**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**FAO-CARB No.1 of 2020(O&M)
Date of Decision:18.04.2023**

Chief Engineer/Projects Haryana Power Generation Corporation Ltd. and another .... Appellants

Versus

M/s Technology Products and another ...... Respondents

**CORAM : HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE HARPREET SINGH BRAR**

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Present: Mr. Puneet Jindal, Sr, Advocate with
Ms.Malvi Aggarwal, Advocate for the appellants.

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HARPREET SINGH BRAR, J.

1. The appellants have preferred this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act' for short) read with Section 13 of The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to as 'the Act of 2015' for short) against the judgment dated 20.07.2019 passed by the learned Presiding Judge, Special Commercial Court at Gurugram. The appellants have also prayed for setting aside the arbitral award dated 06.01.2017.

2. Brief facts of the case emerging from the record are that the Haryana Power Generation Corporation Ltd. (hereinafter referred to as HPGCL) floated notice inviting tender No. 136/CE/TD/E-1/703/U-7&8 dated 21.01.2004 for the work of Design, Manufacture, Assembly,

Inspection and Calibration at Manufacturer's work, supply and delivery F.O.R. site for Electrical Lab Equipments along with accessories for 2 x 250 MW Unit-7&8, TDLTPS, Panipat. After having submitted the offer by respondent/contractor before Special High Purchase Power Committee, Letter of Intent (hereinafter referred to as 'LOI') dated 29.06.2005 was issued to respondent/Contractor which was duly accepted by it vide letter dated 16.05.2005. Thereafter, the contract was entered into between HPGCL and respondent/contractor. The contractor was under contractual obligation to obtain a taking over certificate. Thus, contract dated 16.08.2005 for the aforesaid work was executed. The contract price was Rs. 81,06,963. 48 inclusive of taxes and duties. Several obligations were placed upon the respondent/contractor and after performance thereof, it was entitled to payment of the work executed. The taking over certificate as per clause 11 of Contract dated 16.08.2005 was to be issued by Engineer-in-charge after the material had been received at the site, inspected, counted, measured and found to be in good condition, erected and installed, tested and commissioned and found to be conforming to all the requirements of this contract and the relevant specifications and after completing test and inspection certificate had been duly supplied by the supplier.

3. As per the terms and conditions of the tender awarded to respondent-contractor, the work was required to be completed within six months from the date of the issuance of LOI dated 29.06.2005, however, the respondent completed the work on 22.12.2010. The matter regarding the payment of remaining amount as claimed by the respondent was referred to arbitration by the Haryana Micro Small Enterprises Facilitation Council on

07.07.2015 and arbitrator was appointed vide order dated 28.07.2015. The arbitrator awarded - (i) Rs. 8,10,697/- along with interest from 06.01.2017 (date of award) till payment, and (ii) interest on the amount of Rs. 6,08,083/- which had been paid by the appellant to the respondent-contractor on 05.03.2015 under Section 16 of the Micro Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'the MSMED Act' for short). The objection petitions against the award, filed by the appellants were heard and dismissed by the learned Presiding Judge, Special Commercial Court at Gurugram. Aggrieved from the aforesaid decision, the appellants have preferred this appeal under Section 37 of the Arbitration Act.

4. Learned Senior counsel for the appellants, *inter alia* contended that Section 18(2) of the MSMED Act provides for conducting conciliation proceedings before referring the dispute to arbitrator, which is mandatory in nature. The MSMED Council did not comply with the provisions of Section 65(2) of the Arbitration Act. The Council entertained application under Section 18 of the MSMED Act without resorting to mandatory conciliation proceedings. The Council was bound to follow the drill of Section 18(2) of the MSMED Act. As such, the appointment of arbitrator by the Council is in gross violation of the mandatory provisions of Section 18(2) of the MSMED Act. Thus, the entire proceedings undertaken by the arbitrator as well as the impugned award dated 06.01.2017, suffer from incurable illegality and on this ground alone, the impugned award dated 06.01.2017 and impugned judgment passed under Section 34 of the Arbitration Act, are liable to be set aside.

5. Learned Senior counsel has further vigorously assailed the impugned award dated 06.01.2017 on the ground that the dispute regarding the payment of liquidated damages was never raised in the claim petition rather it was raised in the written arguments. As such, the arbitrator did not provide any opportunity to the appellants for submitting rebuttal arguments to the additional arguments of the respondent-contractor. The impugned award is patently illegal as it is inconsistent and findings are not based on evidence and on this ground also the impugned award cannot sustain in the eyes of law. Moreover, the arbitrator has wrongly allowed interest on the amount of Rs. 6,08,083/- from 22.04.2012 till 05.03.2015, whereas the case of the respondent-contractor was that he was entitled to interest from 18.05.2007.

6. Learned Senior counsel further asserted that the law laid down by Delhi High Court in the case of ***Harbahajan Kaur Bhatia vs. Aadya Trading & Investment Pvt. Ltd.*** *reported in* ***2017(242) DLT 360(DEL)*** as regards the manner and method of deciding Section 34 petition, has not been followed by the learned Presiding Judge, Special Commercial Court at Gurugram and the impugned judgment dated 20.07.2019, as such, is legally unsustainable. Learned Senior counsel for the appellants has placed reliance on the judgment of the Delhi High Court in ***M/s Prestress Wire Industries vs. M/s Uppal Builders Pvt. Ltd., 2020(2) R.A.J. 4.***

7. We have heard learned senior counsel for the appellants and have perused the record carefully. We do not find any merit in the appeal which is required to be dismissed on the following grounds:

8. The appellants had earlier filed CWP No. 24306 of 2015 for setting aside the order dated 21.07.2015 passed by MSMED Council, whereby the application submitted by the appellants for rejecting the claim petition of respondents, was declined and the matter was referred to empanelled arbitrator, notified by the Government under Rule 16 of the Haryana State Micro and Small Enterprises Facilitation Council Rules, 2007, (hereinafter referred to as 'the Rules of 2007' for short) for deciding the dispute between the appellants and respondents. Before the learned Single Bench of this Court, the same argument was raised and the appointment of arbitrator was agitated. The learned Single Bench of this Court vide order dated 30.08.2016, while dismissing the writ petition filed by the appellants, has dealt with the implication of Section 18(2) of the MSMED Act and upheld the orders passed by the Council for referring the matter to empanelled arbitrator, notified by the Government under Rule 16 of the Rules of 2007 and Section 18(3) of the MSMED Act and the following was observed:-

> *" In fact, the learned counsel for the petitioner has miserably failed to substantiate any of his arguments. The impugned order (Annexure P-7) passed by the respondent-Council has not been found suffering from any patent illegality or perversity. Further, learned counsel for the petitioner could not point out any kind of prejudice, which might have been caused to the petitioner, by passing the impugned order, so as to warrant interference, at the hands of this Court, while exercising its writ jurisdiction under Articles 226/227 of the Constitution of India.*
>
> *No other argument was raised.*

> *Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that since the respondent-Council committed no error of law, while passing the impugned order, the same deserves to be upheld. Instant writ petition is wholly misconceived, bereft of merit and without any substance, thus, it must fail. No case for interference has been made out."*

9. After the dismissal of CWP No. 24306 of 2015 by the learned Single Bench of this Court, the appellants have joined arbitration proceedings and never challenged the order dated 30.08.2016 passed therein. As such, the appellants cannot be allowed to rake up the same issue with regard to invoking the conciliation before the appointment of the arbitrator by the Council, *de novo* in an appeal under Section 37 of the Arbitration Act before this Court, where the scope of judicial review is minimal. The appellants have no case, either on facts or in law, in view of the dismissal of CWP No. 24306 of 2015.

10. Learned Senior counsel has laid much emphasis on the fact that the arbitrator allowed the claim of the respondents with regard to the imposition of liquidated damages on the ground that it was not specifically raised in the claim petition rather, it was only agitated in the written arguments for the first time. It is a settled law that an appeal under Section 37 of the Arbitration Act, is in the nature of second appeal and the arbitrator is the final arbiter on facts as well as in law. The scope of interference is limited only to the extent, when the findings of the arbitrator are either contrary to the terms and conditions of the contract between the parties or *ex*

facie patently illegal which go to the root of the matter. Small errors, factual or legal, cannot be corrected in an appeal under Section 37 of the Arbitration Act. If the findings of the arbitrator are plausible, the same have to pass the muster. Reassessment of the evidence is not permissible. The Rules or procedure are the handmaids and not the mistress of justice. Any interpretation in a hyper-technical manner with regard to procedural provisions would run contrary to the letter and spirit of the Arbitration Act. Section 19 of the Arbitration Act provides for determination of rules of procedure. The same requires reproduction which is as under:-

> " ***19- Determination of rules of procedure***. *(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).*
>
> *(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*
>
> *(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.*
>
> *(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*"

Therefore, when Section 19 of the Arbitration Act excludes the applicability of Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872, this argument of the appellant has no legs to stand on. Moreover, once the dispute is raised by a party to the contract even in the written arguments, it would form the subject matter of the arbitration as 'any dispute' indicated in the arbitration clause between the parties. Once either of the parties has raised any dispute during the pendency of the arbitral proceedings and same is not contrary to the terms and conditions of the contract, the arbitrator is well within his rights to adjudicate the same. The Hon'ble Supreme Court in ***National Highway Authority of India vs. Transstroy (India) Limited, 2022 (3) RCR (Civil)*** **491,** has held as under:-

> *" While passing the impugned judgment and order, the High Court has lost sight of the aforesaid aspect, which ought to have been considered while considering the request on behalf of the NHAI to place on record its counter claim. Clauses 26.1 and 26.2 have to be interpreted in a pragmatic and practical manner, as they require that the parties must at first try to settle, resolve and even try conciliation but when the procedure under Clauses 26.1 and 26.2 fails to yield desired result, in the form of settlement within the period specified in Clause 26.2, the Dispute can be resolved through arbitration in terms of Clause 26.3. Once any dispute, difference or controversy is notified under Clause 26.1, the entire subject matter including counter claim/set off would form subject matter of arbitration as "any dispute which is not resolved in Clauses 26.1 and 26.2".*

11. Learned Senior counsel has also assailed the imposition of interest by the arbitrator in the impugned award. It is a settled proposition of law that the award of interest is domain of the arbitrator and he can award compensation for damages in the shape of interest. The Hon'ble Supreme Court has dealt with the same issue in ***M/s Hyder Consulting (UK) Limited vs. Governor, State of Orissa, Thr. Chief Engineer, (2015) 2 Supreme Court Cases 189*** and in para 21 of the judgment has held as follows :-

> *" In the result, I am of the view that S.L. Arora's case is wrongly decided in that it holds that a sum directed to be paid*

by an Arbitral Tribunal and the reference to the Award on the substantive claim does not refer to interest pendente lite awarded on the "sum directed to be paid upon Award" and that in the absence of any provision of interest upon interest in the contract, the Arbitral Tribunal does not have the power to award interest upon interest, or compound interest either for the pre-award period or for the post-award period. Parliament has the undoubted power to legislate on the subject and provide that the Arbitral Tribunal may award interest on the sum directed to be paid by the Award, meaning a sum inclusive of principal sum adjudged and the interest, and this has been done by Parliament in plain language."

It was further held in para 31 that:-

" Coming now to the post-award interest, Section 31(7)(b) of the Act employs the words, "A sum directed to be paid by an arbitral award....". Clause (b) uses the words "arbitral award" and not the Arbitral Tribunal". The arbitral award, as held above, is made in respect of a "sum" which includes the interest. It is, therefore, obvious that what carries under Section 31(7) (b) of the Act is the "sum directed to be paid by an arbitral award" and not any other amount much less by or under the name "interest". In such situation, it cannot be said that what is being granted under Section 31(7)(b) of the Act is "interest on interest". Interest under clause (b) is granted on the "sum" directed to be paid by an arbitral award wherein the "sum" is nothing more than what is arrived at under clause (a).

It was further held in para 32 that:-

" Therefore, in my view, the expression "grant of interest on interest" while exercising the power under Section 31(7) of the Act does not arise and, therefore, the Arbitral Tribunal is well

> *empowered to grant interest even in the absence of clause in the contract for grant of interest."*

12. Reference in this regard can also be made to ***South Delhi Municipal Corporation v. PKSS Infrastructure Pvt. Ltd. 2018(3) Arb. LR 76 (Delhi),*** wherein it was held by the Delhi High Court in para 24 that:

> " *Section 31(7)(a) of the Act empowers the Arbitral Tribunal to award interest at such rate as it deems reasonable, on the amount directed to be paid by one party to another under the award. In the present case, as noted above, award of interest on the amount ordered to be refunded was in form of damages. A reading of the above would show that the arbitrator applied his mind on the rate of interest to be awarded in favour of the respondent."*

13. It is no longer *res integra* that this Court, in an appeal under Section 37 of the Arbitration Act, cannot substitute the findings of the arbitrator on the merits of the rival claims of the parties. The judicial intervention is only permissible to the extent of ensuring that the award is a reasoned award. The aforesaid principle was authoritatively reiterated in ***MMTC Ltd. vs. Vedanta Ltd.*** reported as ***AIR 219 Supreme Court 1168*** wherein the Hon'ble Supreme Court held as under:-

> *"12. 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."

14. In ***K.V.Mohammed Zakir vs. Regional Sports Centre, AIR 2009 SC (Suppl) 2517***, the Honble Supreme Court has held that:

> *" Reasonableness of the reasons given for such award is not open to scrutiny by Courts. However, where reasons are such as no person of ordinary prudence will ever approve of them or are so outrageous in their defiance of logic that they shock the conscience of the Court, then it is an appropriate case to interfere with the award."*

In ***P.R.Shah, Shares and Stock Brokers Private Limited vs. B.H.H. Securities Private Limited and others, (2012) 1 SCC 594***, it was held by the Hon'ble Supreme Court that:

> "*A court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act."*

In ***National Highway Authority of India vs. M/s Progressive, MVR (JV) 2018, AIR (SC) 1270***, the Hon'ble Supreme Court has held that:

> *"Normally, the Court would not interfere with awards when the Arbitral Tribunal has taken a view and this was a plausible view, keeping in mind the parameters of judicial review of Court in exercising the power under Section 34 of the Act."*

15. Keeping in view the facts and circumstances of the case, we find that the learned Presiding Judge, Special Commercial Court, Gurugram has correctly appreciated the scope and power of Section 34 of the Arbitration Act, while rejecting the objections filed by the appellant vide judgment dated 20.07.2019 and that the arbitral award dated 06.01.2017 is a reasoned one. Resultantly this appeal is dismissed.

16. Pending application(s), if any, shall also stand disposed of.

(AUGUSTINE GEORGE MASIH)
JUDGE

(HARPREET SINGH BRAR)
JUDGE

18.04.2023
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Whether Reasoned/Speaking : Yes/No
Whether Reportable : Yes/No