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

Decided on: 24.07.2024

+ **O.M.P. (COMM) 277/2021**

IRCON INTERNATIONAL LIMITEDPetitioner

Through: Mr. Suman K. Doval, Advocate.

versus

TANTIA CONSTRUCTION LIMITEDRespondent

Through: Mr. Sanjoy Bhaumik, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], for the following reliefs:

"a. Rectify the computation error in Claim No-6 and Claim no-12 in award dated 23rd January, 2020, announced by the Arbitral Tribunal of Shri Harpal Singh, Chief Engineer/Headquarter/ Northern Railway in Arbitration titled as M/s Tania Construction Vs IRCON International Limited;

b. Award cost of the Petition in favour of the Petitioner;

c. Pass any other/further order which this Hon'ble Court may pass in the facts and circumstances of the case in order to give complete relief to the parties."

2. The Award dated 23.01.2020, was rendered by the learned sole arbitrator adjudicating disputes between the parties under an agreement dated 07.12.2012 for construction of an embankment, sides drain, retaining walls and blanketing works for construction of a new broad gauge railway line from Jogbani (India) to Biratnagar (Nepal).



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3. The petition is entirely predicated on the contention that there are two “computational errors” in the impugned award, which relate to Claim No.6 and Claim No.12. The petitioner expressly seeks “modification/rectification” of these computational errors, relying upon certain judicial decisions which, according to the petitioner, permit such a course. The decisions cited in the petition, in support of this argument, include the judgment of this Court in *M/s Chennai-Ennore Port Road Co. Ltd. vs. M/s RDS Project Ltd*¹, and *Angel Broking Ltd. vs. Sharda Kapur*², in which *Ennore Port*³ was distinguished. Certain other decisions have also been cited.

4. It is, in my view, unnecessary to enter into a detailed discussion of the question as to whether an arbitral award can be modified in proceedings under Section 34 of the Act, as this question has been settled by the Supreme Court. In *Project Director, NHAI vs. M. Hakeem & Anr.*⁴, the Court clearly held that the power under Section 34 of the Act does not encompass the power to modify an award. The decision was followed in *Larsen Air Conditioning and Refrigeration Company vs. Union of India and Others*⁵, and *S.V. Samudram vs. State of Karnataka*⁶. Although the view taken in these decisions has been referred to a larger Bench⁷, they have not been explained or overruled. The matters remain pending before the Supreme Court. The law, as it presently stands, is clear and

¹ Judgment dated 15.03.2016, passed in FAO (OS) 426/2015.

² Judgment dated 09.05.2017, passed in FAO 435/2016.

³ Supra (note 1).

⁴ (2021) 9 SCC 1.

⁵ 2023 SCC OnLine SC 982.

⁶ (2024) 3 SCC 623.

⁷ Order of a three-Judge Bench dated 20.02.2024, in *Gayatri Balasamy vs. M/s ISG Novasoft Technologies Limited* [SLP(C) 15336-37/2021].



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unambiguous, to the effect that the power under Section 34 of the Act, does not include the power to modify or rectify an award. The Court may set aside an award as a whole or, at best, a severable part thereof, but has no jurisdiction to tinker with the award.

5. Although the prayer clause does not seek setting aside of the award, for the sake of completeness, I have examined the grounds taken in the petition, in the perspective of jurisdiction available under Section 34 of the Act, i.e., whether the petitioner has made out a case for setting aside of the impugned award dated 23.01.2020, insofar as it concerns Claim Nos.6 and 12.

6. Claim No.6, asserted by the respondent herein, was for payment of a performance bank guarantee which, according to it, was illegally encashed by the petitioner. The exact amount of the bank guarantee is mentioned in paragraph 20 of the statement of claim as Rs.1,90,86,595/-. The justification for the aforesaid claim is provided in the statement of claim, as follows:

“Claim 6: Payment of illegally en-cashed Performance Bank Guarantee

The Claimant would like to state that a Performance Bank Guarantee was provided to the Respondent as per condition of the Contract, which was encashed by the Respondent. The contract could not be performed due various reasons not attributial to the Claimant for with time extension without imposition of Liquidated damages was granted by the Respondent form time to time. Even the reciprocal promises of giving possession of site to the Claimant by the Respondent could not be complied by the Respondent even on the date of termination and even today. So question of non performance by the claimant is baseless and encashment of Performance Bank Guarantee is a unilateral decision of the respondent which is challengeable. Learned Arbitrator is prayed to adjudicate the matter.”

7. In the statement of defence filed by the petitioner, the only



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“remarks” offered by the petitioner are as follows:

*“PBG has been encashed in terms of the contract conditions 10.4.
Hence claim is denied”*

8. In the impugned award, the claim has been allowed in the sum of Rs. 1,90,86,595/- with the following reasoning:

“CLAIM NO. 6

REASONS FOR AWARD:- *As deliberated in above paras, the termination of the contract was wrongful illegal and arbitrary due to the occurrence of earthquake in Nepal which also led to declaration of National Emergency, severely affected the citizens. Tender categorically stipulates that in the event of occurrence of a force majeure event, neither party shall be entitled to terminate the contract in respect of non-performance or delay in performance. Hence, claim amount of Rs.1,90,86,595/- is reasonable and payable.”*

9. As evident from the aforesaid reasoning, the learned arbitrator has relied upon his conclusion, with regard to other claims, that the petitioner’s termination of the contract was wrongful, illegal and arbitrary. The learned arbitrator has, therefore, come to the conclusion that the invocation of the performance bank guarantee was prohibited by the *force majeure* clause, and the respondent was, therefore, entitled to reimbursement of the amount recovered by the petitioner.

10. The discussion with regard to the *force majeure* clause and its applicability is to be found in the learned arbitrator’s analysis on Claim No.5, in which the petitioner claimed refund of the security deposit/retention money, withheld by the petitioner. The learned arbitrator recorded that an earthquake had occurred in the region on 25.04.2015, which impacted the normal course of life and daily activities in the region, and also caused civil commotion due to persistent after-shocks. Relying upon Clause 24.0 of the Special Conditions of Contract



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[*force majeure*], the learned arbitrator held that the petitioner was not entitled to terminate the contract or levy any such penalties upon the respondent. These findings are unchallenged.

11. In light of this discussion, I do not find any perversity or arbitrariness in the impugned award on Claim No. 6, so as to invite the interference of the Court under Section 34 of the Act.

12. Further, even the grounds taken in the petition relate only to the quantum of the award, and not to the petitioner's liability. It is stated in the petition that the amount of Rs.1,90,86,595/-, awarded in the impugned award ought to have been reduced to an amount of Rs.97,85,184/- on account of the fact that an amount of Rs. 93,01,410/- had been adjusted by the petitioner. Although it is stated in paragraph 25 of the petition that the "*learned Sole Arbitrator perhaps overlooked*" this adjustment, the fact remains that no such case was placed before the learned arbitrator in the statement of defence, and there was no occasion for him to consider it.

13. Mr. Suman K. Doval, learned counsel for the petitioner, points out that the petitioner filed an application under Section 33 of the Act, seeking rectification to this extent, which was allowed by way of a supplementary award dated 20.08.2020. I am afraid, this contention is also unacceptable, as the "*supplementary award*" was successfully challenged by the respondent herein, in OMP (COMM) 593/2020. By a judgment dated 13.04.2021, a coordinate bench of this Court held that the petitioner's application under Section 33 of the Act was moved beyond the time provided in Section 33(1) of the Act, and the learned arbitrator had no jurisdiction to condone the delay. It was also held that the



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supplementary award was passed without recording any reasons for accepting the petitioner's request for condonation of delay or adhering to the principles of natural justice, as far as the corrections were concerned. The judgment of this Court dated 13.04.2021, has not been challenged by the petitioner.

14. Mr. Doval, points out that paragraph 23 of the said judgment expressly reserves the right of the petitioner to challenge the original award dated 23.01.2020, in the following terms:

"23. Needless to say, all observations contained in this judgment relate only to the sustainability of the impugned supplementary award, dated 20th August, 2020. This Court has not expressed any opinion one way or the other on original award dated 23rd January, 2020."

I do not think this takes the petitioner's case much further. The award dated 23.01.2020 has, nevertheless, to be tested on its own terms in accordance with law, and on the basis of the materials placed before the learned arbitrator when the said award was passed. To permit the petitioner to rely upon the contentions made belatedly in the application under Section 33 of the Act, which this Court has held was without jurisdiction, would really permit it to go behind the unchallenged order of this Court dated 13.04.2021. I am not inclined to do so.

15. The challenge on Claim No. 12 must suffer a similar fate. The said claim, was for an amount of Rs.66,90,000/-, justified in the statement of claim as follows:

"Claim 12: Unbilled Quantity of Blanketing Materials Layed

The quantities are to be entered in the filed book and a joint inspection can only resolve the issue the Respondent may be directed by the Learned Arbitrator, to give strip chart so that the Claimant can point out the leftover quantity."



16. The averment in the statement of defence filed by the petitioner was as follows:

“As final measurement, there is no unbilled quantity of blanketing Materail. Final measurement of work done by the claimant has been done Ex-parte as claimant has not turned up for measurement even after issue of notices in this regard. As per final measurement, final bill amount is (-) Rs. 1,03,09,484.0 lakhs i.e., amount recoverable from claimant.”

17. In the award, the learned arbitrator has allowed the said claim for a sum of Rs.58,08,475/- on the following reasoning:

<u>“CLAIM NO. 12: UNBILLED QUANTITY OF BLANKETING MATERIALS LAYED</u>	AMOUNT CLAIMED	AMOUNT AWARDED
<i>The Respondent has reduced a substantial quantity to an extent of 8074.616 Cum of Blanketing which was measured and paid in the running bills.</i>	Rs. 66, 90, 000/-	Rs. 58,08,475/-
<u>REASONS FOR AWARD-</u> <i>As per 17th and final bill, total quantity paid upto 16th running bill was 47485.880 cum of granular blanketing material but in the aforesaid 17th & final bill it has been reduced to 39411.264 cum. Since the 47485.880 cum is a measured and paid quantity, payment of balance quantity 8074.616 cum recovered from the final bill for amounting to Rs. 58,08,475.00 to be refunded to claimant.”</i>		

18. The petitioner’s challenge in the petition under section 34 of the Act is once again restricted to quantum. The plea, is formulated in paragraph 26 of the petition, which is as follows:

“26. For Claim No-12, the learned Sole Arbitrator, calculated the amount, without taking into consideration of rebate of 7%, given by the Respondent, while quoting the rates for tender. This rebate of 7% becomes the part of the Contract. Thus, the actual amount is Rs.54,01,882.00 instead of Rs.58,08,475.00.”

19. Thus, once again, it is evident that this plea was never taken before the learned arbitrator in the statement of defence filed by the petitioner. It is not permissible for the Court to entertain a factual plea of this nature in



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proceedings under Section 34 of the Act.

20. Mr. Doval, once again, submits that the matter was taken before the learned arbitrator in the application under Section 33 of the Act, and was allowed. For the reason stated with regard to Claim No.6, I am of the view that the petitioner is not entitled to take the benefit of the said order, which has been set aside by this Court in a judgement accepted by the petitioner.

21. For the aforesaid reasons, I do not find any justification for interference with the impugned award within the scope of Section 34 of the Act. The petition is, therefore, dismissed, but with no order as to costs.

PRATEEK JALAN, J

JULY 24, 2024
SS/KB