

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.14 of 2017

In the matter of an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 assailing the judgment dated 24th July, 2017 passed by the learned District Judge, Khurda at Bhubaneswar in Arb(P) No.176 of 2012.

IRCON International Ltd. Appellant

-versus-

Amalgamated Construction Respondents
India Pvt. Ltd. & Another

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):**

For Appellant

- Mr.S.K. Das,
Advocate

For Respondents

- Mr.P.K. Rath, Sr. Advocate
(Respondent No.1)
Mr. P.C. Panda, Advocate
(Respondent No.2)

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 19.02.2024 : Date of Judgment: 11.03.2024

D.Dash, J. The Appellant-Company, by filing this Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the A&C Act' 1996), has assailed the

judgment dated 24.07.2017 passed by the learned District Judge, Khurda at Bhubaneswar in Arb(P) No.176 of 2012 in the matter of an application under section 34 of the Act.

This Appellant had filed the application under section 34 of the A & C Act praying to set aside the award dated 13.06.2012 passed by the learned Arbitrator. By the said award, the learned Arbitrator held the Respondent No.1 (Claimant) to be entitled to a sum of Rs.11,00,000/- from the present Appellant. The learned Arbitrator having so directed the Appellant to pay the said amount to the Respondent No.1-Company (Claimant), has further directed that the same be paid with interest @ 9% per annum from October, 2000 up-till the date of award and thereafter @ 12 % till payment along with the cost of the proceeding assessed at Rs.1,18,500/-

2. Factual Matrix of the Case:-

On 02.09.1996 the Airport Authority of India Ltd. floated the tender for award of work of "Runway Extension Site" at Bhubaneswar Airport. On 04.12.1996, the Appellant was awarded with the work for its execution. In undertaking the said work, the Appellant entered into an agreement with Respondent No.2-Company for execution of part work as awarded under the contract. The Respondent No.2 in order to carry out its obligation which required to procure raw

materials such as sand and moorum for the work, floated another tender for Raising and Transportation of Runway Construction Materials. Finally, on 01.06.2000 agreement was entered into between the Respondent No.1 and Respondent No.2 for the above raising and transportation of the raw materials. The agreement between the Respondent No.1 and Respondent No.2 had been made with the knowledge of the Appellant whose authorized signatory had also lent his signature thereon. The Respondent No.1 since did not receive the payment, the dispute having arisen out of the agreement between the Respondent No.1 and Respondent No.2 which has been executed with the knowledge of the Appellant and wherein the authorized signatory of the Appellant had also signed, the Respondent No.1 as per the clause in the agreement approached this Court for payment of his dues in W.P.(C) No.3785 of 2005. This Court then directed the Appellant to consider and dispose of the representation of the Respondent No.1. On 27.04.2005 the representation of Respondent No.1 for payment of his dues was rejected by the Appellant. So, on 29.08.2005, the Respondent No.1 gave notice to the Appellant for adjudication of the dispute for arbitration as stipulated in Clause-13 of the agreement. Since there was no response, the Respondent No.1-Company filed an application

under section 11(6) of the A & C Act before this Court for appointment of the Arbitrator. The Hon'ble Chief Justice by order dated 25.11.2011 appointed Mr. S.F. Ahmed, a retired District Judge as the sole arbitrator to decide the dispute within six months of entering the reference.

The Appellant-Company then filed a Miscellaneous Application which stood numbered as Misc. Case No.5 of 2012 before this Court for recall of order dated 25.11.2011 appointing the Arbitrator and decide the application afresh. That application stood rejected by order dated 30.03.2012 and there was also no interim order in the said Miscellaneous Application.

3. The Arbitrator having received the letter of the court on 17.01.2012 issued notice to the parties by Registered Post with A.D. as well as through Courier Service calling upon them to appear in person or through their Advocate on 04.02.2012 at 2 p.m. at the venue fixed by him and so indicated in the notice. Several dates having been fixed by the learned Arbitrator when finally on 22.05.2012 none appeared on behalf of the Appellant and Respondent No.2 and an application for further adjournment was sought for, the learned Arbitrator refusing to accept the said prayer and fixed the proceeding to 29.05.2012 for hearing. On that day, the Respondent No.1 only appeared

and the Managing Director of the Respondent No.1-Company (Claimant) filed his evidence on affidavit as also the document which were admitted in evidence and marked exhibits. The Appellant and the Respondent No.2 did not appear. So, having accepted the evidence and documents, the learned Arbitrator then fixed the matter to 02.06.2012 for argument. Having heard the argument from the side of the Respondent No.1-Claimant on 02.06.2012, the learned Arbitrator posted the matter to 13.06.2012 for passing the award and it was so passed.

4. The above award passed by the learned Arbitrator having been challenged by the Appellant by carrying an application under section 34 of the A & C Act before the learned District Judge, the same has been dismissed.

5. The Appellant-Company in the application filed under section 34 of the A & C Act raised the following grounds:-

- (1) learned Arbitrator illegally proceeded with the arbitral proceeding despite an objection raised that his appointment was under challenge before the Hon'ble Court and it is stated that the learned Arbitrator proceeded with the matter showing undue haste and finally passed the award setting the

Appellant ex parte without providing adequate opportunity to the Appellant to defend the claim;

(2) the Appellant had an agreement with the Respondent No.2 for execution of some part of work entrusted to Respondent No.2 by the Appellant and the Respondent No.1 had the agreement with the Respondent No.2 and as such there was no privity of contract between the Appellant and Respondent No.1.

6. The learned District Judge in seisin of the proceeding under section 34 of the A & C Act having perused the day to day orders passed by the learned Arbitrator right from the day of receipt of the letter of his appointment from this Court till the award and further keeping in view the conduct of the Appellant during the arbitral proceeding has held that the learned Arbitrator did not have any other option except to conduct the arbitral proceeding and dispose of the same in accordance with law.

7. Then coming to address the other contentions raised by the Appellant as regards the privity of contract has finally repelled the same in concluding that the learned Arbitrator committed no wrong or error in holding the Appellant as liable for payment of the awarded amount towards the dues of

the Respondent No.1-Claimant. In saying so, the learned District Judge has taken the cue from the followings:-

- (i) the Respondent No.2 had requested the Appellant not to pay the dues to the Respondent No.1-Claimant till the rates are revised in terms of the rates agreed upon by the Appellant. So the Respondent No.1-Claimant for his work was to receive his dues from the Appellant. However, the revision having not been done at any point of time and the amount having not been paid to the Respondent No.1-Claimant and withheld for considerable period of time, it is held that the same cannot be approved of when the Respondent No.2 has not disputed the amount or the outstanding dues on any other ground but requested simply the Appellant to keep the payment in abeyance until the revised rate are determined or agreed upon between the Respondent No.1-Claimant and the Respondent No.2;
- (ii) the outstanding dues was duly certified by the Respondent No.2 as it reveals from the correspondence of the Appellant dated 18.02.2002 (Ext.4);

- (iii) when the work was completed and executed and fully accomplished and to that effect as the endorsement was received by the Appellant under Ext.4, the billed amount was required to be paid by the Respondent No.1-Claimant immediately; and
- (iv) since the rates were not revised for all these periods, the same is a pretext to withheld the billed amount of the Respondent No.1-Claimant and thus there was no scope for denial or disagreement between the parties, providing any justification for the Appellant not to release the billed amount in favour of the Respondent No.1.

The learned District Judge further held that the award is not liable to be set aside as no such ground as finds mention in section 34 of the A & C Act is made out.

8. Hence the present Appeal under section 37 of the A & C Act is at the instance of the Appellant who has suffered under that award which has been refused to be set aside.

9. Heard Mr. S.K.Das, learned counsel for the Appellant and Mr. P.K. Rath, learned Senior Advocate, learned counsel for the Respondent No.1 (Claimant) as also Mr. P.C. Panda, learned counsel for the Respondent No.2 at length.

I have perused the record of the arbitral proceeding as well as that of the proceeding under section 34 of the A&C Act of the Court of the learned District Judge, Khurda at Bhubaneswar.

10. Mr. S.K. Das, learned counsel for the Appellant submitted that the learned Arbitrator has not given the intimation by notice to the Appellant about his intention to proceed ex parte and has abruptly published the ex parte award and, therefore, the award is in gross violation of the provision of section 18 of the A & C Act which provides that each party shall be given due opportunity to present his case. He next submitted that it is in violation of the mandate of section 24 (2) of the Act which speaks that the parties shall be given sufficient advance notice of any hearing. He, therefore, banking upon the clause-III of Sub-section (2) of section 34 of the A & C Act submitted that the award is liable to be set aside as the Appellant was not given proper notice of the arbitral proceeding and was unable to present his case. The learned District Judge has dealt with these objections in detail and has finally negated the said objections.

11. Mr. P.K. Rath, learned Senior Counsel for the Respondent No.1 (Claimant) submitted that the learned District Judge has rightly rejected the application under

section-34 of the A & C Act as there surfaces no ground for interference as provided in section 34 of the Act.

12. The scope of this Court's power under section 37 of the A & C Act and whether the Arbitral award is in contravention of the public policy of the State under section 34(2)(b) (ii) of the A & C Act.

1. In the present case, we are only concerned with Section 37(1)(c) which states that an appeal lies under Section 37 from an order setting aside or refusing to set aside an arbitral award under Section 34 of the A& C Act.
2. It may be noted that the law laid down by the Supreme Court constricts the supervisory role of the courts while testing the validity of an Arbitration Award. In the case of *Mcdermott International Inc. v. Burn Standard Co. Ltd.*¹, the Supreme Court has held as under:—

"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 Ld. Arbitral Tribunals, violation of natural justice, etc. The court cannot correct errors of the Ld. Arbitral Tribunals. It can only quash the award leaving the parties free

¹ (2006) 11SCC 181

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."

13. It is now a settled position that while exercising a power under Section 34 of the A&C Act, the arbitral award can only be confirmed or set aside, but not modified. To buttress the said position of law, reliance is placed on the decision of the Supreme Court's recent judgment and order in *NHAI v. M. Hakeem*², wherein the Supreme Court held that:

"16. What is important to note is that, far from Section 34 being in the nature of an appellate provision, it provides only for setting aside awards on very limited grounds, such grounds being contained in sub-sections (2) and (3) of Section 34. Secondly, as the marginal note of Section 34 indicates, "recourse" to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-sections (2) and (3). "Recourse" is defined by P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Edn.) as the enforcement or

² 2021 SCC Online SC 473

method of enforcing a right. Where the right is itself truncated, enforcement of such truncated right can also be only limited in nature. What is clear from a reading of the said provisions is that, given the limited grounds of challenge under sub-sections (2) and (3), an application can only be made to set aside an award. This becomes even clearer when we see sub-section (4) under which, on receipt of an application under sub-section (1) of Section 34, the court may adjourn the Section 34 proceedings and give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or take such action as will eliminate the grounds for setting aside the arbitral award. Here again, it is important to note that it is the opinion of the Arbitral Tribunal which counts in order to eliminate the grounds for setting aside the award, which may be indicated by the court hearing the Section 34 application.

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31. Thus, there can be no doubt that given the law laid down by this Court, Section 34 of the Arbitration Act, 1996 cannot be held to include within it a power to modify an award. The sheet anchor of the argument of the respondents is the judgment of the learned Single Judge in Gayatri Balaswamy [Gayatri Balaswamy v. ISG Novasoft Technologies Ltd., 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] . This matter arose out of a claim for damages by an employee on account of sexual harassment at the workplace. The learned Single Judge referred to the power to modify or

correct an award under Section 15 of the Arbitration Act, 1940 in para 29 of the judgment. Thereafter, a number of judgments of this Court were referred to in which awards were modified by this Court, presumably under the powers of this Court under Article 142 of the Constitution of India. In para 34, the learned Single Judge referred to para 52 in McDermott case [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] and then concluded that since the observations made in the said para were not given in answer to a pointed question as to whether the court had the power under Section 34 to modify or vary an award, this judgment cannot be said to have settled the answer to the question raised finally.

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42. It can therefore be said that this question has now been settled finally by at least 3 decisions [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] , [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International

Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the “limited remedy” under Section 34 is coterminous with the “limited right”, namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.

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48. Quite obviously if one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what, according to the justice of a case, ought to be done. In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament very clearly intended that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996. It is only for Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over.”

Further, the Supreme Court also re-iterated the above position in National Highway Authority of India vs. Sri P.Nagaraju @ Cheluvaiah & Anr as under:

“26. Under the scheme of the Act 1996 it would not be permissible to modify the award

passed by the learned Arbitrator to enhance or reduce the compensation based on the material available on record in proceeding emanating from Section 34 of the Act, 1996..."

14. It is thus amply clear that the extent of judicial scrutiny under Section 34 of the A&C Act is limited and the scope of interference is narrow. Under Section 37, the extent of judicial scrutiny and scope of interference is further narrower still. An appeal under Section 37 is akin to a second appeal, the first appeal being by way of objections under Section 34. Where there are concurrent findings of facts and law, first by the Learned Arbitral Tribunal which are then confirmed by the court while dealing with objections under Section 34, in an appeal under Section 37, the Appellate Court should be very cautious and loathe to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under Section 34. As laid down by the Apex Court, the supervisory role of the court in arbitration proceedings has been kept at a minimal level and this is so because, the parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as the parties prefer the expediency and finality offered by it.

15. Further, the Supreme Court in the case of **UHL Power Co. Ltd. v. State of H.P.**,¹ recently held as follows:

“16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293], the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)

“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

¹ 2022 SCC Online SC 19

cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 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.”

16. A similar view, as stated above, has been taken by the Supreme Court in *K. Sugumar v. Hindustan Petroleum Corpn. Ltd.*¹, wherein it has been observed as follows:

“2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.”

¹ (2020) 12 SCC 539

17. In the same vein, the Supreme Court in the case of *Haryana Tourism Ltd. v. Kandhari Beverages Ltd.*¹ has held as follows:

“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 and order [Kandhari Beverages Ltd. v. Haryana Tourism Ltd., 2018 SCC OnLine P&H 3233] passed by the High Court is hence not sustainable.”

18. More recently, the Supreme Court affirmed the above legal position in the case of *Punjab State Civil Supplies Corporation Ltd. v. Ramesh Kumar and Company*².

¹ (2020) 3 SCC 237

² (2021) SCC Online SC 1056

19. In the light of the parameters, as laid down by the Apex Court, vis-a-vis the scope of judicial intervention that the present appeal impugning the order dated 19.5.2018 passed by the learned District Judge, Khurda at Bhubaneswar in Arbitration Petition No. 41 of 2016 arising out of arbitration award dated 8.7.2016 passed in Arbitration Case No. 1 of 2014 by the learned Ld. Arbitral Tribunal has to be dealt with.

20. In the case of *Oil & Natural Gas Corporation Ltd. v. Western Geco International Limited*¹, the Apex Court has observed that the award could be set aside if it is against the public policy of India, that is to say, if it is 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.

After being subsequently discussed in *Associate Builders v. Delhi Development Authority* the position of law was clarified and laid down succinctly by the Supreme Court in the case of *Sangyong Engg. & Construction Co. Ltd. v. NHAI*², wherein the Apex Court has held that:

“34. What is clear, therefore, is that the expression “public policy of India”, whether

¹ (2014) 9 SCC 70

² (2019) SCC Online SC 677

contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of *Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to “*Renusagar*” understanding of this expression. This would necessarily mean that *Western Geco* [*ONGC v. Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, *Western Geco* [*ONGC v. Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of *Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court’s intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of *Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for

interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by

the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49:

(2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

21. Furthermore, the law is no longer res integra and is settled that where the Ld. Arbitral Tribunal has assessed the

material and evidence placed before them in detail, the court while considering the objections under Section 34 of the A&C Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under Section 34 is not appellate in nature and an award passed by an Arbitral Tribunal cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Learned Arbitral Tribunal is a plausible view on the facts, pleadings and evidence before the Learned Arbitral Tribunal. Even if on the assessment of material, the court in seisin of an application under Section 34 is of the view that there are two views possible and the Learned Arbitral Tribunal has taken one of the possible views, based on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with that of the Learned Arbitral Tribunal, if the view taken by it is reasonable. The same has been previously reiterated by this Court in the case of *State of Orissa v. Bhagyadhar Dash*¹.

¹ AIR 2011 S.C. 3409

22. The record reveals that on 17.01.2012, the learned Arbitrator received the notice of this Court intimating his appointment as the Arbitrator to decide the dispute between the parties after entering into the reference from that date and to decide the dispute within a period of six months. The learned Arbitrator then issued notice to the parties by Registered Post with A.D. as well as through Courier Service fixing 04.02.2012 as the next date indicting the Venue. On 04.02.2012, the Appellant through his counsel appeared and undertook to file the Vakalatnama by the next date. The Respondent No.1-Claimant's counsel by filing a memo that also undertook to file the Vakalatnama on the next date. The Respondent No.2 did not appear. As on that date learned counsel for the Appellant filed another petition to grant two months time so that the Appellant would obtain the order of this Court on the application filed by it for recall of the order of appointment of the learned Arbitrator as had been passed on 25.01.2011. The learned Arbitrator on that day granted about a month's time and fixed the matter to 02.03.2012.

On 02.03.2012, the learned counsel for the Appellant although appeared did not file the Vakalatnama as undertaken by him on the previous day. Then Respondent No.1-Claimant filed the claim statement. Learned counsel for the Appellant

present refused to receive the copy stating about the pendency of the Misc. Case No.5 of 2012 for recall of the order of appointment of the Arbitrator thus the proceeding be not progressed further. The matter then being posted to 15.03.2012, the learned Arbitrator has found that the claim statement has been duly served upon the Appellant through Registered Post. On that date, the learned counsel who was representing Appellant again filed a memo seeking one month's time on the ground of pendency of Misc. Case No.5 of 2012. He, however, did not file the Vakalatnama on behalf of the Appellant-Company. The learned Arbitrator in that situation again adjourned the matter to 05.02.212. On that date, the learned counsel for the Respondent No.1- Claimant appeared whereas none appeared on behalf of the Appellant and Respondent No.2. A petition dated 14.03.2012 being sent by the Respondent No.2 and received on 29.03.2012 being put up, no action was taken on that petition as already the purpose for which the petition was non-existent. On that day, the learned counsel for the Appellant sent a petition through an Office Boy which was placed before the learned Arbitrator for grant of one month time to proceed further as Misc. Case No.5 of 2012 having been disposed of; the copy was yet to be received. The learned Arbitrator however again adjourned the

matter to 31.04.2012 for filing the document and draft issues. On 31.04.2012, the learned counsel for the Respondent No.1- Claimant appeared whereas, none appeared on behalf of the Appellant and Respondent No.2. The order passed by this Court in Misc. Case No.5 of 2012 arising out of ARBP No.15 of 2006 whereby this Court refused to recall its earlier order of appointment of Arbitrator was placed before the learned Arbitrator.

Learned counsel who had appeared for the Appellant again by then did not file the Vakalatnama. So the learned Arbitrator said that his appearance cannot be taken to be the appearance on behalf of the Appellant and thus, the learned Arbitrator rightly issued fresh notice to the Appellant fixing the matter to 28.04.2012. On 28.04.2012, however, the letter was received from the partner of the Respondent No.2 expressing his inability to contest the proceeding for some personal reason and that it would appoint another Advocate. The Respondent No.1 then gave the new address of the Appellant and again notice was issued to the Appellant by Courier Service as well as by the Courier Post fixing the matter to 15.05.2012. On 15.05.2012, the learned Arbitrator found the notice to have been duly served and accordingly, held the service to be sufficient. Then it dealt with a letter dated

10.05.2012 sent by the General Manager of the Appellant requesting for few months time on the ground that the Appellant was going to file review petition in Supreme Court of India/High Court of Orissa against the order dated 25.11.2012 and 04.04.2012 without stating any other reason/s.

23. In such state of affair looking at the conduct of the Appellant, the learned Arbitrator keeping in view the period fixed for conclusion of the arbitral proceeding, however, again gave an opportunity to the Appellant and Respondent No.2 by fixing the matter to 22.05.2012 in order to see that they participate in the arbitral proceeding. On that day, the following order has been passed:-

“Advocate for the claimant is present. None appears for the respondents. Respondent No.2’s letters dated 12.05.2012 seeking two months time was not received on the date fixed, i.e., 15.05.2012 but it was received on 26.04.2012 was considered on 28.04.2012 and time was allowed till 15.05.2012 to file written statement. He was also intimated over phone about the posting of this proceeding, instead of appearing before me on the date fixed, i.e., 15.05.2012, the respondent no.2 has sent this letter dated 12.05.2012 which was received after the date fixed for filing written statement.

The respondent no.2 has asked for two months time on the ground that they (Res.No.2) have been advised to file review petition before the Hon'ble High Court of Odisha against the order dated 25.11.2012 appointing me as the Arbitrator or challenge the said order before the Hon'ble Supreme Court of India. There is no indication in the letter if any review petition/S.L.P. has been filed before the Hon'ble Courts. None appears today for the respondent no.2. No petition has been filed seeking adjournment of proceeding. In the premises no action need be taken on the letter dated 12.05.2012 received on 16.05.2012, i.e., after the date fixed (15.05.2012). The respondents have failed to communicate their statement of defence even though the proceeding was adjourned from time to time. In the premises this proceeding is to be continued in the absence of the respondents who have failed to communicate the statement of defence.

The learned counsel for the claimant files original job agreement dated 01.06.2000. He has filed a petition with the prayer to return the said agreement after necessary verification. Keep the original agreement in the record. Call on 29.05.2012 at 5 p.m. in this venue for

hearing. The claimant has paid Rs.25,000/- towards Arbitrator's fees and Rs.2,000/- as incidental expenses."

Thereafter on 29.05.2012 the hearing was taken up. The Managing Director of the Respondent No.1-Company filed the evidence on affidavit and documents which were admitted in evidence. None remained present on behalf of the Appellant. The matter stood adjourned to 02.06.2012 and then finally after hearing the argument from the side of the Respondent No.1-Claimant on 13.06.2012 the impugned award has been passed.

24. Viewing the progress of the arbitral proceeding right from the beginning till the passing of the award, it is seen that ample opportunity having been provided to the Appellant to defend and place its case, the Appellant has not availed the same for the reasons best known to it and the moves made by it before the learned Arbitrator appear to be frivolous somehow to avoid and went on protracting the proceeding. The Appellant is found to have grossly abused the opportunity given to it during the proceeding from time to time. Thus, I find every reason and justification to concur with the conclusion arrived at by the learned District Judge.

25. The fact situation of the case cited by learned Counsel for the Appellant, i.e., *M/s. Narinder Singh & Sons Vrs. Union of India through Divisional Superintendent Engineer-II,*

Northern Railway, Ferozepur Division, Ferozepur passed in Civil Appeal No.6734 of 2021 disposed of on 18th November, 2021 are completely different and distinct from the case at hand. There the Hon'ble Court had found that there was unnecessary haste and hurry by the Arbitrator and the Respondent therein was deprived of reasonable and fair opportunity to cross-examine the Claimant witness (P.W.1) and then again it was seen that the evidence of the Respondent therein on record and their contentions and evidence being not considered, there was debilitation of the Respondent from setting up their case which amounted to violation of the principles of natural justice and opportunity as envisaged under section 18 of the A & C Act, which is not at all the situation in the given case. Similarly the case cited by the learned counsel for the Appellant, i.e., *Nadendla Gopala Rao Vrs. Steel City Securities Ltd., 2011 (1) Civil LJ 23* decided by the High Court of Andhra Pradesh is quite distinguishable in the facts and circumstances of the present case. In that case the Arbitrator was found to have not followed such procedure or indicated in the notice that failure of the Appellant therein to substantiate his claim with regard to the jurisdiction of the Arbitrator, the Arbitrator would proceed with the claim ex parte and pass the award, which is not the situation in the case

at hand. The Appellant has not filed any application or raised any objection before learned Arbitrator as regards the lack of jurisdiction. The Appellant simply went on praying for time on the ground that it had moved the High Court for recall of the order of appointment of the Arbitrator and that too said move has later on been dismissed and attained finality being not further challenged. Then although the Appellant could have very well participated has, however, not so opted and that is at its peril.

26. Coming to the challenge to the award on merit that there was no privity between the Appellant and Respondent No.1, it is seen that the learned District Judge has discussed the same at paragraph-5 of its judgment.

In the present case, the agreement executed between the Respondent No. and 2 has the endorsement of the Appellant and the signature of Appellant's authorized signatory is found thereon. The correspondence (Ext.4) reveals that the work in respect of which payment was to be made had been completed and the payment was to be made by the Appellant to the Respondent No.1-Claimant which was asked by the Respondent No.2 to be withheld when the Respondent No.1-Claimant pressed for its release. Clause-14 of the said agreement clearly speaks that in case of failure of the

Respondent No.2 to make the payment, the Appellant would have the obligation to pay and honour the commitment. Although the agreement was not between the Appellant and Respondent No.1, a plain reading of Clause-14 of the agreement would reveal that the Appellant created the faith in the mind of the Respondent No.1-Claimant as regards the payment of his dues in case of carrying out the work as per the agreement executed with the Respondent No.2. Thus under the agreement on failure on the part of the Respondent No.2 to pay the legal dues of the Respondent No.1, the Appellant had undertaken the liability for said payment. The correspondence between the Respondent No.2 and Respondent No.1 makes the position still worse that the Respondent No.2 had requested the Appellant to withhold the payment citing certain reasons which the learned Arbitrator has found on fact to be mere pretext and that view has also been endorsed by the learned District Judge.

27. For all the aforesaid, this Court finds that the learned District Judge has rightly rejected the contention of the Appellant that it has no liability for payment of the dues under the agreement in question.

In that view of the matter, the learned District Judge finding no ground under section 34 of the A & C Act to have

been made out to set aside the award, in my view, has rightly dismissed the application under section 34 of the A & C Act, which does not warrant interference in this Appeal.

28. Resultantly, the Appeal stands dismissed. No order as to cost.

*(D. Dash),
Judge.*

Himansu



Signature Not Verified

Digitally Signed
Signed by: HIMANSU SEKHAR DASH
Reason: Authentication
Location: OHC
Date: 14-Mar-2024 18:07:59

