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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPEAL NO.12 OF 2011
WITH
ARBITRATION APPEAL NO.13 OF 2011
WITH
ARBITRATION APPEAL NO.14 OF 2011

The Godavari Marathwada Irrigation Development Corporation, Through Executive Engineer, Lower Dudhana Project Division, Sailu District – Parbhani ... APPELLANT

VERSUS

1. M/s Manoj Kumar Construction Company C/o Anil Constructions, Satya Dharm Complex Opposite Saint Francis School Jalna Road, Aurangabad ... RESPONDENTS

2. Shri D. S. Waghmare (Retired) Superintending Engineer, E. G. S., Commissioner Office, Station Road, Nashik

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Mr. B. R. Survase, Advocate for the appellant
Mr. G. K. Naik – Thigale, Advocate for respondent No.1

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 27th SEPTEMBER, 2023
PRONOUNCED ON : 26th OCTOBER, 2023

ORDER :

1. By these appeals, filed under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter "the said Act"), Award

dated 30th June, 2007 passed by Arbitrator (hereinafter "Tribunal") and decisions rendered by District Court in Miscellaneous Civil Applications Nos. 165 of 2007, 163 of 2007 and 164 of 2007 filed under section 34 of the said Act, are challenged.

2. Hereinafter, appellant will be referred as "Corporation" and respondent as "Contractor".

3. Brief facts, leading to this litigation are as follows:

4. Appellant allotted work of construction of balance earth work and lining in KM No. 126 from chainage sheet No. 125000 to 125251 of Paithan Right Bank Canal bearing contract LCB 2 of 1984-85 to the Contractor.

5. It is case of Corporation that Contractor did not complete work within stipulated time and was given extensionS thrice i.e. 30th June, 1986, 31st March, 1987 and 30th September, 1987. According to Corporation, Contractor raised demand of claim, after 15 years from the date of payment of final bill. By issuing notice under clause 52 of the contract, on 7th October, 2002, Contractor made certain claims to Corporation. In support of claimS, no document / evidence, was submitted by Contractor. According to Corporation, claim of Contractor is afterthought and

time barred. It is claimed that on 30th October, 1988, final bill was accepted by Contractor without protest and notice raising claims was issued on 7th October, 2002 and, therefore, claims raised by Contractor were beyond prescribed limitation provided under section 43 of the said Act and section 28 of the Indian Contract Act.

6. Contractor unilaterally appointed D. S. Waghmare, retired Superintending Engineer (EGS), Commissioner Office, Nashik, as a sole Arbitrator. By filing claim statement, total 11 claims were raised by Contractor before Tribunal. Corporation, by filing say, opposed the claims. Tribunal passed Award thereby allowing claims Nos. 1, 3, 4, 5, 8 and 9 and awarded interest @ 18% from 1st April, 1989.

7. Corporation challenged the Award, by filing Miscellaneous Civil Applications Nos. 165 of 2007, 163 of 2007 and 164 of 2007 under section 34 of the said Act, before the District Court. After hearing the parties, District Court rejected these applications. Hence, the present Arbitration Appeals.

8. Learned advocate for Corporation has assailed the Award on the ground of limitation. According to him, final bill was paid to Contractor on 30th October, 1988, which was accepted by

Contractor without protest and, thereafter, after 15 years, claims are raised, which are beyond limitation and ought not to have been entertained by the Tribunal, on the sole ground of limitation.

9. It is submitted that Contractor appointed retired Superintending Engineer as Arbitrator, who was not qualified to be appointed as Arbitrator and said appointment is contrary to clauses 52 and 53 of the contract. Procedure provided in contract, for appointment of Arbitrator, is not followed in the present case. Tribunal and District Court have failed to consider terms and conditions of contract, more particularly default liability period 18 (E) and condition in contract that no interest will be payable to Contractor on the money due and, therefore, according to him, exorbitant interest awarded by Tribunal, is unsustainable. By relying on ***Rashtiya Chemicals and Fertilizers Limited V/s Chowgule Brothers and Others" (2010) 8 SCC 546*****,** he submits that Tribunal cannot pass Award contrary to the terms of agreement / contract. Further submission is, there is no evidence in respect of the claim of Contractor. Only period is different in all the three appeals, otherwise challenge is on the same grounds. In support of his submissions, he relied on following citations

I. "Rashtiya Chemicals and Fertilizers Limited V/s Chowgule

Brothers and Others" (2010) 8 SCC 546

II. *"Godavari Marathwada Irrigation Development Corporation, Gangakhed V/s Pawar and Company (Engineers and Contractors) Pune" 2013 (4) Mh.L.J. 183*

III. *"Union of India V/s Bright Power Projects (India) Pvt Ltd.," 2016 (3) Mh.L.J. 1*

IV. *"Govind Singh V/s Satya Group Pvt Ltd.," 2023 SCC On Line Del 37*

V. *"Satluj Jai Vidyut Nigam Ltd V/s Jaiprakash Hyundai Consortium and Other" 2023 SCC OnLine Del 4039*

10. Per contra, learned advocate for Contractor supported the Award and decisions of the District Court. He submitted that there was continuous correspondence by Contractor to Corporation, raising various claims, which were under consideration of Corporation. He, therefore, submits that there is no merit in the challenge raised by Corporation on the ground of limitation.

11. According to him, Corporation, in the correspondence has acknowledged claims of Contractor from time to time. Appeal filed by Contractor was decided by the Superintending Engineer on 20th December, 2002. Till the said decision, officers of Corporation were assuring to make payment of certain claims on the condition that the Contractor furnishes an undertaking that

he will not take recourse to arbitration proceedings. He, therefore, submits that there is no merit in the appeals filed by Corporation and they are liable to be dismissed. In support of his submissions, he placed reliance on following judgments:

I. *"Laxmi Mathur V/s Chief General Manager MTNL" 2003 (3) Mh.L.J. 841*

II. *Municipal Corporation of Greater Mumbai V/s Press Stress Products India" 2003 (3) B.C.R. 117*

III. *Bharat Coking Coal Ltd V/s M/s Annapurna Construction" 2003 AIR SCW 4146*

IV. *"Harishankar Singhaniya & Others V/s Gourishankar Singhaniya and Others" 2006 (2) Arbitration Law Reporter 1*

V. *"National Aluminum Company Ltd Vs G. Canungo" 2009 AIR SCW 4672*

VI. *"Major (Retd) Inder Singh Rekhi V/s D.D.A" AIR 1988 SC 1007*

VII. *"Utkal Commercial Corporation V/s Central Coal Fields Ltd" AIR 1999 SC 801 (1)*

VIII. *Reliance Infrastructure Ltd V/s State of Goa" AIR 2023 SC 2280*

IX. *"M/s S. D. Shinde TR Partner V/s Government of Maharashtra and Others" Civil Appeal Nos. 6107-6108 of 2017"*

12. By relying on ***"Reliance Infrastructure Limited"*** *(supra)* he submits that the Tribunal was justified in granting interest.

13. Heard learned advocate for Corporation and learned advocate for Contractor, at length. Perused the memo of appeals, annexures, record and proceedings, grounds raised in the appeals, written notes of arguments and citations relied on by the respective learned advocates for the parties.

14. Record reveals that Tribunal, at the instance of Corporation, had framed preliminary issue about constitution of Tribunal and its jurisdiction and it was held against Corporation, by observing that, by following procedure laid down in clauses 52 and 53 of general conditions of contract, the Tribunal was constituted and, therefore, it has jurisdiction to entertain arbitration proceedings.

15. Challenge of Corporation as to the arbitrability of claims on the point of limitation is negatived by Tribunal, holding that Contractor, by notice dated 11th November, 2002 (Exhibit-C-1) raised claims and Executive Engineer of Corporation, while rejecting the claims raised in said notice, admitted in candid terms that out of 10 claims two are under consideration of Corporation. The Superintending Engineer, by letter dated 20th December, 2002, while deciding appeal of Contractor under clause 52, intimated the Contractor that certain claims can be

considered by the Corporation, if claimant / Contractor submits undertaking not to invoke arbitration proceedings. Tribunal, therefore, has rightly held that claims raised by Contractor were never denied by Corporation, in view of admission given of Executive Engineer in letter dated 11th November 2002 and admission of Superintending Engineer in letter dated 20th December, 2002, thereby admitting claims of Contractor, immediately, prior to reference of disputes to Tribunal, the claims can be said to be within limitation. Tribunal has further held that Corporation has failed to produce any evidence in support of contention that claims are time barred. On the basis of correspondence placed on record by Contractor, Tribunal has held that the claims of Contractor are within limitation and they are arbitrable.

16. In ***"National Aluminum Company Ltd"*** (*supra*), Apex Court held that claims made within 3 years from the date of denial, cannot be said to be time barred claims, which supports the case of Contractor.

17. So far as competency of Arbitral Tribunal to decide arbitral dispute is concerned, it is the case of Contractor that at the time of appointment, Arbitrator was serving as Superintending Engineer and he retired subsequently. This aspect is not

specifically denied by Corporation. Nothing is brought on record by Corporation to demonstrate that appointment of Arbitral Tribunal was unilateral and that a retired Superintending Engineer was appointed as Arbitrator. Therefore, there does not appear any merit in the challenge raised by Corporation to the competency of Arbitral Tribunal.

18. The next ground of challenge of Corporation is that exorbitant interest is awarded by Tribunal, in absence of there being any provision of payment of interest.

It is specific case of Contractor that point of interest was not pleaded by Corporation in written statement. According to Contractor, condition No.1.17.0 of the contract bars payment of interest, cannot be relied on as, according to him, said condition is not part of the contract. The Tribunal in the Award has held that Corporation was responsible for delay in execution of work and, therefore, allowed claims No.1, 3, 5 to 9. Considering the fact that Corporation, in clause No.8 of the General Conditions of Contract, has charged and recovered interest @ 18% p.a. on mobilization advance, the Tribunal has awarded interest @ 18% p.a. on all the amounts due and payable from 31st March, 1989 to 7th October, 2002, in respect of claims No.1, 3, 5, 8 and 9. Interest @ 15% p.a. is awarded in respect of claim No.6 from 7th

October, 2002 till passing of Award. The Tribunal has further awarded interest @ 12% p.a. from the date of Award till realization of amount. Though the Corporation has strenuously urged that no interest was payable in terms of the General Conditions, this submission was not substantiated by Corporation, by pointing out any clause of exclusion of interest from General Conditions of Contract or from agreement. On going through the original agreement / contract, no clause, which excludes interest, is found. By relying on clause 1.17.0 of the tender, it is submitted that under the said clause, Contractor was not entitled to any interest on money due. However, perusal of original agreement / contract does not show that this clause of part of original contract. Therefore, the said submission is liable to be rejected. In the peculiar facts of the present case, interest @ 18% awarded by the Tribunal, cannot be said to be exorbitant. In absence of clause dis-entitling payments due to Contractor, reliance placed on ***"Rashtriya Chemicals and Fertilizers Limited"*** and ***"Godawari Marathwada Irrigation Development Corporation"*** (*supra*) is of no assistance to the Corporation.

19. In ***"Reliance Infrastructure"***, (*supra*), the Apex Court held thus -

"34. We are of the view that the aforesaid reduction of rate of interest by the High Court is also unjustified. We have noticed the provisions of Section 31 (7) (b) that unless the award otherwise directs, the sum payable under the arbitral award shall carry interest at the rate of 2% higher than the current rate of interest prevalent on the date of the award, from the date of the award to the date of payment. The expression "current rate of interest" has been explained in the Explanation to the said Section to have the same meaning as assigned under Section 2 (b) of the Interest Act, 1978. The High Court has referred to the decision in Vedanta Ltd. (supra) to hold that a Court may reduce interest awarded by the Arbitrator when such interest does not reflect the prevailing economic condition or where it is not found reasonable or where it promotes interest of justice. We do not find any basis in the impugned judgment of the High Court for reducing the rate of interest, as in the case of Vedanta Ltd., wherein this Court was dealing with an International Commercial Arbitration involving rupee as well as euro components. Moreover, in the case of Vedanta Ltd., the rate of interest was reduced in respect of the foreign currency component to bring the interest rate in line with the international rate on the ground that the rate of interest prevailing on the rupee debt in India and on international currency abroad were different and the international rates were lower. Such a situation is not obtaining in the present case.

34.1. The High Court seems to have not considered the relevant factual aspects. On the contrary, as has been submitted before us as well as the High Court, the prevailing interest rate being the prime lending rate of State Bank of India was in the range of 13% to 14% per annum. Thus, the Arbitral Tribunal was justified in granting interest at the rate of 15% per annum post- award. In our view, the Arbitral Tribunal was well within its jurisdiction under Section 31 of the Act to award interest at the rate of 15% p.a. and there was no justification to reduce the same to 10% p.a. We may observe with respect that the High Court was not exercising any equity jurisdiction so as to resettle the rate of interest as deemed fit by it. It *had been a matter relating to an award made by the Arbitral Tribunal in a commercial dispute. Final comments, observations, and conclusion*

20. In the light of aforesaid ratio, award of interest by Tribunal cannot be said to be exorbitant and unwarranted in the facts of the present case.

21. There is no substance in the argument of Corporation that there is no evidence in support of the claims raised by Contractor. There is sufficient material on record, which is properly appreciated by the Tribunal while allowing the claims of Contractor.

22. It is well settled by catena of decisions of the Apex Court that scope of interference in appeal under section 37 of the said Act is extremely limited. High Court cannot interfere in the Award, which is confirmed by District Court, unless there is error of law, which can be discovered from the award itself or from the document actually incorporated therein. Facts of the present matters do not disclose any error of law and the Award is passed in accordance with the principles embodied in law and the findings are based on evidence placed before Tribunal.

23. In ***"Haryana Tourism Limited V/s Kandhari Beverages Limited" (2022)3 SCC 237***, Supreme Court has summarized

principles for exercise of jurisdiction of the court under sections 37 and 34 of the said Act. It is held

> *"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 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.*
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> *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 nad order passed by the High Court is hence not sustainable."*

24. Applying aforesaid ratio to the facts of the present case, it is clear that appellant has failed to make out ground that there is perversity in the reasoning of the Arbitral Tribunal. It is not the case that the Award is rendered without reasons. Appellant has failed to make out case that the Award is contrary to the

fundamental policy of Indian law or the interest of India or justice or morality or and that it is patently illegal. No such illegality could be demonstrated by appellant, which goes to the root of the matter and the Award cannot be said to be so unfair and unreasonable, that it shocks conscience of the court.

25. In "***Project Director, National Highways No. 45E and 220 National Highways Authority of India V/s M.Hakeem and Another" (2021) 9 SCC 1***, it is held -

> *"23. It is settled law that a Section 34 proceeding does not contain any challenge on the merits of the award. This has been decided in MMTC Ltd V. Vedanta Ltd , (2019) 4 SCC 163, at 167 as follows: -*
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> *14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37 this Court must be extremely cautious and slow to disturb such concurrent findings.*
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> *24. Likewise, in Ssangyong Engg & Construction Co. LTD V NHAI, (2019) 15 SCC 131, this Court under the caption "Section 34 (2) (a) does not entail a challenge to an arbitral award on merits" referred to this Court's judgment in Renusagar Power Co. Ltd., V General Electric Co., 1994 Supp (1) SCC 644, the Convention on the Recognition and*

Enforcement of Foreign Arbitral Awards, 1958 [the "New York Convention"] and various other authorities to conclude that there could be no challenge on merits under the grounds mentioned in Section 34 - (see paras 34 to 48). This Court also held, in Maharashtra State Electricity Distribution Co Ltd. V Datar Switchgear Ltd., , (2018) 3 SCC 133 (at 170), that the court hearing a Section 34 petition does not sit in appeal (see para 51).

25. As a matter of fact, the point raised in the appeals stands concluded in Mc. Dermott International Inc. V. Burn Standard Co Ltd., , (2006) 11 SCC 181, where this Court held: -

51. After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the arbitrator has an obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. It was required to be raised during arbitration proceedings or soon after initiation thereof. The jurisdictional question is required to be determined as a preliminary ground. A decision taken thereupon by the arbitrator would be the subject-matter of challenge under Section 34 of the Act. In the event the arbitrator opined that he had no jurisdiction in relation thereto an appeal thereagainst was provided for under Section 37of the Act.

52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

27. Also, in Dyna Technologies (P) Ltd V Crompton Greaves Ltd,. (2019) 20 SCC 1, this Court held: -

36. At this juncture it must be noted that the legislative intention of providing Section 34 (4) in the Arbitration Act was to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. This provision cannot be brushed aside and the High Court could not have proceeded further to determine the issue on merits.

37. In case of absence of reasoning the utility has been provided under Section 34 (4) of the Arbitration Act to cure such defects. When there is complete perversity in the reasoning then only it can be challenged under the provisions of Section 34 of the Arbitration Act. The power vested under Section 34 (4) of the Arbitration Act to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitration Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication. It is in this state of affairs that we lament that the purpose of arbitration as an effective and expeditious forum itself stands effaced."

26. In ***"Delhi Airport Metro Express Private Limited V/s Delhi Metro Rail Corporation Limited" (2022) 1 SCC 131***, the Apex Court has laid down principles for exercising jurisdiction under section 34 of 37 of the said Act. It is held that if the Award is found 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,* then it can be set aside under sections 34 and 37 of the said Act. None of these

exceptions are found in the present matters. This Court, while exercising jurisdiction under section 37 of the said Act, cannot enter into merits of the claim and also cannot sit as appellate court against judgment and decree of trial Court.

27. In the present appeals, Corporation has not made out any case to warrant interference in the impugned Award under section 37 of the said Act. The Appeals being devoid of merit, are dismissed. No costs.

28. In view of disposal of Arbitration Appeals, pending civil applications also stand disposed of.

[NITIN B. SURYAWANSHI]
JUDGE

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