

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

ARBITRATION APPEAL NO.39 OF 2022

Tapi Prestressed Product Limited,
Bhusawal, Tq. Bhusawal, District Jalgaon,
Through its Authorized Signatory,
Mr. Jayant Fakirchand Kothari,
Age: 53 years, Occu.: Service,
R/o: C/o: TPPL, Anjale Shivar,
Tq. Yawal, District Jalgaon.

... Appellant
(Orig. Appellant)

Versus

M/s. Gondwana Engineers Limited,
Through: Mr. R.M. Partikar,
Age: 62 years, Occu.: Business,
R/o : 92, Abhyankar Nagar, Park Road,
Nagpur, District Nagpur – 440 010.

... Respondent
(Orig. Opponent)

...
Mr. A.B. Girase, Advocate for Appellant
Ms. Vaishnavi Vishwanathan, Advocate a/w Mr. Uday S. Malte,
Advocate for Respondent
...

CORAM : NITIN B. SURYAWANSHI, J.

**RESERVED ON : 11th SEPTEMBER, 2023
PRONOUNCED ON : 01st DECEMBER, 2023**

ORDER :

1. By this appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, 'the said Act'), appellant challenges judgment and order dated 24/02/2022, passed by learned District Judge-2, Jalgaon, in Misc. Civil Application No.63/2014, thereby confirming award dated 20/11/2013, passed by Arbitral Tribunal.

2. Appellant is a public limited company. Jalgaon Municipal Corporation floated tender for work of execution of Stage-V, Phase-I with Waghur Dam as source for Jalgaon Water Supply Scheme work and appellant was the successful bidder. Respondent approached appellant and expressed its desire to execute certain work of contract. Appellant agreed to entrust some part of original contract's work to respondent by separate contract of mutual agreement. Offer made by respondent was accepted by appellant and accordingly agreement dated 20/09/1999 was executed. Total value of work to be executed was Rs.6,60,000,00/-. According to appellant, respondent failed to discharge its obligation/responsibility and closed contract unilaterally and illegally with effect from 01/03/2008, which is reflected in communication of appellant dated 09/06/2008 and 03/11/2008, as well as in letters of respondent dated 05/07/2008.

According to respondent, though regular bills were raised during execution of work, since the beginning of work appellant withheld and delayed payments. 23 bills were submitted by respondent till completion of work, but appellant failed to make payments. Respondent issued notice dated 16/10/2009 claiming balance due to it, along with interest and costs. Since appellant failed to respond and make payment, respondent issued notice dated 10/11/2009, invoking clause 16 of the agreement by

nominating it's Arbitrator and requesting appellant to nominate it's Arbitrator within 30 days.

3. By order dated 06/07/2012, this Court appointed Justice Mr. Anil B. Naik, (Retired) as sole arbitrator to arbitrate dispute between the parties. On 24/01/2013, respondent filed statement of claim, claiming an amount of Rs.2,05,87,591/- plus interest. Appellant also filed counter claim of Rs.250.78 Lakhs plus interest. During the course of proceeding before learned Arbitrator, on 21/10/2013 appellant filed application seeking adjournment till last week of November, 2013, for placing on record original copy of agreement dated 20/09/1999, as according to appellant forged copy of agreement is supplied by advocate for respondent. On 20/11/2013, learned Arbitrator, by taking recourse to procedure contemplated under Section 25(c) proceeded *ex-parte* and passed the award.

4. Appellant challenged *ex-parte* award by filing Misc. Civil Application No.63/2014, before District Court, Jalgaon, under Section 34 of the said Act. After hearing the parties, District Court dismissed the application. Hence, the present appeal.

5. Heard learned advocate for appellant and learned advocate for respondent.

6. Learned advocate for appellant submits that respondent has obtained award on the basis of forged and fabricated

agreement dated 20/09/1999. Incorrect figures contrary to actual bills and receipts were shown in the claim. By misrepresenting facts and figures, impugned award is obtained by respondent. Since award is obtained by playing fraud, the same is nullity in the eyes of law. It is submitted that, on the basis of forged document 100% escalation is claimed by respondent, when in fact, original clause 1(H) of agreement dated 20/09/1999 provides escalation to the extent of 50% only. Still learned Arbitrator has erroneously granted 100% escalation. Fact of receipt of 50% of escalation bill is suppressed by respondent. Learned Arbitrator and District Court have failed to verify correctness of figures and facts. It is further submitted that payment towards R.A. Bills is wrongly calculated by learned Arbitrator. As per agreement, 10% of the amount was to be deducted from R.A. Bills for HY testing. Though appellant directed to deduct said amount, Rs.24,91,992/- was deducted less by the respondent. Since, by deducting said amount, appellant was liable to pay amount of Rs.4,37,75,388/- to respondent, in view of payment of Rs.4.48 Crores made by appellant to respondent, in fact, no balance is remained.

7. It is contended by learned advocate for appellant that as per terms of contract, respondent was under obligation to conduct water tightness test, HY test, to the satisfaction of Jalgaon Municipal Council and then raise bills. Respondent completed work

as per satisfaction of Jalgaon Municipal Council. As per record submitted by appellant alongwith it's counter claim, it is clear that Jalgaon Municipal Council pointed out defective work done by respondent. Respondent company since closed it's work from 01/03/2008, appellant completed unfinished / defective work and submitted it's report to Jalgaon Municipal Council. Therefore, respondent is liable to pay difference of amount spent by appellant to complete the unfinished work. Counter claim of Rs.2.50 Crores filed by appellant was not at all considered by learned Arbitrator and this aspect is also ignored by the District Court. It is submitted that award of learned Arbitrator is without following principles of natural justice and hence, the same is liable to be quashed and set aside. In support of his submissions he relied on *A. V. Papayya Sastry and Others Vs. Government of A. P. and Others, (2007) 4 SCC 221* and *S. P. Chengalvaraya Naidu Vs. Jagannath, (1994) 1 SCC 1*.

8. Per contra, learned advocate for respondent supported the impugned award and the decision of District Court. She would urge that scope of judicial scrutiny under Section 37 of the said Act, is extremely limited. She further submits that allegations of fraud are raised before this Court for the first time and it was not raised before District Court. She points out that on the basis of copy of agreement produced by respondent learned Arbitrator has held

that, respondent was not entitled to claim escalation at 100% and it was entitled to only 50% of escalation cost, therefore, allegation of fraud is totally incorrect. She further submits that, assuming without admitting that appellant's contention that learned Arbitrator though held that claimant was only entitled to 50% cost, has erroneously awarded more than 50% is correct, it would amount to arithmetic error or error of fact and the same cannot be brought within the scope of Section 37 as being affected by fraud. Appellant has failed to lead evidence and to approach Arbitral Tribunal under Section 33 of the said Act to correct the calculations. Appellant also failed to raise this issue before District Court under Section 34. She would urge that learned Arbitrator has passed award after considering all the documentary evidence adduced by both the parties and appellant has failed to make out ground to warrant interference under Section 37 for setting aside the award. In support of her submissions, she relied on *Associate Builders Vs. Delhi Development Authority, (2015) 3 SCC 49*, *Haryana Tourism Limited Vs. Kandhari Beverages Limited, (2022) 3 SCC 237*, and judgment of the Supreme Court in Civil Appeal No. 3798/2023 [*Larsen Air Conditioning and Refrigeration Company Vs. Union of India and Others*].

9. Perused appeal memo, annexures thereto, impugned award and order and affidavit-in-reply filed by respondent as well

as citations relied upon by the parties.

10. Perusal of award indicates that learned Arbitrator has relied on copy of agreement dated 20/09/1999, which was placed before this Court at the time of seeking appointment of Arbitrator and by relying on the same it is held that 50% of escalation price was to be paid to respondent. Learned Arbitrator has dealt with submission of appellant that copy of agreement is forged one and tailor made to suit the case of respondent. While dealing with said submission, learned Arbitrator has relied upon copy of said agreement produced before this Court at Nagpur Bench, wherein clause 1(H) provides that, *"escalation on quoted amount of sub-contractor to be received from tendering authority, shall be paid at a rate of 50% to the sub-contractor"*. Learned Arbitrator, after considering documents placed on record and counter claim filed by appellant, has accepted that escalation is to the extent of 50% only. Therefore, it is not possible to accept submission of appellant that respondent has obtained award by playing fraud. Fact remains that, in application filed under Section 34 of the said Act, appellant has not raised ground of fraud. Perusal of grounds of objections raised in application under Section 34 reveals that award passed by learned Arbitrator was not challenged on the ground of fraud, but it was challenged mainly on the grounds that, appellant was unable to lead evidence before learned Arbitrator and could not substantiate

it's claim, findings of learned Arbitrator are self contradictory and steps taken by learned Arbitrator under Section 25(c) are harsh and erroneous.

11. Learned District Judge, after considering challenge raised by appellant and on going through documents and award, has recorded a finding that meeting of Tribunal was fixed on 21st, 22nd and 23rd October, 2013. These dates were duly communicated in advance to the parties by E-mail. On 21st October, 2013 parties were present and a request for postponing meeting till last week of November, 2013 was made on behalf of appellant. Thereafter, on 22nd October, 2023, none appeared on behalf of appellant. On 09th November, 2013, E-mail was received by learned Arbitrator from appellant and at the request of appellant proceeding was adjourned to 20th November, 2013. On that day, learned Arbitrator passed award on the basis of oral and documentary evidence on record. Therefore, it appears that learned Arbitrator has taken into consideration documents and evidence of both the parties and passed award based on sound reasons. Learned District Judge has, therefore, rightly come to a conclusion that no case is made out by appellant to interfere in the said award.

12. Scope of jurisdiction to be exercised under Section 37 of the said Act is explained by the Apex Court in *Haryana Tourism Limited* (supra) as follows;

"8. So far as the impugned judgment and order passed by the High Court quashing and setting aside the award and the order passed by the Additional District Judge **S. P. Chengalvaraya Naidu Vs. Jagannath, (1994) 1 SCC 1**, under Section 34 of the Arbitration Act are concerned, it is required to be noted that in an appeal under Section 37 of the Arbitration Act, the High Court has entered into the merits of the claim, which is not permissible in exercise of powers under Section 37 of the Arbitration Act.

9. 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."

13. In **Associate Builders** (supra), the Apex Court has held,

"56.It cannot possibly include what the court thinks is unjust on the facts of a 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 awards 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."

14. In present case, award passed by learned Arbitrator cannot be said to be perverse. It is also not the case that learned Arbitrator has taken into consideration irrelevant factors and has

ignored vital evidence while passing award. The award cannot be termed as irrational. Learned Arbitrator is, therefore, justified in passing the award.

15. Appellant having failed to lead evidence in support of its counter claim, cannot now take advantage of its own wrong and contend that award is passed in violation of principles of natural justice. Though appellant had prayed to lead evidence, it has failed to lead evidence and for that it cannot blame learned Arbitrator.

16. In this view of the matter and considering reasons assigned by learned Arbitrator, decisions in *A.V. Papayya Sastry and Others Vs. Government of A. P. and Others, (2007) 4 SCC 221*, and *S. P. Chengalvaraya Naidu Vs. Jagannath, (1994) 1 SCC 1*, are of no assistance to appellant.

17. In view of aforesaid reasons, no case is made out by appellant to warrant exercise of jurisdiction under Section 37 of the said Act. The appeal being devoid of merit is dismissed.

18. In view of dismissal of appeal, amount deposited by appellant be released in favour of respondent, alongwith accrued interest.

(NITIN B. SURYAWANSHI, J.)