



\$~J-3

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: 12.12.2023

+ **O.M.P.(COMM.) 393/2020 & IA Nos. 1695/2021, 1366/2023**

WAPCOS LTD

..... Petitioner

Through: Mr. Naresh Kaushik, Mr. Manoj Joshi, Ms. Shikha John and Mr. Shubhum Dwivedi, Advs.

versus

JYOTI SARUP MITTAL

..... Respondent

Through: Mr. Ashish Aggarwal, Mr. Satyajit Yadav and Mr. Nishchay Kapoor, Advs.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

O.M.P.(COMM) 393/2020

1. The present petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the Award dated 08.04.2014 passed by learned Sole Arbitrator, on disputes arising out of a contract for the work relating to 'Construction of WAPCOS Office Complex at 76 'C', Sector-18, Gurgaon'.
2. The respondent/claimant raised the following claims in the arbitral proceedings:-

"Claim No. 1 Claimants claim Rs. 76,61,322.78/- towards non-payment of final bill.

Claim No. 2 Claimants claim Rs. 6,12,066.22/-towards interest on non-payment of final bill.

Claim No. 3 Claimants claim Rs. 6,09,802.29/- towards interest on the delayed payments of 15th Running account bill.



Claim No. 4 Claimants claim Rs. 62,32,453.67/- towards payment of balance amount of escalation.

Claim No. 5 Claimants claim Rs. 2,88,862/- on account of interest on delayed payments of running account bills from 1st to 14th R/A.

Claim No. 6 Claimants claim Rs. 78,88,313.70/- on account of loss of profit due to non-completion of the project within the stipulation period of completion on account of non-fulfillment of contractual obligations by the WAPCOS.

Claim No. 7 Claimants claim Rs. 1,75,500/- towards payment of item of 4 mm thick Fibre Doom not included in the Arrangement and was to be paid separately at the negotiated rate of Rs. 1350/- per sqm.

Claim No. 8 Claimants claim Rs. 1,13,40,000/- towards damages on account of salary of staff, establishment and under utilization of T & P etc due to prolongation of the Contract beyond stipulated date of completion due to non-fulfilment of contractual obligation by the WAPCOS.

Claim No. 9 Claimants claim Rs. 33,11,128/- on account of rise in market price of the labour and material for the work done beyond the stipulated period of completion.

Claim No. 10 claimants claim Rs. 10,00,000/- towards refund of security deposit.

Claim No. 11 Claimants claim for declaratory award that no action is warranted against the claimants under the clauses 63,72,43 of the Agreement.

Claim No. 12 Claimants claim of interest @ 18% on the amount of the claims as under :-

- (i) Pre-suit interest from the date of invocation of arbitration Clause.
- (ii) Pendentilite interest.
- (iii) Future interest.

Claim No. 13 Claimant claim Rs. 5,00,000/- towards cost of arbitration proceedings/litigation expenses.”

3. The petitioner herein also preferred certain counterclaims. The impugned award, after carefully perusing the material and evidence on record, rejected most of the claims sought to be raised by the respondent and allowed only the following claims:-

<i>Claim No. 1</i>	<i>Non Payment of Final Bill</i>	
<i>i)</i>	<i>Amount of work done as per the final Bill prepared by the respondent but not paid</i>	<i>31,07,640/-</i>
<i>ii)</i>	<i>Marble Chips Skirting</i>	<i>3,884/-</i>
	<i>P/F Makrama White Marble Slab</i>	<i>1,214/-</i>
	<i>Providing & laying six course water proof</i>	<i>1,16,797/-</i>



	<i>treatment</i>	
	<i>Colour washing to give an even shade of new work</i>	<i>3,254/-</i>
	<i>Finishing external surface with water proofing cement paint</i>	<i>27,611/-</i>
	<i>Providing & Fixing GI Pipe 50 mm dia.</i>	<i>11,043/-</i>
	<i>Providing & Fixing 2mm thick Plain fiber sheet</i>	<i>18,000/-</i>
	<i>Providing & Fixing anodized Aluminum doors with frames</i>	<i>58,960/-</i>
	<i>Water supply and sanitation providing White Pedestal Type WC</i>	<i>11,000/-</i>
<i>Claim No. 4</i>	<i>Balance amount of Escalation</i>	<i>18,46,689/-</i>
<i>Claim No. 10</i>	<i>Security Deposit</i>	<i>10,00,000/-</i>
		<i>62,06,092/-</i>

4. The counter claims that were allowed are as follows:-

<i>Counter claim no. 1</i>	<i>Liquidated damages</i>	<i>38,87,665/-</i>
<i>Counter claim no. 2</i>	<i>Charges for Design of Dome</i>	<i>15,657/-</i>
<i>Counter claim no. 5</i>	<i>Not rounding of edges & not providing glass strips in flooring</i>	<i>694/-</i>
<i>Counter claim no. 6</i>	<i>Providing less size manhole covers</i>	<i>732/-</i>
<i>Counter claim no. 9</i>	<i>Not providing Lipping in doors</i>	<i>9405/-</i>
<i>Counter claim no. 14</i>	<i>Not using Polysulphide</i>	<i>5,64,933/-</i>
<i>Counter claim no. 16</i>	<i>Electricity Charges</i>	<i>51,531/-</i>
<i>Counter claim no. 18</i>	<i>Risk & cost of claimant</i>	<i>36,724/-</i>
	<i>Total</i>	<i>45,67,341/-</i>

5. In the light of the findings in respect of the claims and the counterclaim, the impugned award works out the interest entitlement of the respondent as under:-

“Both the claimant and the respondent have claimed interest on their claim and counterclaim respectively which are being dealt with as follows”:-

<i>(i)</i>	<i>Amount of work done payable to the claimant as per the final bill prepared by the respondent but</i>	<i>Rs. 31,07,640/-</i>
------------	---	------------------------



	<i>not paid</i>	
(ii)	<i>Total amount awarded to the claimant for their claims.</i>	<i>Rs. 30,98,452/-</i>
(iii)	<i>Total amount awarded to the Respondent for their counterclaims.</i>	<i>Rs. 45,67,341/-</i>
(iv)	<i>Total amount awarded to the claimant after deduction of the amount of counter claim awarded to the Respondent(i) + (ii) – (iii)</i>	<i>Rs. 16,38,751/-</i>
(v)	<i>Date of submission of final bill</i>	<i>08.06.2002</i>
(vi)	<i>Considering all aspect of the case, I decided that the rate of interest at 12% P.A. is fair, reasonable and justified and I awarded the same in favour of the claimant.</i>	
(vii)	<i>The amount of interest on Rs. 16,32,751/- from 08/12/2002(Schedule date of payment of final bill) to 07/04/2014 the date of award @12% p.a., work out to Rs 22,28,700/-.</i>	<i>Rs. 22,28,700/-</i>
(viii)	<i>Total amount payable to the claimant on the date of award (iv) + (vii).</i>	<i>Rs. 38,67,451/-</i>
(ix)	<i>The Respondent will pay a sum of Rs.38,67,451/- to the claimant within 2 months from the date of receipt of the award by the Respondent failing which the Respondent will also pay future interest @12% PA on Rs. 38,67,451/- from the date of award to the date of actual payment.</i>	

6. The petitioner has challenged the impugned award primarily assailing the manner in which the impugned award calculates the interest payable to the respondent. It is submitted that for the purpose of calculation of the interest, the learned sole arbitrator has wrongly aggregated the amount of Rs. 30,98,452/- found to be payable to the respondent along with the amount assessed to be payable under the various claims assessed and adjudicated by



the learned sole arbitrator. It is the contention of the learned counsel for the petitioner that the amount found payable under the claims is less than the counterclaims awarded to the petitioner; as such the impugned award is not justified in awarding interest in favour of the respondent.

7. It is also contended by the learned counsel for the petitioner that the arbitrator has not dealt with the counterclaim no. 22 raised by the petitioner pertaining to interest on counterclaims. It is also contended by the learned counsel for the petitioner that the learned arbitrator was unjustified in awarding the escalation amount to the respondent/claimant inasmuch as the same was payable only for the work-done during the contract period i.e. upto December, 1998 whereas in the impugned award escalation is even beyond the said date.

8. The aforesaid contentions have been controverted by the learned counsel for the respondent who submits that there is no infirmity in the manner in which the interest payable to the respondent/claimant has been worked out. Further it is submitted that the award gives cogent reasoning for allowing the claim of escalation made by the respondent for a period of 753 days which was the delay period occasioned due to circumstances beyond the control of the claimant. In this regard, reliance has been placed upon judgments in the case of *Union of India vs. Mago Construction*¹, *K.N. Sathyapalan (Dead) by Lrs vs. State of Kerala & Ors.*² and *Bharat Heavy Electricals Limited vs. Vasavi Power Services Pvt. Ltd.*³

¹ 2019 SCC Online Del 6566

² MANU/SC/5270/2006

³ MANU/DE/1711/2022.



Analysis and Conclusion

9. Having perused the record and having considered the submissions of the respective counsel for the parties, I find no merit in the contentions raised on behalf of the petitioner.

10. No fault can be found with the manner in which the impugned award works out the interest payable to the respondent/claimant. The impugned award takes note of the total entitlement of the respondent/claimant viz. an outstanding amount of Rs. 31,07,640/- as being the unpaid amount of final bill and a sum of Rs. 30,98,452/- being the amount assessed and awarded to the claimant in respect of the other claims raised before the learned sole arbitrator. From the aggregate amount, the amount awarded in respect of the counterclaims preferred by the petitioner was deducted and a net sum of Rs. 16,38,751/- was found to be payable to the respondent/claimant.

11. The pre-award interest has been worked out for the period 08.12.2002 (scheduled date of payment of final bill) to 07.04.2014 (Date of award) @ 12% p.a. As such, the total amount payable to the respondent/claimant as on the date of award has been found to be Rs. 38,67,451/-. No infirmity whatsoever can be found with the aforesaid finding, much less any infirmity of the kind which warrants interference of exercise of jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996.

12. Likewise, for the purpose of assessing the respondent/claimant's entitlement towards escalation, the impugned award renders a finding of fact that out of the period of delay viz. from 01.01.1999 to 30.04.2002 (1216 days), the period of delay attributable to the claimant was only 463 days as per the respondent itself and therefore the balance period i.e. 753 days was beyond the control of the claimant. It was therefore found that the



respondent/claimant was entitled to escalation for this period. Accordingly, the escalation claim was assessed in following terms:

Escalation Bill No.	R/A Bill No.	Period of Escalation	Amount of escalation
VI th	8 th dt. 23.01.99	01/99 to 01/99	45,442/-
VII th	9 th dt. 13.05.99	2/99 to 4/99	1,92,352/-
VIII th	10 th dt 25.09.99	05/99 to 8/99	3,80,387/-
IX th	11 th dt. 20.12.99	09/99 to 11/99	3,14,826/-
X th	12 th dt. 08.04.2000	12/99 to 3/00	1,31,570/-
XI th	13 th dt. 20.10.2000	4/00 to 9/00	1,45,392/-
XII th	14 th dt. 21.05.2001	10/00 to 22/01/01	6,36,720/-

13. Learned counsel for the respondent has rightly contended that the award of escalation in the aforesaid conspectus cannot be faulted and the same is consistent with the judgments in case of **Mago Construction** (supra), **K.N. Sathyapalan** (supra) and **Bharat Heavy Electricals** (supra).

14. There is no gainsaying that the scope of interference with the arbitral awards in exercise of jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 is limited. Reference in this regard is apposite to the recent pronouncement of the Supreme Court in **Hindustan Construction Co. Ltd. vs. National Highways Authority of India**⁴, wherein it has been held as under:-

“26. The prevailing view about the standard of scrutiny-not judicial review, of an award, by persons of the disputants’ choice being that of their decisions to stand-and not interfered with, [save a small area where it is established that such a view is premised on patent illegality or their interpretation of the facts or terms, perverse, as to qualify for interference, courts have to necessarily chose the path of least interference, except when absolutely necessary]. By training, inclination and experience, judges tend to adopt a corrective lens; usually, commended for appellate review. However, that lens is unavailable when exercising jurisdiction under Section 34 of the Act. Courts cannot, through process of primary contract interpretation, thus, create pathways to the kind of review which

⁴ 2023 SCC OnLine SC 1063



is forbidden under Section 34. So viewed, the Division Bench's approach, of appellate review, twice removed, so to say [under Section 37], and conclusions drawn by it, resulted in displacing the majority view of the tribunal, and in many cases, the unanimous view, of other tribunals, and substitution of another view. As long as the view adopted by the majority was plausible-and this court finds no reason to hold otherwise (because concededly the work was completed and the finished embankment was made of composite, compacted matter, comprising both soil and fly ash), such a substitution was impermissible.

27. For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especxially when they interpret contractual terms, ought not to be interfered with, lightly. The proposition was placed in State of UP v. Allied Constructions:

“[...] It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see Sudarsan Trading Co. v. The Government of Kerala, (1989) 2 SCC 38 : AIR 1989 SC 890). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the. interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law”

28. This enunciation has been endorsed in several cases (Ref McDermott International Inc. v. Burn Standard Co. Ltd.). In MSK Projects (I) (JV) Ltd v. State of Rajasthan it was held that an error in interpretation of a contract by an arbitrator is “an error within his jurisdiction”. The position was spelt out even more clearly in Associate Builders (supra), where the court said that:

“[...] if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator



construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.””

15. In **Konkan Railway Corpn. Ltd. vs. Chenab Bridge Project**⁵, it has been held as under:-

“19. Therefore, the scope of jurisdiction under Section 34 and Section 37 of the Act is not akin to normal appellate jurisdiction. It is well-settled that courts ought not to interfere with the arbitral award in a casual and cavalier manner. The mere possibility of an alternative view on facts or interpretation of the contract does not entitle courts to reverse the findings of the Arbitral Tribunal. In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., this Court held : (Dyna Technologies case, SCC p. 12, paras 24-25)

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

⁵ (2023) 9 SCC 85



16. In **Reliance Infrastructure Ltd. vs. State of Goa**⁶, it has been held as under:-

“48. In MMTC Limited (supra), this Court took note of various decisions including that in the case of Associate Builders (supra) and expounded on the limited scope of interference under Section 34 and further narrower scope of appeal under Section 37 of the Act of 1996, particularly when dealing with the concurrent findings (of the Arbitrator and then of the Court). This Court, inter alia, held as under:—

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corp., [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445]; and McDermott International Inc. v. Burn Standard Co.

⁶ 2023 SCC OnLine SC 604



Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

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.”

xxx

xxx

xxx

51. In Delhi Airport Metro Express (supra), this Court again surveyed the case-law and explained the contours of the Courts' power to review the arbitral awards. Therein, this Court not only re-affirmed the principles aforesaid but also highlighted an area of serious concern while pointing out “a disturbing tendency” of the Courts in setting aside arbitral awards after dissecting and re-assessing factual aspects. This Court also underscored the pertinent features and scope of the expression “patent illegality” while reiterating that the Courts do not sit in appeal over the arbitral award. The relevant and significant passages of this judgment could be usefully extracted as under:—

“26. A cumulative reading of the UNCITRAL Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the 1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. While deciding applications filed under Section 34 of the Act, Courts are mandated to strictly act in accordance with and within



the confines of Section 34, refraining from appreciation or reappreciation of matters of fact as well as law. (See Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570], Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd. [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306].)

xxx

xxx

xxx

28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract



and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression “patent illegality”.

30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression “public policy of India” and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

xxx

xxx

xxx

*42. The Division Bench referred to various factors leading to the termination notice, to conclude that the award shocks the conscience of the court. The discussion in SCC OnLine Del para 103 of the impugned judgment [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] amounts to appreciation or reappraisal of the facts which is not permissible under Section 34 of the 1996 Act. The Division Bench further held [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] that the fact of AMEL being operated without any adverse event for a period of more than four years since the date of issuance of the CMRS certificate, was not given due importance by the Arbitral Tribunal. **As the arbitrator is the sole Judge of the quality as well as the quantity of the evidence, the task of being a Judge on the evidence before the Tribunal does not fall upon the Court in exercise of its jurisdiction under Section 34.** [State of Rajasthan v. Puri Construction Co. Ltd., (1994) 6 SCC 485] On the basis of the issues submitted by the parties, the Arbitral Tribunal framed issues for consideration and answered the said issues. Subsequent events need not be taken into account.”*

17. This Court in ***THDC India Ltd. vs. PCL-Intertech Lenhydro***



Consortium JV⁷, has held as under:-

“50. At the outset, it is important to consider the scope of the present proceedings under Section 34 of Arbitration and Conciliation Act, 1996. The award in the present case is dated 17.12.2010.

51. It has been held by the Supreme Court in the case of Ssangyong Engg. & Construction Co. Ltd. v. NHAI, as under:—

“19. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of “public policy of India” in ONGC v. Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] [-Saw Pipes”] and ONGC v. Western Geco International Ltd. [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] [-Western Geco”] has been done away with, and a new ground of “patent illegality”, with inbuilt exceptions, has been introduced. Given this, we declare that Section 34, as amended, will apply only to Section 34 applications that have been made to the Court on or after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.”

xxx

xxx

xxx

53. In the context of the above statutory prescription, the Supreme Court in Associate Builders v. DDA, after minutely analysing the legal position enunciated by the Supreme Court in the cases of ONGC Ltd. v. Saw Pipes Ltd., Hindustan Zinc Ltd. v. Friends Coal Carbonisation, McDermott International Inc. v. Burn Standard Co. Ltd.,; Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., DDA v. R.S. Sharma and Co.,; J.G. Engineers (P) Ltd. v. Union of India, Union of India v. L.S.N. Murthy, P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.. held as under:—

33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score Once it is found that the arbitrators approach is not arbitrary or capricious,

⁷ 2023 SCC OnLine Del 4040



then he is the last word on facts.

54. The Supreme Court also cited with approval the dictum laid down in *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.* [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342], wherein it has been held as under:—

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable..... Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

xxx

xxx

xxx

57. Again in *Madhya Pradesh Power Generation Company Ltd. v. Ansaldo Energia SPA*, it was observed as under:—

“25. The limit of exercise of power by courts under Section 34 of the Act has been comprehensively dealt with by R.F. Nariman, J. in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Lack of judicial approach, violation of principles of natural justice, perversity and patent illegality have been identified as grounds for interference with an award of the arbitrator. The restrictions placed on the exercise of power of a court under Section 34 of the Act have been analysed and enumerated in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] which are as follows:

(a) The court under Section 34(2) of the Act, does not act as a court of appeal while applying the ground of “public policy” to an arbitral award and consequently errors of fact cannot be corrected.

(b) A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the sole judge of the quantity and quality of the evidence.

(c) Insufficiency of evidence cannot be a ground for interference by the court. Re-examination of the facts to find out whether a different decision can be arrived at is impermissible under Section 34(2) of the Act.

(d) An award can be set aside only if it shocks the conscience of the court.

(e) Illegality must go to the root of the matter and cannot be of a



trivial nature for interference by a court. A reasonable construction of the terms of the contract by the arbitrator cannot be interfered with by the court. Error of construction is within the jurisdiction of the arbitrator. Hence, no interference is warranted. (f) If there are two possible interpretations of the terms of the contract, the arbitrator's interpretation has to be accepted and the court under Section 34 cannot substitute its opinion over the arbitrator's view."

18. In the facts of the present case, no ground is made out to interfere with the impugned arbitral award in exercise of the jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996.

19. The present petition is accordingly dismissed. The pending applications also stand disposed of.

SACHIN DATTA, J

DECEMBER 12, 2023
at/hg