

B. T. Patil and Sons Belgaum (Construction) Private Limited, represented by GPA Holder Balasaheb B. Patil Vs.	...	Petitioner
Konkan Railway Corporation Limited	...	Respondent

Mr. Tushad Kakalia a/w. Mr. D. J. Kakalia, Ms. Bhavna Singh Jaipuria and Mr.Paresh Patkar i/b. Mulla and Mulla & Craigie Blunt & Caroe for Respondent.

CORAM : MANISH PITALE, J.
DATE : MARCH 02, 2023

ORDER :

. Heard learned counsel for the parties.

2. By this appeal, the appellant has challenged judgement and order dated 26.02.2016 passed by the District Court, Ratnagiri, whereby an application filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996, was dismissed.

3. The controversy in the present case is in a very narrow conspectus. The brief facts leading to filing of the present appeal are that, due to disputes that arose between the parties, on the strength of an arbitration agreement, the disputes were referred to a three-member arbitral tribunal for resolution.

4. On 28.03.2007, the three-member arbitral tribunal pronounced its award directing a specific sum of money to be paid to the appellant under various heads.

5. On 12.04.2007, the respondent moved an application under

Section 33 of the aforesaid Act, duly notifying the appellant about having moved such an application, claiming that the Tribunal had committed a computational error in calculating the claim of the appellant towards bulkage.

6. On 17.04.2007, one of the members of the three-member arbitral tribunal issued a communication to the petitioner as well as the respondent, stating that the tribunal had reviewed the award and effectively accepted the calculation error as claimed by the respondent. As a consequence of the same, the amount payable to the appellant stood reduced by Rs.9,01,480/-, which pertained to the claim towards bulkage. It is pointed out that in the original award, the amount towards the said claim was granted at Rs.30,04,931.48.

7. The respondent sent a cheque to the appellant towards payment as per the award, which stood corrected under the aforesaid corrigendum dated 17.04.2007, issued by one of the members of the three-member arbitral tribunal. Thereafter, number of communications were exchanged between the parties and on 05.05.2007, the appellant addressed a communication acknowledging the receipt of the amount paid by way of the aforesaid cheque by the respondent and alleging that there was short payment on behalf of the respondent. The appellant, at this stage, moved an application under Section 33 of the said Act before the tribunal raising certain issues. But, the said application, being barred by limitation, was not considered by the tribunal.

8. Thereafter, the appellant filed its application under Section 34 of the said Act, challenging the aforesaid corrigendum dated 17.04.2007. The appellant raised various grounds of challenge and particularly a ground that one single member of the three-member arbitral tribunal could not have issued the impugned corrigendum, effectively reviewing the original award passed by the three-member arbitral tribunal.

9. The District Court, by the impugned judgement and order, dismissed the application only on the ground that since the appellant had accepted the awarded amount as reviewed and corrected under the corrigendum in question, it had waived its right to challenge the corrigendum issued on 17.04.2007. In the impugned judgement and order itself, the District Court did observe that all the members of the three-member tribunal had not signed the corrigendum and yet held against the appellant on the sole ground that it had accepted the amount without any protest.

10. Aggrieved by the impugned judgement and order, the appellant filed the present appeal, wherein the respondent appeared through counsel and the appeal is taken up for final disposal.

11. Mr. Soman, learned counsel appearing for the appellant submitted that a perusal of the impugned judgement and order would show that the District Court did accept the fact that the corrigendum dated 17.04.2007, was issued only by one-member of the three-member arbitral tribunal and yet held against the appellant only on the ground that it had accepted the amount without protest. It was submitted that the approach adopted by the District Court is against the fundamental principles of law, for the reason that the corrigendum dated 17.04.2007, having been signed by only one member of the three-member arbitral tribunal violated Section 31(1) and (2) read with Section 33(7) of the said Act. It was emphasized that the aforementioned provisions of the Act specifically mandate that the arbitral award shall be signed by members of the tribunal and the same would apply with full force to the corrigendum issued in the present case. It was submitted that merely because the appellant had accepted the amount, as corrected by the corrigendum, could not be a ground to hold against the appellant. By accepting the amount, the appellant could not be said to have given up

or waived its right to challenge the corrigendum issued by only one member of the three-member arbitral tribunal. On this basis, it was submitted that the impugned judgement and order of the District Court deserves to be set aside and the corrigendum also deserves to be set aside by allowing the application filed under Section 34 of the said Act.

12. On the other hand, Mr. Kakalia, learned counsel appearing for the respondent submitted that the appellant, by its conduct, had waived its right to challenge the corrigendum issued on 17.04.2007. It was submitted that the appellant could have challenged the corrigendum, only if it had accepted the amount from the respondent under protest and by reserving its right to challenge the corrigendum. In this regard, learned counsel for the respondent relied upon judgement of the Supreme Court in the case of *Pooran Chand Nangia Vs. National Fertilizers Limited*, (2003) 8 SCC 245.

13. It was further submitted that the error which stood corrected by way of the corrigendum was so obvious that even on merits, the appellant could not be heard to say that the error corrected by way of the corrigendum could have been defended by the appellant on merits. It was submitted that in the original award, the arbitral tribunal had granted claim towards bulkage beyond what was even claimed by the appellant, and therefore, in the facts of the present case, no interference is warranted.

14. This contention is stoutly denied by the learned counsel appearing for the appellant by referring to the relevant portion of the original award pertaining to claim No.9, concerning bulkage and the stand taken on behalf of the respondent in the application moved under Section 33 of the said Act.

15. Heard learned counsel for the rival parties and perused the

material on record. It is an admitted position that when the application was moved under Section 33 of the said Act on the part of the respondent seeking certain clarification / correction and consequent revision of the award, the same was disposed of by the corrigendum dated 17.04.2007. A perusal of the said corrigendum shows that only one out of the three-member arbitral tribunal issued the said corrigendum. It was only one member who signed the same. The said corrigendum opens with the words “that the tribunal had reviewed the award for claim No.9 and paragraph 4.9 of the award pertaining to the said claim stood modified as recorded in the corrigendum”. It is an admitted position that the other two members of the three-member arbitral tribunal did not sign the corrigendum. On the face of it, this conduct violates the statutory provisions under Section 31(1) and (2) read with Section 33(7) of the said Act.

16. Apart from this, it cannot be accepted that an award signed and pronounced by a three-member arbitral tribunal could be modified in the aforesaid manner by issuance of the corrigendum dated 17.04.2007, issued and signed by only one member of the three-member arbitral tribunal. On this ground alone, the issuance of the corrigendum was wholly without jurisdiction. This admitted position was indeed taken into account by the District Court in the impugned judgement and order. It was also noted that the appellant was not given an opportunity to respond to the contentions raised in the application filed under Section 33 of the said Act on behalf of the respondent. Yet, the District Court proceeded to dismiss the application filed under Section 34 of the said Act, only on the ground that the appellant accepted the awarded amount, as corrected under the aforesaid corrigendum, without protest and without reserving its right to challenge the corrigendum. In other words, the District Court held that in the facts of the present case, the appellant had waived its right to challenge the corrigendum dated 17.04.2007.

17. This Court is of the opinion that the approach adopted by the District Court is wholly unsustainable. Having noted the admitted position on facts that the corrigendum was issued and signed only by one member of the three-member arbitral tribunal, the District Court could not have dismissed the application filed by the appellant, only on the ground that the amount was accepted without protest. This Court is of the opinion that mere acceptance of the amount without protest on the part of the appellant would not amount to the appellant having waived its right to challenge the impugned corrigendum.

18. In fact, the corrigendum dated 17.04.2017, admittedly issued and signed by only one member of the three-member arbitral tribunal, was wholly without jurisdiction. The three-member arbitral tribunal, in the present case, had not considered or disposed of the application filed by the respondent under Section 33 of the said Act, in a manner known to law. Therefore, on this ground alone, the impugned corrigendum ought to have been set aside.

19. An attempt was made on part of the respondent to claim that as per Section 33 of the said Act, the tribunal was not obliged to issue notice to the appellant before issuing the corrigendum, particularly when the respondent had abided by the requirement of the said provision by serving a copy of the application and putting the appellant to notice about having moved the arbitral tribunal for correction of the error. This Court is of the opinion that even if it is to be assumed that under the statutory provision, the Tribunal was not necessarily required to issue notice to the appellant, nonetheless, it was the three-member arbitral tribunal, which could have considered the application filed under Section 33 of the said Act. Since the material on record shows that only one of the three members of the tribunal issued and signed the corrigendum in question, thereby effectively accepting the contentions

of the respondent in the application filed under Section 33 of the said Act, this Court finds that there was a breach of fundamental principles of law while issuing the impugned corrigendum. This aspect was not appreciated by the District Court in the correct perspective.

20. As regards the judgement on which the learned counsel for the respondent has placed reliance i.e. **Pooran Chand Nangia Vs. National Fertilizers Limited** (*supra*), the same is clearly distinguishable on facts. In the said case, the aggrieved party, who challenged the arbitral award, had not, at any stage, challenged the jurisdiction of the sole arbitrator and it was found on facts that the said party had unequivocally accepted the jurisdiction as also the awarded amount without any reservation. In the present case, the appellant was not even afforded the opportunity to challenge the jurisdiction of the lone member of the three-member arbitral tribunal to consider the application under Section 33 of the said Act and to issue and sign the corrigendum, thereby accepting the contentions raised in such an application. In such a factual matrix, the said judgement of the Supreme Court is clearly inapplicable.

21. In view of the above, this Court is convinced that the impugned judgement and order deserves to be set aside. Accordingly, the impugned judgement and order is quashed and set aside. As a result, the application filed under Section 34 of the said Act is allowed and the impugned corrigendum dated 17.04.2007 is quashed and set aside.

22. Appeal stands allowed in above terms. No order as to costs.

(MANISH PITALE, J.)