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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 25.08.2022+ **FAO(OS) (COMM) 335/2019**

M/S PRADEEP VINOD CONST CO Appellant
Through: Mr S. W. Haider, Adv.

versus

UNION OF INDIA Respondent
Through: Mr Ashok Singh, Adv.

CORAM:**HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MS. JUSTICE TARA VITASTA GANJU****[Physical Hearing/Hybrid Hearing (as per request)]****RAJIV SHAKDHER, J. (ORAL):**

CM APPL. 49781/2019 *[Application for condonation of delay of 62 days in filing the instant appeal]*

1. This is an application for condonation of delay in filing the appeal.
2. Although it is averred in the application that the period of delay involved is 62 days, an additional affidavit has been filed on behalf of the appellant, pursuant to the directions issued by the Court on 26.02.2020 and 13.05.2022, wherein the delay is pegged at 31 days.
 - 2.1. Mr S. W. Haider, who appears on behalf of the appellant, says that the delay was unintentional and not deliberate.
 - 2.2. In this behalf, Mr Haider has taken us through the additional affidavit dated 21.05.2022.
 - 2.3. Based on the assertions made therein by the affiant, it is submitted



that since one of the partners of the appellant-firm had been advised complete bed rest by the concerned doctor from 15.09.2019 to 15.10.2019, there was a delay in instituting the instant appeal.

3. Mr Ashok Singh, who appears on behalf of the respondent, says that in view of the medical certificate attached to the additional affidavit and the reasons given therein, he does not oppose the prayer made in the application.

4. Thus, having regard to the assertions made in the additional affidavit and the medical certificate dated 15.09.2019 appended thereto, we are inclined to condone the delay.

4.1. Delay is, accordingly, condoned.

5. The application is disposed of, in the aforesaid terms.

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6. This appeal is directed against the impugned judgment passed by the learned Single Judge dated 31.07.2019. The appellant is aggrieved by only one aspect of the impugned judgment i.e., the reduction of the rate of interest from 18% per annum to 10% per annum.

6.1. According to the appellant, the learned Single Judge, while exercising powers under Section 34 of the Arbitration and Conciliation Act, 1996 [in short “the 1996 Act”], could not have issued such a direction.

7. The record shows that the appellant was awarded the contract for the replacement of bridge timber with steel channel sleepers on bridge nos.79, 168, 196, 216, 225, 227 & 228 on Delhi–Ambala section under ADEN/Karnal [hereafter referred to as the “subject contract”].

7.1. The subject contract was awarded to the appellant on 31.01.2003.

7.2. It is not disputed that the subject contract was closed on 06.06.2005, *albeit*, at the request of the appellant. The record also shows that the



respondent i.e., Union of India [in short “UOI”] rescinded the subject contract on 04.07.2005, without extending the stipulated period for completion of the subject contract, which had expired on 31.01.2005.

7.3. This led to disputes arising between the parties, resulting in the respondent/UOI constituting an arbitral tribunal. A communication, in that behalf, was issued by the respondent/UOI on 13.06.2006.

7.4. Subsequently, the arbitral tribunal rendered its award on 12.10.2007.

7.5. Via the said award, the appellant was awarded Rs.7,91,243/-.

7.6. The details, with regard to the various claims against which the said award was passed, are set forth hereafter:

“Total claims of claimant:

Claim no.1 Rs.3,87,449.65

Claim no.2 Rs.97,137.60

Claim no.3 Rs.80,997.00

Claim no.4 Rs.2,25,659.00

Total Rs.7,91,243.25 Say Rs.7,91,243.00”

7.7. Besides this, the appellant was also awarded interest, as indicated above, at the rate of 18% per annum, which was to be triggered on the 45th day post the date when the award was rendered and would continue to run, till the date of realization of the amount.

8. Being aggrieved by the arbitral award, the respondent/UOI filed a petition with this Court, under Section 34 of the 1996 Act.

8.1. The learned Single Judge, after hearing the counsel for the parties, concluded that the award did not deserve interference, insofar as the monies that the appellant had been awarded against the aforementioned claims were concerned.

8.2. However, having reached the above conclusion, the learned Single



Judge proceeded to interfere with the part of the award, insofar as interest was concerned.

8.3. Insofar as the interest awarded by the arbitral tribunal is concerned, the following was stated by the learned Single Judge:

“11. The rate of interest that was awarded by. the Id. Tribunal is @ 18% per annum after 45 days from the date of award till the date of realization of the amount. The operative portion of the award reads as under:

"The respondent should realize the award announced above within 45 days from the date of award and claimant shall be entitled to interest @ 18% per annum after 45 days from the date of award till the date of realization of the amount."

12. Under the circumstances of this case, where the Contractor himself has sought repeated extensions and has also finally sought closure of the contract on his own, the rate of interest is modified to 10% per annum from the date of the award."

8.4. Mr Haider states that the direction issued by the learned Single Judge via the impugned judgment, is contrary to law and fact.

8.5. It has been pointed out by Mr Haider that the arbitral tribunal has, in fact, returned a finding of fact that the delay in the execution of the subject contract lay at the door of the respondent/UOI.

8.6. Furthermore, Mr Haider says that the learned Single Judge could not have scaled down the interest, while exercising jurisdiction under Section 34 of the 1996 Act.

8.7. Mr Singh, on the other hand, relies upon the judgment of the learned Single Judge, in rebuttal to the contention advanced by Mr Haider, concerning aspects pertaining to scaling down the interest rate.

8.8. It is also Mr Singh's contention that there is no impediment in the



Court exercising jurisdiction under Section 34 of the 1996 Act, while ordering a reduction in the rate of interest.

9. Having heard the counsel for the parties, undoubtedly, insofar as the aspect, as to whether or not the appellant was responsible for the delay, one would have to go by the finding returned by the arbitral tribunal, in that behalf. The finding returned by the arbitral tribunal, for the sake of convenience, is extracted hereafter:

“Point No.1: Whether the claimant is responsible for the delay in the execution of work?”

The date of currency of contract was extended up to 20.2.04, 31.7.04 and 31.1.05 on written request of claimant. While recommending the request the ADEN/Karnal found claimant not responsible for delay and accordingly the respondent granted all three extensions without penalty. The claimant in his request for extension mentioned shortage of labour as one of the reason for extension of currency apart from technical reasons and hike of prices of steel in market. Claimant on dated 28.12.04 requested respondent to arrange 40 mm thick grooved rubber pad as per site requirement against the provision of 28 mm given in contract. The claimant clarified that the procurement for fittings for sleeper will be arranged according to the thickness of grooved rubber plate. The respondent has not given any directions to claimant for use of either 40mm or 28 mm grooved rubber plate. The claimant in the absence of any decision of respondent, cannot proceed further for execution of work. The reasons cited by claimant while seeking last i.e. third extension up to 31-1-05 are not on account of Railways. The Railways, while granting various extensions of date of completion admitted that the claimant is not responsible for delay. Therefore, considering all the factors, it is decided that the delay for execution of work is largely not on account of claimant.”

[Emphasis is ours.]



9.1. In view of the above, it has to be said that the contention of Mr Haider, that the appellant was not responsible for the delay in the execution of the subject contract, is correct.

10. In any event, since the arbitral tribunal has appraised, the material placed before it, and thereafter, formed a view, it would not be within the ken of the Court to interfere with a finding concerning the delay. It is only in those cases, where there is no evidence, or the evidence being placed on record, shows to the contrary, that a Court can interfere with the award in a Section 34 action.

11. It is important to note at this juncture, that the respondent/UOI has not filed any appeal against the order of the learned Single Judge.

11.1. In this context, we may also note the order dated 26.02.2020 passed by the coordinate Bench in this very matter. At the hearing held on the said date, counsel for the respondent/UOI had, in no uncertain terms, informed the Court that the respondent/UOI had decided to accept the impugned judgment.

12. Clearly, the observation made in paragraph 12 of the impugned judgment passed by the learned Single Judge to justify scaling down of interest to the effect that: *“the Contractor himself has sought repeated extensions and has also finally sought closure of the contract on his own”*, does not reveal the entire picture. The reduction of interest rate, in the given circumstances, is based on a flawed premise i.e., that the appellant was responsible for the delay in the execution of the contract.

12.1. As noted above, the arbitral tribunal has, after appreciating the evidence placed on record, concluded that the respondent/UOI was largely responsible for the delay.



12.2. Therefore, the very justification for scaling down the interest is founded on tenuous grounds.

13. That apart, we are of the view that the learned Single Judge does not have the power to scale down the rate of interest, as it results in modification of the award.

13.1. In this behalf, we are fortified by the judgment of the Supreme Court dated 20.07.2021, rendered in *Project Director, National Highways No.45 E and 220 National Highway Authority of India vs. M. Hakeem and Anr.* (2021) 9 SCC 1. For the sake of convenience, the relevant portions of the said judgment are extracted hereafter:

“42. It can therefore be said that this question has now been settled finally by at least 3 decisions of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the ‘limited remedy’ under Section 34 is co-terminus with the ‘limited right’, namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.

43. A look at the Arbitration Acts of England, the United States, Canada, Australia and Singapore also lead to the same conclusion. In each of those legislative measures, there are express provisions which permit the varying of an award, unlike Section 34 of the present Act. In para 51, the learned Single Judge then refers to recourse to a court against an arbitral award, and argues that a statute cannot be interpreted



in such manner as to make the remedy worse than the disease. As has been pointed out by us, the “disease” can only be cured in very limited circumstances thus limiting the remedy as well. Also, to assimilate the Section 34 jurisdiction with the revisional jurisdiction under Section 115 of the Code of Civil Procedure, 1908 [the “CPC”], is again fallacious. Section 115 of the CPC expressly sets out the three grounds on which a revision may be entertained and then states that the High Court may make “such order as it thinks fit”. These latter words are missing in Section 34, given the legislative scheme of the Arbitration Act, 1996. For all the aforesaid reasons, with great respect to the learned Single Judge, it is not correct in law and therefore stands overruled.

44. *Coming to the submission in support of the impugned judgment that the fact that the Central Government appoints an arbitrator and the arbitration would therefore not be consensual, resulting in a government servant rubber stamping an award which then cannot be challenged on its merits, cannot possibly lead to the conclusion that, therefore, a challenge on merits must be provided driving a coach and four through Section 34 of the Arbitration Act, 1996. The impugned judgment is also incorrect on this score.*”

[Emphasis is ours.]

13.2. The position in *M. Hakeem and Anr.* has been affirmed by the Supreme Court in *National Highways Authority of India vs. P. Nagaraju alias Cheluvaiah and Anr* 2022 SCC OnLine SC 864.

13.3. We may note that in the recent past, the only judgment of the Supreme Court, where interest set *via* an arbitral award has been modified, is *Vedanta Limited vs. Shenzhen Shandong Nuclear Power Construction Company Limited* (2019) 11 SCC 465. This was a case where the arbitral tribunal awarded a dual rate of interest at the first instance; 9% if the same is paid or deposited within 120 days of passing of the award. This interest, according to the award rendered in that case, would stand enhanced to 15% if the



amount awarded is not paid within 120 days of the passing of the award. The interest was to run on the amount which was crystalized, both in Indian rupees and Euros. It is in this circumstance, that the Court took recourse to London Interbank Offer Rate [‘LIBOR’.] Notably, in paragraph 2.14, the Supreme Court noted that the challenge to the interest awarded by the arbitral tribunal is being considered in the background of ‘peculiar facts and circumstances’ and ‘specific clauses of the contract in question.’

13.4. Therefore, the sense one gets is that when the Supreme Court finds the interest rate is usurious or not in line with the prevailing economic conditions and therefore ceases to be compensatory in nature, it could interfere by exercising powers under Article 142 of the Constitution. However, no such power exists in this Court, under Section 37 of the 1996 Act.

14. In any event, the learned Single Judge has given reasons for scaling down the interest, which do not align with the facts and circumstances obtaining in the case. [See paragraphs 9, 9.1, 12 and 12.1 hereinabove.]

14.1. The Court, while exercising jurisdiction under Section 34 of the 1996 Act, as it stands today, can either sustain or set aside the award. Modification of the award is not the power available to the Court.

15. Thus, for the foregoing reasons, we are inclined to allow the appeal and set aside the impugned judgment, to the extent it scales down the interest rate, from 18% to 10%.

16. The appeal is disposed of, in the aforesaid terms.



17. Pending application shall stand closed.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

AUGUST 25, 2022

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