

OCD-1

**IN THE HIGH COURT AT CALCUTTA
COMMERCIAL APPELLATE DIVISION
ORIGINAL SIDE**

**APO/71/2020
WITH
AP/810/2010**

**WEST BENGAL HOUSING BOARD
VS
THE CIVCON CONSTRUCTION PVT. LIMITED**

BEFORE:

The Hon'ble JUSTICE DEBANGSU BASAK

-AND-

The Hon'ble JUSTICE MD. SHABBAR RASHIDI

For the Appellant : *Mr. Shounak Mukhopadhyay, Adv.
Ms. Shrayashee Das, Adv.
Mr. Paritosh Sinha, Adv.
Mr. Tridibesh Dasgupta, Adv.
Mr. Rohan Kumar Thakur, Adv.*

For the Respondent : *Mr. Shiv Shankar Banerjee, Adv.
Ms. Arijita Ghose, Adv.
Mr. Siddhartha Chamaria, Adv.*

HEARD ON : 02.12.2025

DELIVERED ON : 02.12.2025

DEBANGSU BASAK, J.:-

1. Appeal under Section 37 of the Arbitration and Conciliation Act, 1996, is directed against the judgment and order dated March 17, 2020 passed in AP/810/2010.
2. By the impugned judgment and order, learned Single Judge refused to set aside the award dated September 30, 2010.
3. Learned advocate appearing for the appellant, draws the attention of the Court to the terms and conditions of the contract entered into

between the parties and particularly, the arbitration clause. According to him, there are certain matters which are excepted in terms of the arbitration clause.

4. Learned advocate appearing for the appellant draws the attention of the Court to the statement of claim as also the statement of defence and counter-claim. He submits that, out of 22 claims, the arbitrator allowed 11 claims being claim nos.1, 5, 6, 7, 8, 9, 11, 13, 19, 21 and 22.
5. Learned advocate appearing for the appellant refers to discussions with regard to the claims as made in the award. He contends that, claim nos.1 and 5 were allowed by the arbitrator ignoring the express terms of the contract. He submits that, the respondent is not entitled to any claim under those two heads. In respect of claim nos.6, 7, 8 and 9, learned advocate appearing for the appellant submits that, some of the claims were allowed without giving any reasons and that, claim nos.8 and 9, in particular, were not arbitrable.
6. Learned advocate appearing for the appellant submits that, the arbitrator proceeded to award claim nos.11 and 13 without any evidence. So far as the claim nos.19, 21 and 22 are concerned, he submits that, they are largely incidental to the earlier claims. If the earlier claims are disallowed, claim nos.19, 21 and 22 should also be disallowed.
7. Learned advocate appearing for the appellant submits that, the formal work order was issued on September 11, 2002. The date of completion of the contract was October 3, 2003. Work was actually

completed on May 22, 2004. He submits that there are correspondence exchanged between the parties where the appellant called upon the respondent to complete the work within the stipulated time and in default, inform the respondent that the appellant will invoke the liquidated damages clause. He refers to the liquidated damages clause in the contract. He points out that, the learned arbitrator proceeded to disallow the counter-claim only on the basis of the arbitrator not allowing one of the claims of the claimant.

8. Learned advocate appearing for the appellant submits that, since the contract was of 2002 and the date of completion of the contract was October 3, 2003 with the work being completed on May 22, 2004, the arbitration, is governed by the provisions of Section 34 of the Act of 1996 as it stood then without the amendments.
9. Learned advocate appearing for the appellant draws the attention of the Court to the impugned judgment and order. He submits that, in paragraphs 15 and 16 of the impugned judgment and order, learned Single Judge noted the provisions of Section 34(2-A) of the Act of 1996 and proceeded to deal with the challenge under Section 34 of the Act of 1996 on such basis. He draws the attention of the Court to the fact that, Section 34(2-A) was introduced to the Act of 1996 by way of an amendment with retrospective effect from October 23, 2015, even then, since the date of completion of the contract was on May 22, 2004 and the disputes and differences arising prior to the introduction of the amended Section 34(2-A) of the Act of 1996,

learned Trial Judge did not apply the correct provisions of Section 34 of the Act of 1996 for evaluating the challenge.

10. Learned advocate appearing for the appellant draws the attention of the Court to the various paragraphs of the impugned judgment and order. He submits that, the authorities considered by the learned Judge, while exercising powers under Section 34 of the Act of 1996, were in respect of the amended Section 34 and not the unamended Section 34 of the Act of 1996. According to him, learned Single Judge did not apply the correct principles of Section 34 of the Act of 1996.
11. Learned advocate appearing for the appellant relies upon **(2003) 5 SCC 705 (Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.)** for the meaning of public policy of India as used in Section 34 of the 1996 Act. He relies upon **(2015) 3 SCC 49 (Associate Builders vs. Delhi Development Authority)** as to what would constitute a perverse decision.
12. Learned Advocate appearing for the appellant relies upon **(2018) 6 SCC 287 (Board of Control for Cricket in India vs. Kochi Cricket Private Limited & Ors.)** for the proposition that, petitions filed prior to October 23, 2015 and pending as on that date will be governed by the unamended provisions of Section 34 of the Act of 1996.
13. Learned Advocate appearing for the appellant relies upon **(2022) 4 SCC 206 (Ratnam Sudesh Iyer vs. Jackie Kakubhai Shroff)** again for the proposition as to inapplicability of the provisions of the amended Section 34 to proceedings commencing prior to October 23, 2015.

14. Learned advocate appearing for the respondent submits that, the learned Single Judge considered the merits of the claims. He points out that, the learned Single Judge dealt with the grounds of challenge canvassed in detail. The impugned judgment and order contains reasons as to why the challenge under Section 34 of the Act of 1996 failed.
15. Learned advocate appearing for the respondent relies upon **2024 INSC 742 (Punjab State Civil Supplies Corporation Limited & Anr. Vs. M/s. Sanman Rice Mills & Ors)** on the scope of challenge under Section 37 of the Act of 1996. He submits that, by the introduction of Section 34(2-A) to Section 34 of the Act of 1996, the scope of challenge under Section 34 was enlarged. He places the entirety of Section 34 as it stood unamended as also after the amendments. According to him, the learned Judge correctly applied the principles under Section 34 of the Act of 1996 while deciding the challenge to the award.
16. Learned advocate appearing for the respondent submits that the impugned judgment and order should be tested on its substance rather than the nomenclature used in the body of the impugned judgment and order. He contends that the learned Judge applied the unamended provisions of Section 34 while considering the challenge to the award, by the impugned judgment and order.
17. Appellant floated a tender for construction and installation of piles, beams etc. up to the ground floor level to a multi-storied building in Kolkata. The value of the tender was Rs.7.28 crores. The respondent herein participated in such tender process. The

respondent became the successful bidder in the tender process. A formal work order with regard to such tender was issued in favour of the respondent on September 11, 2002.

18. The work order is to be read with the other terms and conditions of the contract including the tender conditions. Existence of an arbitration agreement between the parties is admitted. The scope and ambit thereof need not be discussed presently.
19. Disputes and differences arose between the parties with regard to the contract. Disputes were referred to the sole arbitration of the arbitrator. Respondent submitted a statement of claim containing 22 heads of claim. Appellant filed a statement of defence containing a counter-claim.
20. Learned arbitrator passed an award dated September 30, 2010 allowing 11 claims being claim nos.1, 5, 6, 7, 8, 9, 11, 13, 19, 21 and 22, out of the 22 claims of the respondent. Learned arbitrator disallowed the counter-claim of the appellant.
21. Appellant filed an application under Section 34 of the Act of 1996 challenging the award dated September 30, 2010 which was registered as AP/810/2010.
22. By the impugned judgment and order, learned Single Judge dismissed AP/810/2010.
23. Scope of Section 37 of the Act of 1996 is explained in **Punjab State Civil Supplies Corporation Limited** (*supra*), which is as follows:

“In view of the above position in law on the subject, the scope of the intervention of the court in arbitral matters is virtually prohibited, if not absolutely barred and that the interference is confined only to the extent envisaged under Section 34 of the

Act. The appellate power of Section 37 of the Act is limited within the domain of Section 34 of the Act. It is exercisable only to find out if the court, exercising power under Section 34 of the Act, has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the power so conferred. The Appellate Court has no authority of law to consider the matter in dispute before the arbitral tribunal on merits so as to find out as to whether the decision of the arbitral tribunal is right or wrong upon reappraisal of evidence as if it is sitting in an ordinary court of appeal. It is only where the court exercising power under Section 34 has failed to exercise its jurisdiction vested in it by Section 34 or has travelled beyond its jurisdiction that the appellate court can step in and set aside the order passed under Section 34 of the Act. Its power is more akin to that superintendence as is vested in civil courts while exercising revisionary powers. The arbitral award is not liable to be interfered unless a case for interference as set out in the earlier part of the decision, is made out. It cannot be disturbed only for the reason that instead of the view taken by the arbitral tribunal, the other view which is also a possible view is a better view according to the appellate court.”

24. Therefore, as a Court exercising powers under Section 37 of the Act of 1996, we are to find out, as to whether or not, the Court exercising powers under Section 34 of the Act of 1996 acted within its limits as prescribed thereunder or exceeded or failed to exercise the power so conferred.
25. The work order being of September 11, 2002, award being dated September 30, 2010 and the challenge to the award being of 2010, the principles to evaluate such challenge were to be adjudged on the parameters of the provisions of Section 34 of the Act of 1996 as it

obtained then. Sub-Section (2-A) of Section 34 of the Act of 1996 was introduced later.

26. Essentially, the challenge to the award dated September 30, 2010 was required to be evaluated on the anvil as to whether or not the award in conflict with the public policy of India as laid down in **Saw Pipes** (supra) or perverse as held in **Associates Builders** (supra).
27. In the facts and circumstances of the present case, the learned Single Judge proceeded to evaluate the challenge under Section 34 of the Act of 1996 to the award dated September 30, 2010 on the basis of the amendments introduced to Section 34, in particular, Section 34(2-A) of the Act of 1996.
28. That, the learned Single Judge, proceeded on the basis of Section 34(2-A) of the Act of 1996 appears on the face of the impugned judgment and order, and in particular, in paragraphs 15 and 16 thereof. The learned Single Judge, therefore, after applying such principles, did not find any merits in the challenge thrown to the award.
29. Contention of the respondent before us, is that, Section 34(2-A) of the Act of 1996 rather than restricting the scope of a challenge to an award, actually enlarges it. With respect, we are not in a position to accept such a contention, in view of the categorical finding in **Ratnam Sudesh Iyer** (supra). It would be apposite to refer to paragraph 12 of the **Ratnam Sudesh Iyer** (supra) in this regard, which is as follows:

“12. The admitted position is that the appellant is a party based in Singapore and thus, in terms of the aforesaid

*definition the arbitration although carried out within the country, would be an “international commercial arbitration”. We may notice at this stage that it is nobody’s case that the award in question is a foreign award within the meaning of Part II Section 44 of the said Act. For domestic awards, Chapter 7 of the said Act provides recourse against the arbitral award. Section 34 of the said Chapter provides for application for setting aside an arbitral award and specifies the ground available for the same. The Arbitration and Conciliation (Amendment) Act, 2015 (for short ‘2015 Amendment Act’) amended the said Act w.e.f. 23.10.2015; inter alia by inserting Explanations to Section 34(2) of the said Act as well as by inserting Sub-Section 2-A to Section 34. There is no doubt that the scope of interference by the Court became more restrictive with the amendments coming into force. The pre-amendment position with respect to expression “in conflict with public policy of India” was enunciated by this Court in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, which referred to the judgment of this Court in *Associated Builders v. DDA*.”*

30. The next contention of the respondent is that, the impugned judgment and order, if read as a whole, would demonstrate that, the correct principles under the unamended Section 34 of the Act of 1996 were applied. Again, we are not in a position to accept such contention in view of the categorical findings returned by the learned Single Judge in the impugned judgment and order. Learned Single Judge not only referred to the provisions of Section 34(2-A) of the Act of 1996 but also proceeded to apply authorities of the Supreme Court based on Section 34 (2-A) of the Act of 1996, relied upon on behalf of the respondent at that stage.

31. There is no material on record to suggest, let alone establish that, the challenge to the award was evaluated on the principles of **Saw Pipes** (supra) or **Associates Builders** (supra). Impugned judgment and order does not speak of assessment of the award dated September 30, 2010 on the basis of the unamended provisions of Section 34 of the Act of 1996. Materials on record does not prompt us to infer that, learned Single Judge assessed the validity and legality of the award or the challenge thrown to it, on the anvil of the unamended provisions of Section 34 of the Act of 1996. There is therefore, a failure on the part of the learned Single Judge in exercising jurisdiction vested upon it in law.
32. On the touchstone of **Punjab State Civil Supplies Corporation Limited** (supra), we are not in a position to return a finding that, the learned Trial Judge exercising powers under Section 34 of the Act of 1996 acted within its limits as prescribed. In fact, the learned Single Judge, failed to exercise such powers and exceeded in applying the rigours of Section 34(2-A) of the Act of 1996 in not interfering with the award.
33. In view of the discussions above, we set aside the impugned judgment and order. We remand AP/810/2010 for fresh consideration. We clarify that we did not enter into the merits of the rival claims of the parties before the learned arbitrator or before this Court considering the challenge under Section 34 of the Act of 1996. Our observations so far as the merits are concerned, are limited for the purpose of evaluating whether, the Court exercising powers

under Section 34 of the Act of 1996 exercised it in accordance with law or not.

34. APO/71/2020 along with applications, if any, stands disposed of without any order as to costs.
35. At this stage, learned advocate appearing for the respondent informs the Court to issue directions for expeditious disposal of AP/810/2010 in view of the period of time that such proceedings are pending.
36. Request of the respondent being reasonable is accepted. Learned Trial Judge is requested to hear and dispose of AP/810/2010 as expeditiously as possible without affording any unnecessary adjournments to any of the parties.
37. In view of the appeal being allowed, interim order requiring the appellant to furnish security is recalled. The appellant is at liberty to withdraw the renewable bank guarantee furnished with the learned Registrar, Original Side.

(DEBANGSU BASAK, J.)

38. I agree.

(MD. SHABBAR RASHIDI, J.)