

Neutral Citation No. - 2024:AHC-LKO:47632-DB

**Reserved
AFR**

Chief Justice's Court

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 66 of 2023

Appellant :- M/S Shyam Lalit Dubey And Another

Respondent :- Union Of India Thru. Ganeral Manager Northern Railway Baroda House, New Delhi And Another

Counsel for Appellant :- Pritish Kumar, Shantanu Gupta

Counsel for Respondent :- Deepanshu Dass, Varun Pandey

Hon'ble Arun Bhansali, Chief Justice

Hon'ble Jaspreet Singh, J.

(Per : Arun Bhansali, CJ)

1. This appeal is directed against the judgement dated 28.06.2023 passed by the Commercial Court, Lucknow whereby the petition filed by the respondents under Section 34 of the Arbitration and Conciliation Act, 1996 (for short the 'Act, 1996') has been allowed and the arbitral award dated 6.11.2020 has been set aside.
2. Tender offer of the appellants for the work of rebuilding of Bridge No. 70 at Km 34/13-14 between Lalgopalganj (LGO) and Bhadri (BHDR) Station on ARC Section under ADEM/PRG of Lucknow Division was submitted in pursuance of the tender notice dated 21.12.2016, which was accepted by the competent authority at the offered rates. The total cost of assigned work was Rs.2,50,86,758.87P.
3. Pursuant to the said acceptance, Letter of Acceptance (LoA) dated 01.05.2017 was issued. Pursuant to the terms of the contract, earnest money deposited by the appellants with the tender documents was retained and balance security deposit was to be recovered from the progressive bills @ 10% till full security amount was recovered. A performance guarantee of Rs.12,54,340/- was required to be submitted, which was submitted in the shape of FDRs by the appellants. A formal agreement was entered into between the parties to which the general conditions of

Railways contract ('GCC') were applicable. Under the agreement, the appellants were required to complete the work within eight months from the date of issue of LoA i.e. by 31.12.2017 in conformity with the approved drawing.

4. It was claimed by the appellants that it arranged the entire paraphernalia and infrastructure including labour, staff, tools and materials at the site to execute the awarded contract. However, the contract could not be carried out between the period 01.05.2017 to 31.12.2017 in terms of the agreement as the respondents failed to provide approved drawing to construct the bridge, though it was provided that the same would be supplied at the time of execution of the agreement. The contract period was extended without penalty from 01.01.2018 to 31.07.2018. However, even during the extended period the approved drawing was not supplied.

5. It is claimed that in June, 2018, the appellants were directed by the Senior Divisional Engineer-IV to perform epoxy grouting work on Bridges No. 4, 6, 8, 12, 110, 115, 119, 96, 151, 148, 146, 146A, 147, 144, 140, 120, 116, 105A, 105, 117, 104A, 104, 127, 123, 109 & 131A. It is further claimed that though the said work was not provided in the contract, keeping in view the long standing association of the appellants with the Railways and emergent and urgent nature of the work, the same was performed whereby the appellants expended about Rs.65 Lakhs. The said epoxy grouting work was approved and verified by the competent Railway Authorities. However, the payment was not made.

6. Since the approved drawing was not provided to the appellants within time to complete the work awarded to them under the contract and on account of non payment of their dues for epoxy grouting, the respondents were requested to appoint an Arbitrator under clause 64 of the GCC. However, when the Arbitrator was not appointed, the appellants approached the High Court, which appointed a sole Arbitrator by its order dated 06.01.2020.

7. The Arbitrator passed the arbitral award dated 06.11.2020 and awarded the following amounts along with 12% *pendente lite* interest :

A. Amount under earnest money	:	Rs. 2,72,500.00
B. Amount under the performance guarantee	:	Rs.12,54,340.00
C. Amount of epoxy grouting work	:	Rs.61,24,732.79
D. Amounts under mobilization of resources	:	Rs.34,13,437.50
E. Amount under 10% loss of profit	:	Rs.25,08,675.89
F. Fee and Expenses (Rs.360937.50 + 172000.00)	:	Rs. 5,32,937.50
Total	:	Rs.1,41,06,623.68

8. Feeling aggrieved, the petition under Section 34 of the Act, 1996 was filed by the respondents.

9. After hearing the parties, the Commercial Court dealt with the issues raised and came to the conclusion that so far as the award pertaining to mobilization of resources was concerned, appreciation and re-appreciation of facts, evidence adduced by the parties in arbitral proceedings under Section 34 of the Act, 1996 was not permissible. For the claim pertaining to epoxy grouting, it was held that the claim of epoxy grouting was not an arbitrable dispute. The Commercial Court also came to the conclusion that in terms of the proviso to Section 31(7) of the Act, 1996 read with clause 16(3) of the GCC in question, interest was not payable and based on its discussion, on finding that the award suffers from patent illegality, set aside the same.

10. The present appeal has been filed by the appellants seeking to question - (i) Setting aside of the entire award by the Commercial Court despite coming to the conclusion that the award made pertaining to mobilization of resources was justified and on other items no finding against the award was recorded (ii) Rejection of claim pertaining to epoxy grouting and (iii) setting aside of award of interest *pendente lite*.

11. During the course of submissions, counsel for the appellants submitted that in so far as the Commercial Court has set aside the award of interest for the period the cause of action arose till the award was delivered, in view of the provisions of Section 31(7)(a) of the Act, 1996, the appellants do not press the said ground in appeal.

12. Learned counsel for the appellants made submissions that the Commercial Court was not justified in setting aside the entire award once it came to the conclusion that in so far as the award of claim towards mobilization of resources was justified, only because it came to the conclusion that the award pertaining to epoxy grouting and interest was not justified.

13. Learned counsel further submitted that setting aside of the entire award, is contrary to the proviso to Section 34(2)(a)(iv) of the Act, 1996, which clearly provides that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside and therefore, to that extent the judgment impugned deserves to be set aside.

14. For the issue relating to epoxy grouting, submissions were made that it has not been denied by the respondents that the work was done as directed by Engineer In Charge of the site, who had forwarded the record to ADRM for approval, which was denied in view of the GCC for lack of any written contract, which situation was squarely covered by the provisions of Section 70 of the Contract Act, 1872 (for short the 'Act, 1872') and the principle of *quantum meruit* and therefore, setting aside of the award on the said count also is not justified.

15. It was prayed that the judgement of the Commercial Court to the extent the claim pertaining to epoxy grouting has been denied and/or setting aside of the entire award deserves to be set aside.

16. Reliance was placed on ***Union of India v. Promode Kumar Agarwalla & another : 1967 Lawsuit (Cal) 293, Municipal Corporation of Delhi v. Ravi Kumar in OMP No. 273 of 2008*** decided on 22.11.2017 by Delhi High Court and ***Bharat Sanchar Nigam Limited v. Vihaan Networks Ltd., : 2023 Lawsuit (Del) 3385.***

17. Learned counsel for the respondents supported the judgement impugned. Submissions were made that the Arbitrator was not justified in coming to the conclusion that the claim made by the appellants pertaining to mobilization of resources etc. was required to be accepted. Submissions were also made that when it was proved on record that in so far as Bridge No. 70 *qua* which contract was entered into never took off, the fact that the appellants had undertaken work of epoxy grouting *qua* other bridges and the amendment sought in the agreement was specifically rejected by the competent authority, there was no reason to award the amount towards epoxy grouting.

18. Further submissions were made that reliance placed on Section 70 of the Act, 1872 is wholly misplaced inasmuch as once the work relating to epoxy grouting does not form part of the contract in question, with reference to Section 70 of the Act, 1872, the same cannot become an arbitrable dispute and once the said dispute was beyond the scope of the arbitration clause, the award impugned was wholly without jurisdiction and has rightly been set aside.

19. Further submissions were made that once the award on epoxy grouting was found by the Commercial Court as beyond the arbitration clause and award of interest contrary to provisions of Section 31(7) of the Act, setting aside of the entire award as patently illegal cannot be questioned and therefore, the appeal deserves dismissal.

20. Reliance was placed on ***M/s. Patel Engineering Co. Ltd. v. Indian Oil Corporation Ltd. : 1975 AIR (Patna) 212, Union of India vs. Monoranjan Mondal : 2006(1) ICC 168*** and ***The Sports Authority of Assam v. Larsen and Turbo Limited : 2024 (1) GauLR 894.***

21. We have considered the submissions made by the counsel for the parties and have perused the material available on record.

22. A bare perusal of the judgement impugned passed by the Commercial Court would reveal that apparently out of 6 claims on which award was passed the challenge was laid to 2 claims and award of interest. The court has dealt with three issues, pertaining to mobilization of resources, epoxy grouting and award of interest by the Arbitrator in his arbitral award dated 06.11.2020. The Court while upholding the findings in the award pertaining to mobilization of resources, came to conclusion that the issue of epoxy grouting work was beyond the arbitration clause and the award of interest was contrary to the provisions of Section 31(7) of the Act, 1996. However, without further discussing as to why the appellants were not entitled to the amount, as awarded by the Arbitrator, pertaining to mobilization of resources, the Court on its finding that the award passed was patently illegal, has set aside the entire award.

23. We are firmly of the opinion that setting aside of the entire award, apparently is contrary to the proviso to sub-clause (iv) of clause (a) of sub-section (2) of Section 34 of the Act, 1996. The provision reads as under :

“34. Application for setting aside arbitral award. - (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if -

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that -

(i)

(ii)

(iii)

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration :

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

- (v)
- (b)
- (2-A)”

24. A perusal of the above would reveal that power, conferred on the Court to set aside the arbitral award is subject to establishing on the basis of record of the arbitral tribunal on the ground contained in sub-clause (i) to (v) of clause (a) and (b) of sub-section (2) of Section 34 of the Act, 1996. While clause (iv) of Section 34(2)(a) of the Act, 1996 provides that the arbitral award, which deals with a dispute not contemplated by or not falling within the terms of the arbitration or it contains decisions on matters beyond the scope of the submission to arbitration, the same can be set aside by the court. However, the proviso saves the decisions on matters submitted to arbitration and mandates that only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside.

25. In the present case, the Commercial Court though came to the conclusion that the issue pertaining to epoxy grouting was not arbitrable and that award of interest was contrary to the provisions of Section 31(7) of the Act, 1996, still in light of the above proviso to Section 34(2)(a)(iv), the award pertaining to mobilization of resources was not required to be set aside/interfered with and to the said extent the judgement impugned passed by the Commercial Court, cannot be sustained.

26. Coming to the issue of award pertaining to epoxy grouting, the findings recorded by the Commercial Court reads as under :

“Keeping in view the law laid down above it has to be seen whether the work of epoxy grouting can be said to have been done within the frame work of original contract no. 48/WA/Ag/work/26/ Sr.DEN-IV-LKO/ 2016-17. From the perusal of the agreement it is crystal clear that as per clause 22(1) of the G C C the work of 'Rebuilding of Bridge no. 70 at Km. 34/13-14 between Lalgopal ganj (LGO) & Bhadri (BHDR) station on ARC section under ADENPRG of Lucknow Division (Estt.No. 169-2014) had to be performed as per I.S. specifications and in conformity with the drawing. Since the drawing was not made available to the Respondent/Claimant hence the work of rebuilding bridge no. 70 at Km. 34/13-14 between Lalgopal ganj

(LGO) & Bhadri (BHDR) station on ARC section under ADENPRG of Lucknow Division (Estt.No. 169-2014) never started. The work of epoxy grouting was done at the oral instruction of the Senior Divisional Manager (IV) on several bridges bearing no. 46, 8, 12, 110, 115, 119, 96, 151, 148, 146, 146A, 147, 144, 140, 120, 116, 105A, 105, 117, 104A, 104, 127, 123, 109 and 131A. It is undisputed that the said work of epoxy grouting was never made a part of the contract. In this way it is palpably clear that the work of epoxy grouting was not in any way connected with the original contract no. 48/ WA/ Ag/ work/ 26/ Sr.DEN-IV-LKO/2016-17. Thus the work of epoxy grouting was not covered by the agreement no. 48/ WA/ Ag/ work/ 26/ Sr.DEN-IV-LKO/2016-17 containing arbitration clause. Therefore the claim of epoxy grouting is not arbitrable dispute. It is true that the Respondent/Claimant has performed the epoxy grouting work and the Petitioners/Railways are enjoying its benefit so respondent/Claimant is entitled to be compensated for the epoxy grouting work some where else but not under the present arbitration case because the work of epoxy grouting was never made a part of contract and the work of epoxy grouting was not within the frame work of the agreement. In this way the learned Arbitrator has entertained a non arbitrable dispute. Thus the award passed under the head epoxy grouting is contrary to provisions of the Arbitration and Conciliation Act, 1996. Therefore the impugned award is a result of patent illegality, being against the public policy of India.”

27. The findings of the Commercial Court are specific that epoxy grouting work pertaining to several bridges was never made part of the contract and the same was not in any way connected with the contract in question and therefore, the work of epoxy grouting was not covered by the agreement containing arbitration clause and consequently, the same was not an arbitrable dispute.

28. The Arbitrator and counsel for the appellants have relied on the provisions of Section 70 of the Act, 1872 for supporting the award, pertaining to epoxy grouting.

29. Section 70 of the Act, 1872 reads as under :

“70. Obligation of person enjoying benefit of non-gratuitous act. - Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

30. The above provision deals with an obligation of a person enjoying the benefit of non-gratuitous act and provides that the beneficiary is bound to make compensation to the person for those non-gratuitous services.

31. In the present case, it is not in dispute that the appellants had undertaken the work of epoxy grouting at several bridges under the oral instructions of Senior Divisional Railway Manager-IV and the officer attempted to get the same included in the contract in question. However, the effort made in this regard was specifically rejected by the competent authority i.e. ADRM on 08.03.2018 in the following terms :

“Introduction of a new item 22073 for amount Rs.1,24,75,485/- in a contract of Rs.2,50,86,758.87 is not agreeable, in view of objection that asking for a rate for new item 22073 may fetch a competitive rate in open tender.”

32. Once the said addition to the contract was specifically refused, it cannot be said that the said work undertaken by the appellants had any relation whatsoever with the contract, which was awarded to them pertaining to Bridge No. 70 *qua* which, no work was undertaken though resources were mobilized. The arbitration clause, which forms part of the GCC, to the extent relevant *inter-alia* reads as under :

“63. Matters Finally Determined by the Railway : All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the Contractor to the GM and the GM shall, within 120 days after receipt of the Contractor’s representation, make and notify decisions on all matters referred to by the Contractor in writing provided that matters for which provision has been made in Clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61(2) and 62(1) to (xiii) (B) of Standard General Conditions of Contract or in any Clause of the Special Conditions of the Contract, shall be deemed as ‘excepted matters’ (matters not arbitrable) and decisions of the Railway authority, thereon shall be final and binding on the Contractor; provided further that ‘excepted matters’ shall stand specifically excluded from the purview of the Arbitration Clause.

64.(1) Demand for Arbitration :

64.(1) (i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any

matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the Contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the “excepted matters” referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64.(1)(ii) *The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute(s) or difference(s) in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.”*

33. A perusal of the above reveals that for disputes and differences of any kind whatsoever arising out of or in connection with the contract can be referred by the contractor to the GM and the GM is required to make and notify decisions on all matters referred to by the contractor in writing within 120 days and in case the GM fails to make a decision within 120 days, demand in writing can be made that the disputes and differences be referred to arbitration.

34. From the above, it is apparent that the disputes and differences have to arise out of or in connection with the contract in question. As has been firmly established in the present case that while the contract in question pertains to rebuilding of Bridge No. 70 at Km 34/13-14 between Lalgopalganj (LGO) and Bhadri (BHDR) Station, the same has nothing to do with epoxy grouting in relation to the other bridges. The said work was wholly alien and independent to the work under contract and as only incidentally the contract in question was in existence, it cannot be said that the work of epoxy grouting arose out of or in connection with the contract in question.

35. In so far as reliance placed on provisions of Section 70 of the Act, 1872, i.e. principle of *quantum meruit* is concerned, though in present circumstance in relation to epoxy grouting the same may apply but as to

whether on account of provisions of Section 70 of the Act, 1872, the same can *ipso facto* become an arbitrable dispute in relation to an arbitration clause contained in an agreement subject matter of which had no relation to the work non gratuitously done by the appellants ? Qua the said aspect of the matter, wherein some extra work etc. pertaining to the same contract has been undertaken may form part of the arbitrable dispute, however, in an arbitral dispute with reference to *quantum meruit* or Section 70 of the Act, 1872, for a work undertaken which is wholly independent of the contract containing the arbitration clause, the same cannot become an arbitral dispute.

36. Hon'ble Supreme Court in **Renusagar Power Co. Ltd. Vs. General Electric Company And Another : (1984) 4 SCC 679**, dealing with the said aspect while referring to the judgement in **Union of India Vs. Salween Timber Construction (India) : AIR 1969 SC 488**, observed as under:

“Arbitration Clause in the contract covered any question or dispute arising under the contract or “in connection with the contract”. On the question whether the arbitrators had jurisdiction to adjudicate upon that claim this Court, relying upon its earlier decision in Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar held, that the test for determining the question is whether recourse to the contract, by which both the parties are bound, was necessary for the purpose of determining whether the claim of the respondent was justified or otherwise and since it was necessary in the case to have recourse to the terms of the contract for the purpose of deciding the matter in dispute the matter was within the scope of the arbitration clause and the arbitrators had jurisdiction to decide it.”

The Hon'ble Court laid down the test for determining the question whether the arbitrator had jurisdiction to adjudicate upon the claim i.e. whether recourse to the contract was necessary for the purpose of determining whether the claim was justified or otherwise.

37. In the present case, for determination of issue pertaining to epoxy grouting, no reference whatsoever was required to be made to the contract

in question as the same only pertained to rebuilding the Bridge No. 70, the dispute in this regard, cannot and does not fall within the arbitrable dispute. The Commercial Court was perfectly justified in observing that the appellants may be entitled to be compensated for epoxy grouting work somewhere else but not under the present arbitration case.

38. So far as the judgement relied on by the counsel for the appellants are concerned, none of the judgements apparently deal with execution of non-gratuitous work wholly independent of the contracted work.

39. In the case of ***Promode Kumar Agarwalla (Supra)*** also, the court referred to the judgement in ***A. M. Mair & Co. v. Gordhandas Sagarmull : 1951 AIR (SC) 9*** wherein also the principle was laid down that if a party has to take recourse to the contract to establish the claim, the dispute in respect of which the claim arises is a dispute under or arising out of the contract. As noticed herein-before, the case of the appellants fails on the touchstone of the said principle laid down by Hon'ble Supreme Court.

40. In case of ***Ravi Kumar (Supra)***, the dispute pertained to additional work, in relation to the contract in question. Similarly, in the case of ***Bharat Sanchar Nigam Limited (Supra)*** also the dispute arose out of the contract containing an arbitration clause and was found to be arbitrable.

41. In view of the above discussions, findings recorded by the Commercial Court in relation to the claim pertaining to epoxy grouting being not arbitrable cannot be faulted.

42. Consequently, the appeal is **partly allowed**. The judgement impugned dated 28.06.2023 passed by the Commercial Court in Arbitration Case No. 19 of 2021 is set aside. While the Arbitral Award dated 06.11.2020 relating to claim of the appellants pertaining to epoxy grouting amounting to Rs.61,24,732.79P. and payment of interest @ 12% from the date on which the cause of action arose till the date of award, is set aside, the rest of the award is upheld.

43. The appellant, except for the amount of epoxy grouting and *pendente lite* interest awarded by the Arbitrator, would be entitled to execute the rest of the award in accordance with law.

44. No order as to costs.

Order Date :-15.07.2024
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(Jaspreet Singh, J)

(Arun Bhansali, CJ)