as it may, the Kalsi report submitted that *prima facie* the appellant had no in-house expertise to handle the techno-economic project of such complexity and secondly, none of the stake-holders were fully prepared for the implementation of the model of the distance education program. Taking further the argument, learned counsel for the appellant contends that PTU

appointed an Independent Expert Committee in compliance of the terms of Clause 3(f)(ii) of the GSA, which gave a report but the same had not been produced. The said fact is important for the reason that when the contract was terminated on 11.10.2005, there was a mention of this report.

The next contention of the counsel of the appellant is with regard to non-application of provision of Section 34 (2) (a), which reads as under:

“34. Application for setting aside arbitral awards.

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application 1 [establishes on the basis of the record of the arbitral tribunal that]-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains

decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or”

Counsel for the appellant has vehemently argued and emphasized that the witness-Mr. Elangovan admitted in his cross-examination that the respondent did not provide to the University, the password which was required to manage the website, and therefore, in the absence of the password the training of the University Officials and execution of the e-Governance was meaningless and was of no use to the University. The systems could not have been tested properly and were not user friendly. The extensive and cogent evidence available with the Arbitral Tribunal has not been appreciated in the correct perspective and therefore, the Award is hit by the vices of “public policy” and deserves to be set aside.

Counsel for the appellant has relied upon **2003 (5)SCC 705, ONGC vs. Shop Pipes Ltd.** to contend that the award is not in accordance with the contract entered between the parties and hence the learned District Judge should have exercised powers under Section 34 (2) to set aside the same, rendering the award as well as the order passed by the District Judge to be illegal. He has also relied upon **2006 (11) SCC 181, McDemott International Inc. Vs. Burn Standard Co. Ltd.and ors** and **2015 (3) SCC 49, Associate Builders Vs. Delhi Development Authority.**

Learned Senior counsel while concluding and summarizing his arguments, has contended that the award suffered from patent illegality and further the learned First Appellate Court while considering the objections under Section 34 (2) has not actually gone into the issue as it had to, especially in the light of the provisions of Section 34 (2) and the Award as well as the order on the objection petition deserves to be set aside.

Per contra, Mr. Amit Jhanji, Sr. Advocate appearing for the respondent has opened his argument by raising an issue, that it is not open to the Appellate Court to re-appreciate the evidence while exercising powers under Section 37 of the Arbitration and Conciliation Act, 1996. It is further contends that even if this Hon'ble Court finds that another interpretation is possible, even that has been held not to be a sufficient ground for interference. He has contended that a view, which is a plausible and possible and has been taken by the Arbitral Tribunal which is based on evidence and material available before it and further there being no error apparent on the face of the record, therefore, there is no occasion for interference and the entire submission of the appellant have no force.

As regards the issue of "Public Policy", learned counsel for the respondent has argued that the test to be applied has to be a patent error or against the interest of the country, against the justice and/or morality. The appellant having failed to demonstrate its case and bringing the same within any of these parameters, cannot invoke the powers of this Court. It has been further argued that the Division Bench cannot interfere in pure finding of facts as the Arbitral Tribunal is the one, which has to judge the quantity and quality of evidence and to culminate his argument, counsel for the respondent has submitted that even presuming for the sake of argument there is any error of

fact, still the powers of Section 37 cannot be exercised for setting aside the arbitral award until it passes the litmus test of it being against the public policy and the fundamental principles that the arbitrator must have acted perversely against the interest of India or causing injustice and beyond the purview of morality.

Mr. Jhanji has contended that when a court is applying the contours of “public policy” test to an arbitration award, it does act as a Court of appeal. More so, the expression “justice” when it comes to setting aside an award on the ground of it being opposed to “public policy” can only mean that an award shocks the conscience of the Court. It cannot possibly include what the Court thinks is unjust on the facts of the case for which it then seeks to substitute its view for the arbitrator’s view and does what it considers to be “justice”. With great respect to the Division Bench, the whole approach to setting aside arbitral award is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate Court and cannot interfere with errors of fact.

Mr. Jhanji has further argued that the jurisdiction conferred on the Courts under Section 34 and subsequently under Section 37 of the Arbitration Act is settled by the dicta of the judgment passed by Hon’ble Supreme Court of India in ***Civil Appeal No.10341 of 2011*** on 07.01.2022, wherein it has held as under:

“15. As it is, the jurisdiction conferred on Courts under section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under section 37 of the Arbitration Act, the jurisdiction of an Appellate Court in examining an order, setting aside or refusing to set aside an award, is all the more

*circumscribed. In **MMTC Limited v. Vedanta Limited (2019) 4 SCC 163**, the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under section 34 of the Arbitration Act has been explained in the following words:*

*"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 [**Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)**] 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."*

*16. A similar view, as stated above, has been taken by this Court in **K. Sugumar v. Hindustan Petroleum Corporation Ltd. (2020) 12 SCC 539**, where it has been observed as follows:*

"2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator."

*17. It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned Arbitrator proceeds to accept one interpretation as against the other. In **Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. (2019) 20 SCC 1**, the limitations on the Court while exercising powers under section 34 of the Arbitration Act has been highlighted thus:*

"24. There is no dispute that section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of

the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."

Lastly, Mr. Jhanji has submitted that the evidence available cannot be reappraised under exercise of powers under Section 37 of the Act, he submits that if the view of the arbitrator is a possible view, the award or the reasoning contained therein cannot be examined.

To conclude Mr. Jhanji has summarized his arguments on two points (i) the ambit of Section 37 of the Act is circumscribed and it is not open to this Court to re-appreciate the evidence and even if the another plausible view is available even then the award should not be set aside; (ii) the second limb of the argument in counter to the argument raised by the appellant is with regard to the interpretation of domain of "public policy" which are not attracted in the present case as none of the four parameters as detailed above and hence in the absence of the same, the present appeal deserves to be dismissed.

Having heard the counsel for the parties, we are of the opinion that Arbitrator has duly considered the entire evidence available with it before passing the award. The scope of Section 34(2) has not been met by the

appellant which led to the dismissal of the objection petition by the District Judge. It is settled principle of law that the powers under Section 37 of the Act are extremely circumscribed. Section 37 of the Act reads as under:

“37. Appealable orders.—

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) granting or refusing to grant any measure under section 9;
(b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.—

(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

A perusal of the above coupled with the catena of judgments passed by the Hon'ble Apex Court clearly lay down the law and the parameters, whereby this Court can exercise its power under Section 37 of the Act in an extremely limited sphere. The present case does not fall within such domain as the learned counsel for the appellant has failed to demonstrate any illegality which is against the fundamental policy of the Indian law or the interest of India or against the principles of justice or morality nor any patent

illegality has been brought to fore. The entire stand of the appellant is only based on re-appreciation of evidence and the claims granted by the arbitrator, which cannot be looked into as the same does not prick the conscious of this Court.

It is settled law and as has been held in **2019 (15) SCC 131 Ssangyong Engineering and Construction Company Ltd. Vs. National Highway Authority of India**, wherein the Hon'ble Supreme Court while relying upon the judgment in Associate Builders(supra) held in as under:

“What is clear, therefore, is that the expression “Public Policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of Associate Builders i.e. the fundamental policy of Indian law would be relegated to “Renusagar” understanding of this expression. This would necessarily mean that Western Geco expansion has been done away with. In short, Western Geco, as explained in paras 28 and 29 of Associate Builders, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court’s intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Section 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders”.

The Hon'ble Supreme Court in **2021 SCC online, SC 498 NTPC**

Ltd. Vs. Deconar Services Pvt. Ltd. has held as under: -

*"12. Further, it is also a settled proposition that where the arbitrator has taken a possible view, although a different view may be possible on the same evidence, the Court would not interfere with the award. This Court in **Arosan Enterprises Ltd. v. Union of India, (1999) 9 SCC 449** held as follows:*

"36. Be it noted that by reason of a long catena of cases, it is now a well-settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the court to reappraise the evidence is unknown to proceedings under section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the court would not be justified in interfering with the award.

37. The common phraseology "error apparent on the face of the record" does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined..."

*13. From the above pronouncements, and from a catena of other judgments of this Court, it is clear that for the objector/appellant in order to succeed in their challenge against an arbitral award, they must show that the award of the arbitrator suffered from perversity or an error of law or that the arbitrator has otherwise misconducted himself. Merely showing that there is another reasonable interpretation or possible view on the basis of the material on the record is insufficient to allow for the interference by the Court [See **State of U.P. v. Allied Constructions, (2003) 7 SCC 396; Ravindra Kumar Gupta and Company v. Union of India, (2010) 1 SCC 409; Oswal Woollen Mills Limited v. Oswal Agro Mills Limited, (2018) 16 SCC 219**].*

After considering the entire matter, the counsel for the appellant could not wriggle out of the finding that neither the Kalsi Committee nor the Independent Expert Committee were independent in its constitution as required under Clause 3(f)(ii) of GSA. In fact, the learned Court below has not relied upon either the Kalsi Committee report or the Independent Expert Committee for the reason that the constitution of these committees itself were defective as the appellant could not be judge of his own cause. The show cause notice was issued by Dr. R.P. Singh and at the same time the same person gave a detailed note to the Kalsi Committee and in fact was a signatory also and subsequently when the Independent Expert Committee was allegedly formed by the Board of Governors, the same was done after the Kalsi Committee Report when the appellant had already decided to terminate the contract, therefore, the Court below have rightly held that the termination of

contract was not done fairly and professionally after inquiry by a team of experts.

It is established with cogent evidence that the appellant illegally terminated the contract, accordingly the arbitrator gave a positive finding that the project did not succeed for various reasons which are not attributable to the respondents. The respondents have clearly established that the appellant had received the fees from the students but did not make the payment to the respondents on their own whims and fancies, which led to this entire litigation and hence, making them liable to the award passed against them, coupled with the fact that the exercise of jurisdiction of Section 37 of the Act does not permit the re-appreciation of the evidence.

Accordingly, in the light of the above facts and law established, the appeal being devoid of any merit and finding no illegality in the award and the order of the District Judge, Jalandhar on the petition under Section 34 of the Act, this appeal deserves to be dismissed.

Ordered accordingly.

(AUGUSTINE GEORGE MASIH)
JUDGE

(ALOK JAIN)
JUDGE

16.09.2022
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Whether speaking/reasoned Yes/No

Whether Reportable Yes/No