



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

COMMERCIAL APPEAL NO. 11/2022

Bharat Heavy Electricals Limited, Having its]
Registered Office at BHEL, PSWR, 345, Kingsway,]
Nagpur – 440 001, Maharashtra, India, Through]
Its Authorized Representative.] **APPELLANT**

.....VERSUS.....

Al-Bilal Group for General Contracts Ltd., A Company]
Registered in Iraq having its Office at Fountain Plaza,]
Gate(2), 2nd Floor, Abdel Rahim Haj Moh'd St.,]
Sweifayah, PO. Box 852085, Sweifayah, Amman 11185,]
Jordan, Through its Managing Director.] **RESPONDENT**

Shri Anand Jaiswal, Senior Advocate with Shri Surjendu Das, Yash Maheshwari, and Miss Annie Mittal, counsel for the appellant.

Shri Vijay Sharma with Ms Swagoti Batches, Rashi Verma and Kushal Jain, counsel for the respondent.

CORAM : A. S. CHANDURKAR AND MRS. VRUSHALI V. JOSHI, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : OCTOBER 13, 2023

DATE ON WHICH JUDGMENT IS PRONOUNCED : NOVEMBER 30, 2023

[PRONOUNCEMENT THROUGH VIDEO CONFERENCE]

JUDGMENT (PER : A.S. CHANDURKAR, J.)

ADMIT. Heard the learned counsel for the parties at length.

2. This appeal preferred under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996') raises a challenge to the judgment dated 05.05.2022 passed in Criminal Miscellaneous Application No.501 of 2012 by which the application preferred by the appellant herein under Section 34 of the Act of 1996 came to be partly allowed. The appellant is aggrieved by that part of

the order by which its challenge to the majority award passed by the Arbitral Tribunal has been rejected.

3. The facts relevant for considering the challenge as raised are that the appellant is a public sector undertaking engaged in the work of Power Generation, Transmission, Industry and Renewable Energy. On 10.03.2009 the appellant entered into a contract with the respondent, a construction company that has been incorporated in the year 2003 and has been registered in Iraq. As per Clause 2.2 of the General Conditions of Contract, the contract was to be governed by the law for the time being in force in the Republic of India. The Civil Court at Nagpur was to have the exclusive jurisdiction in respect of all the claims under the contract. Clause 2.14 incorporated the arbitration clause and the Rules of arbitration framed by the International Commercial Council were to be adhered.

4. On disputes arising between the parties the arbitration clause came to be invoked by the respondent herein. It raised its claim under various heads and sought payment of outstanding amounts. The appellant raised its defence and denied the claim as made. It also raised a counter claim against the respondent and sought monetary relief in that regard. In terms of the arbitration clause, the Arbitral Tribunal consisting of three Arbitrators, one Arbitrator each nominated by the

parties with a third Arbitrator as Chairman conducted the said proceedings. At the conclusion thereof, two arbitrators passed a majority award and directed the appellant to pay the respondent a sum of US \$ 368539.40 €. The appellant was also required to pay costs to the respondent of US \$ 2,22,500. The minority award passed by the third Arbitrator held the appellant entitled to US \$ 22,50,5000. He also held the respondent entitled to US \$ 11,00,928. The parties were accordingly governed by the majority award as passed on 25.06.2012. The appellant being aggrieved the said majority award filed application under Section 34 of the Act of 1996 raising a challenge to the same on various counts. It sought the setting aside of the award dated 25.06.2012 to the extent its counter claim was disallowed and the claims of the respondent were allowed. The respondent filed its reply to the aforesaid proceedings and supported the majority award. After the pleadings were complete the parties placed on record written submissions as well as written arguments for consideration. The learned District Judge – 2, Nagpur considered the said proceedings. It was held that the award dated 25.06.2012 could not be treated as a foreign award. On the other challenges as raised by the appellant, the learned Judge observed that in the proceedings under Section 34 of the Act of 1996 it was not permissible to re-appreciate and re-evaluate the evidence on record. He further held that the reasons assigned in

the majority award were supported by sound reasons and hence it was not permissible to interfere with the same. On that premise, the learned Judge proceeded to hold that the challenge to the majority award passed by the Arbitral Tribunal did not warrant interference. The miscellaneous civil application was accordingly dismissed on 05.05.2022. Being aggrieved the appellant has challenged the aforesaid order in the present appeal under Section 37 of the Act of 1996.

5. Shri Anand Jaiswal, learned Senior Advocate for the appellant submitted that the learned Judge failed to take into consideration the specific challenges raised by the appellant to the findings recorded in the majority award and merely observed that the scope for interference under Section 34 of the Act of 1996 was limited and refused to examine such challenge. Inviting attention to the adverse findings recorded in the majority award and the challenge raised to such findings in the written notes that were placed on record, it was submitted that the same required due consideration by the Court exercising jurisdiction under Section 34 of the Act of 1996. If the challenge as raised was not acceptable, reasons for the same ought to have been indicated in the impugned judgment. He submitted that in paragraph 48 of the impugned judgment a finding was recorded that the award dated 25.06.2012 was not a foreign award. Thereafter the challenges on merit have only been

briefly referred to in paragraphs 49 to 54 and without specifically considering individual challenges, the majority award has been upheld. Referring to the discussion in paragraph 52 of the impugned judgment it was submitted that various factual incorrect observations had been made thereunder. The majority award in paragraph 20.2.2 did not apply its own formula in the matter of awarding liquidated damages. Reference in paragraph 20.2.2 was only in the context of the respective pleadings of the parties. Except for stating that what was discussed in the impugned judgment was self-explanatory, an independent analysis was not undertaken by the learned Judge. On the aspect of delay caused by the respondent it was submitted that the majority award incorrectly held that the losses suffered could be quantified at US \$ 4000 per day. This finding was contrary to the material placed before the Arbitral Tribunal. He referred to various other Heads of claims that were considered by the Arbitral Tribunal and submitted that for each of the said Heads, the appellant had sought to demonstrate the incorrectness in the said findings. The material evidence on the aspect of delay on the part of the respondent had been ignored while holding against the appellant. Similar was the contention on the aspect of unjust enrichment and the finding recorded on the claim with regard to the caravans. It was thus submitted that the learned Judge ought to have specifically considered the grounds of challenge as raised in

detail. However without doing so the challenge was brushed aside by observing that the reasons contained in the award were sufficient and that the scope for interference was limited. In support of his submissions, the learned Senior Advocate placed reliance on the decisions in *Oil & Natural Gas Corporation Ltd. Versus Saw Pipes Ltd.* [(2003) 5 SCC 705], *Rajasthan State Mines & Minerals Ltd. Versus Eastern Engineering Enterprises & Another* [(1999) 9 SCC 283], *Hindustan Zinc Ltd. Versus Friends Coal Carbonisation* [(2006) 4 SCC 445], *Delhi Development Authority Versus R.S. Sharma & Company, New Delhi* [(2008) 13 SCC 80], *Arulvelu & Another Versus State represented by the Public Prosecutor & Another* [(2009) 10 SCC 206], *Sumitomo Heavy Industries Limited Versus Oil and Natural Gas Corporation Limited* [(2010) 11 SCC 296], *Security Printing and Minting Corporation of India Limited & Another Versus Gandhi Industrial Corporation* [(2007) 13 SCC 236], *Oil and Natural Gas Corporation Limited Versus Western Geco International Limited* [(2014) 9 SCC 263] *Associate Builders Versus Delhi Development Authority* [(2015) 3 SCC 49], *Ssangyong Engineering and Construction Company Limited Versus National Highways Authority of India (NHAI)* [(2019) 15 SCC 131], *Antrix Corporation Ltd. Versus Devas Multimedia P. Ltd.* [Arbitration Petition No. 20 of 2011] decided on 10.05.2013, *Antrix Corporation Ltd. Versus Devas Multimedia Private*

Limited [O.M.P (Comm.) 11 of 2021] decided on 29.08.2022 at Delhi High Court, *Axios Navigation Co. Ltd. Versus Indian Oil Corporation Ltd.* [2012(3) Mh.L.J. 701], *Oil and Natural Gas Corporation Ltd. Versus Interocean Shipping (India) Pvt. Ltd.* [2017(5) Bom.CR 8], *Modi Entertainment Pvt. Ltd. Versus Prasar Bharati* [2017(163) DRJ 291], *General Manager, BSNL Versus Anil Kumar Tripathi* [Arbitration Appeal No.01/2012] decided on 22.04.2016, *Krishna Lifestyle Technology Ltd. Versus Cotton Corporation of India Ltd.* [2021 SCC OnLine Bom 12963], *Bharat Immunologicals and Biologicals Corporation Ltd. Versus Rameshwari Devi & Others* [First Appeal No.127 of 1995] decided on 01.09.1997 at High Court of Allahabad, *Central Bank of India Versus State of Gujarat & Others* [(1987) 4 SCC 407], *Sihor Nagar Palika Bureau Versus Bhabhlubhai Virabhai & Co.* [(2005) 4 SCC 1] and *Harbhajan Kaur Bhatia Versus M/s Aadya Trading & Investment Pvt. Ltd. & Another* [(2017) 242 DLT 360]. It was thus submitted that the impugned order passed under Section 34 of the Act of 1996 ought to be set aside.

6. Shri Vijay Sharma, learned counsel for the respondent opposed the aforesaid submissions and supported the order passed under Section 34 of the Act of 1996. According to him the observations made by the learned Judge in paragraph 20 of the impugned judgment were correct since the appellant had restricted consideration of the challenge on the aspect of seat of arbitration and

other points referred to therein. Despite the allegation that the respondent was responsible for the delay, the appellant did not take steps whatsoever to terminate the contract. According to the learned counsel since the Arbitral Tribunal had passed a speaking award and had assigned reasons for its conclusions it was not necessary for the learned Judge to have dealt with the entire proceedings and passing a detailed order. As the learned Judge accepted the findings of the majority award it rightly did not interfere in the proceedings under Section 34 of the Act of 1996. There were various claims raised by the respondent which had not been granted by the Arbitral Tribunal in which no further grievance was raised. It therefore could not be said that the Arbitral Tribunal acted in a biased manner against the appellant. It was rightly held that the scope for interference under Section 34 of the Act of 1996 was limited. In absence of any perversity or patent illegality on the face of record the majority award was rightly not interfered with. The learned counsel referred to various findings recorded in the majority award and submitted that the same were in accordance with the various terms of the contract and the Arbitrators did not travel beyond the contract. Since the majority award had been upheld under Section 34 of the Act of 1996 there was no reason whatsoever to interfere in a challenge to the said judgment. To substantiate his contentions in that regard, the learned counsel

referred to the decisions in *Delhi Airport Metro Express Private Limited Versus Delhi Metro Rail Corporation Limited* [(2022) 1 SCC 131], *Punjab State Civil Supplies Corporation Ltd. & Another Versus Ramesh Kumar and Company & Others* [AIR 2021 SC 5758], *Maharashtra State Electricity Board Versus Sterlite Industries (India) & Another* [(2001) 8 SCC 482], *Dyna Technologies Private Limited Versus Crompton Greaves Limited* [(2019) 20 SCC 1], *UHL Power Company Ltd. Versus State of Himachal Pradesh* [(2022) 4 SCC 116], *Haryana Tourism Limited Versus Kandhari Beverages Limited* [(2022) 3 SCC 237] and *Welspun Specialty Solutions Limited (Formerly known as Remi Metals Gujarat Limited) Versus Oil and Natural Gas Corporation Limited* [(2022) 2 SCC 382] and submitted that the appeal was liable to be dismissed.

7. We have heard the learned counsel for the parties at length and with their assistance we have also perused the relevant documents that were placed on record in proceedings under section 34 of the Act of 1996. At the outset it may be stated that insofar as the finding recorded by the learned Judge that the award dated 25.06.2012 was not a foreign award is concerned, that finding has been accepted by both the parties and hence it is not necessary to go into the said aspect. The challenge raised by the appellant to the judgment passed under Section 34 of the Act of 1996 is based on the premise that specific

challenges raised by the appellant to various Heads in the majority award had not been considered by the learned Judge while dismissing the proceedings. The contentions urged have not been dealt with. In this regard we may observe that while it is true that the scope for interference under Section 34 of the Act of 1996 is limited to examining as to whether the contingencies stipulated in Section 34 of the Act of 1996 have been satisfied or not, it would nevertheless be necessary for the Court to examine the challenge as raised on such permissible grounds. When a specific challenge is raised to the award in the context as permissible under Section 34 of the Act of 1996, it would be necessary for the Court to deal with such challenge. Merely by stating that the scope for interference under Section 34 of the Act of 1996 is limited, the Court would not be justified in refusing to examine specific challenges to the award. Though the Court while exercising jurisdiction under Section 34 of the Act of 1996 cannot sit in appeal over the award passed by the Arbitrator, it would have to refer to and deal with objections raised to the award and assign some reasons for either accepting such challenge or for turning down the same. The order passed under Section 34 of the Act of 1996 therefore ought to indicate consideration of the challenges raised on the touchstone of Section 34 of the Act of 1996 and briefly indicate the reasons for either accepting the same or negating such challenge. The impugned

judgment is therefore required to be examined in the aforesaid context.

8. Perusal of the impugned judgment dated 05.05.2022 indicates that after referring to the factual aspects and rival contentions the judgment proceeds to hold in paragraph 48 that the award dated 25.06.2012 is not a foreign award. The other challenges on merit have been dealt with in the remaining six paragraphs of the said judgment. As regards the aspect of liquidated damages is concerned the contention has been referred to that the express terms and conditions of awarding liquidated damages had not been followed by the majority award and the same could not have exceeded 2.5% of the total contract cost. The learned Judge in paragraph 52 has observed that the majority award had applied its own formula in view of the discussion in paragraph 20.2.2. It has then observed that the reasons discussed in paragraph 42.4 to 42.15 in the majority award were self explanatory and on that basis has concluded that since the said aspect was supported by sound reasons the Court under Section 34 could not interfere.

The appellant in its written submissions in paragraphs 12 to 18 has raised a ground that the award passed by the majority ignores express terms of the contract insofar as liquidated damages are concerned. It

has sought to justify its entitlement to liquidated damages and has urged that even if the respondent was responsible for the delay of only 75 days, the appellant would be entitled to maximum liquidated damages for delay exceeding ten weeks. It has referred to the contractual terms in that regard. It has also sought to rely upon the dissenting opinion on the aspect of liquidated damages to contend that the appellant was entitled to the counter claim on this basis. We find that in paragraph 20.2.2 the majority award has not applied any formula as observed by the learned Judge but it merely refers to the contentions of the parties in that regard. In this context, reference can also be made to the stand taken in paragraphs 42 to 58 of the application filed under Section 34 of the Act of 1996 by the appellant. We thus find that when a specific challenge was raised by the appellant to the majority award while adjudicating the claim for liquidated damages that it failed to take into consideration the terms of the contract, this contention ought to have been dealt with by the learned Judge in the backdrop of the terms of the contract. However, the observations in paragraph 52 of the impugned judgment do not indicate such consideration.

9. On the aspect of claims based on caravans a specific challenge was raised by the appellant that the majority award has recorded an adverse finding by ignoring material evidence on record.

According to the appellant it was not liable to make any payment in that regard since the breach in that regard was committed by the respondent. The purchase price of the caravans was also not available before the Arbitral Tribunal and the claim as awarded was therefore without any supporting evidence. The aspect of depreciation in the value of the caravans being used for a period of more than two years had also not been considered. Such stand has been taken in paragraphs 38 to 42 of the written submissions. The same has also been countered by the respondent. Paragraphs 53 and 54 of the impugned judgment however do not indicate any such consideration in that regard. Same is the case on the aspect of loss of profit due to de-scoping of works as well as the claim based on Invoice No.10 as well as the aspect of interest. It is to be noted that in paragraph 20 of the impugned judgment reference to these aspects having been argued on behalf of the appellant has been made which observations even according to the learned counsel for the respondent are correct. We however find that the impugned judgment does not specifically deal with these challenges except for observing that what was granted in the majority award was based on facts and supported by reasons. Without dealing with the specific challenges as raised it has merely been observed that it was incumbent on the part of the appellant to show that such findings were against or beyond the scope of the terms

and conditions of the agreement. As stated above, the specific challenges though raised have not been dealt with and the only observation made is that the scope for interference under Section 34 of the Act of 1996 was limited.

10. The right conferred on a party aggrieved by an award is required to be exercised in the manner prescribed by Section 34 of the Act of 1996. We therefore find that such challenge having been raised by the appellant it ought to have been considered on the basis of the material on record. Mere observation that the scope for interference with the award would not be sufficient in the facts of the present case since we find from the record that detailed written submissions as well as written notes of arguments were placed on record by both the parties. It may be stated that both the learned counsel sought to substantiate their respective contentions in support of and against the award by referring to the said material. We however find that such consideration for the first time in proceedings under Section 37 of the Act of 1996 without there being such consideration under Section 34 of the Act of 1996 would not be feasible. We are therefore inclined to direct re-consideration of the proceedings under Section 34 of the Act of 1996 afresh. For this reason we have not specifically referred to the various decisions sought to be relied upon by the learned counsel for the parties in support of such challenge. For supporting our

conclusion, we may only refer to the judgment of the Delhi High Court in *Harbhajan Kaur Bhatia* as well as the subsequent decision in *Indian Oil Corporation Limited* (supra). The learned Judge while considering a somewhat similar challenge has observed that dismissal of objections raised under Section 34 of the Act of 1996 except by stating that the award was not against public policy or that it did not violate the ratio of the judgment in *Oil and Natural Gas Company Limited* (supra) was not a satisfactory manner of disposing off Section 34 objections.

11. For aforesaid reasons, the following order is passed :-

- (I) The judgment dated 05.05.2022 passed in Commercial Miscellaneous Application No. 501 of 2012 is set aside. The proceedings are remitted to the District Court for considering the application filed under Section 34 of the Act of 1996 afresh and in accordance with law.
- (II) Since the said proceedings were filed in the year 2012 the same are expedited. The District Court shall take necessary steps to ensure that the proceedings are decided by the end of April-2024.

(III) It is clarified that the observations in this judgment have been made only for dealing with the rival submissions of the parties and the same do not indicate consideration of such claims on merits.

(IV) All points are expressly kept open.

12. The Commercial Appeal is allowed in aforesaid terms leaving the parties to bear their own costs.

(MRS.VRUSHALI V. JOSHI, J.) (A.S. CHANDURKAR, J.)

APTE