



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPEAL NO. 4 OF 2012

Manish Dharshibhai Parmar ...Appellant

Versus

The Executive Engineer ...Respondent

- Mr. A. K. Gawali, Advocate for the Appellants
- Mr. Ruturaj Patil, Advocate for Respondent

CORAM : R. M. JOSHI, J

DATE : MARCH 18, 2025

PER COURT :

1. At the outset, it needs to be recorded that the Counsels for both sides were heard and Appeal is reserved for judgment. In view of the fact that there is reference pending for decision before Hon'ble Supreme Court as to whether the Arbitral Award can be modified or has to be set aside in toto, an option was given to the parties for deferment of the pronouncement of this judgment till the reference is decided by the Hon'ble Supreme Court. Learned Counsels for both sides, on instructions, made statement that without waiting for the decision on reference, present Appeal be decided. Hence, this Appeal is decided.

2. This Appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short '**the Act**') taking exception to the judgment and order dated 09.12.2011 passed by the Principal District Judge, Beed (for short '**PDJ**') in Misc. Civil Application (RJE) No. 55/2009 whereby the award passed by the sole arbitrator dated 20.12.2008 in respect of the disputes arising out of execution of work in respect of contract LCB No. 53/1989-90 came to be set aside.

3. The facts, which are necessary for the proper appreciation of the rival contentions, are reproduced in nutshell as under:

Appellant participated in the tender for the work of Pohner Branch Canal, balance earthwork and lining from K.M. 9 to 12 off-taking at RD 13805 M of Majalgaon Right Bank Canal and was selected as the competent bidder who has quoted to execute the work at 9.28% below the estimated cost of Rs. 31,72,409/-. Accordingly, contract was executed between Executive Engineer and Appellant. On 31.12.1989 Appellant given machinery advance by the Respondent on which interest was charged at the rate 18% p.a. It is the case of the

Appellant that due to the increase in the quantities and extra items, the Appellant had to work for 20 months over and above stipulated period of contract, for which he was granted six times extension under clause 51. It is claimed by the Appellant that the contractor therein is responsible for the said extensions and extension has been given without any reason. Appellant was paid a sum of Rs. 1,23,67,107/- for the entire work executed by him as against expected amount of Rs. 28.77 lacs. It is further case of the Appellant that since there was breach of reciprocal terms by Respondent, Appellant invoked clause 52 of the contract which provided for in house mechanism for seeking redressal of his grievance by approaching hierarchy of officers as contemplated in clause no. 52. Thus, it is the case of the Appellant that after exhausting the remedies available under clause 52, Appellant invoked provisions of clause 53 and appointment of sole arbitrator came to be done.

4. The proceedings of Arbitral Tribunal commenced from 24.03.2005. In all 13 meetings were held. Evidence was placed before the Arbitrator. The Arbitral Tribunal

after scrutinizing the material on record and according to the Appellant, by giving adequate opportunity of hearing to both sides, passed award dated 28.12.2008 partly allowing the claim of the Appellant. This award came to be assailed in an Application under Section 34 of the Act before the PDJ by Respondent. Appellant appeared in the said proceeding and filed written statement and cross-objection, being aggrieved by the award passed by the Arbitrator of denial of interest for a particular period. The PDJ by passing impugned order dated 09.12.2011 set aside the award. It is the case of the Appellant that the said order came to be passed by exceeding the jurisdiction of the Tribunal to cause interference in the award as contemplated by Section 34 of the Act.

5. Learned Counsel for the Appellant submits that the jurisdiction of the District Court under Section 34 of the Act to cause interference in the impugned award before it was extremely limited and that except for the provision of sub-section 2 of Section 34, there was no scope for causing interference therein. He drew attention of the Court to the claim Petition filed

before the Arbitral Tribunal and the response of the Respondent. According to him, in rejoinder it was specifically claimed by the Appellant herein that all claims were already raised before the Authorities as provided by clause 52 of the contract and that there was no new claim made in the statement of claim. It was contended that there was only increase in the amounts and no different/additional claim was made by the Appellant. It is his submission that the District Court has committed error in considering the said claims to be fresh claims and for non compliance of clauses 51 and 52 of the contract, award passed by the Tribunal came to be interfered with. It is further argued that the Arbitral Tribunal after giving opportunity of hearing and after scrutinizing the documents in detail, has passed reasoned award and that in absence of case being made out to cause interference therein within the scope of Section 34, the order impugned cannot sustain. In so far as the cross-objection filed before District Court is concerned, the same was to the extent that sole arbitrator has failed to award interest at the rate 18% p.a. for the pre reference/pre pendente lite period i.e., from 1st notice under clause 52 dated

13.09.2000 till appointment of the sole arbitrator. In support of his submissions, he placed reliance on following judgments: McDermott International Inc vs. Burn Standard Co. Ltd and Others, (2006) 11 SCC 181, Bombay Slum Redevelopment Corporation Private Limited vs. Samir Narain Bhojwani, (2024) 7 SCC 218 & Municipal Corporation of Greater Mumbai and Others vs. M/s Jyoti Construction Company, 2003(4) Mh.L.J. 25.

6. Learned Counsel for Respondent supported the impugned order with contention that the award passed by the Arbitral Tribunal, which is contrary to the terms of the agreement, is vitiated and therefore, is rightly interfered with. It is his submission that in the statement of claim there is no case sought to be made out by the Appellant before Arbitral Tribunal that the claim amount is only by way of increase in the amount and not a fresh claim. By drawing attention of the Court to the relevant material on record, it is argued that admittedly no claim was made under clauses 51 and 52 of the contract before the concerned Authorities in respect of entire claim. Thus, it is his contention that the entire claim was certainly not tenable before

the Arbitral Tribunal. According to him, in view of the prevailing position of law as per the judgment of Hon'ble Supreme Court in case of *The Project Director, National Highways Nos. 45E and 220, National Highways Authority of India Vs. M. Hakeem and Ors, 2021 (9) SCC 1* that the award cannot be modified and has to be set aside in entirety. He, therefore, submits that there is no reason or justification to cause interference in the impugned order. Moreover, it is his submission that the PDJ has recorded cogent reasons for causing interference in the impugned award before it and hence, appeal be dismissed.

7. At the outset, this Court is required to consider the scope of Section 37 of the Act which has been determined by the Hon'ble Supreme Court in case of *Bombay Slum Redevelopment Corporation Private Limited* (supra). It would be relevant to refer to paragraph 26 of the said judgment, which reads thus:

"26. The jurisdiction of the Appellate Court dealing with an appeal Under Section 37 against the judgment in a petition Under Section 34 is more constrained than the jurisdiction of the Court dealing with a petition Under Section 34. It is the duty of the Appellate Court to consider whether

Section 34 Court has remained confined to the grounds of challenge that are available in a petition Under Section 34. The ultimate function of the Appellate Court Under Section 37 is to decide whether the jurisdiction Under Section 34 has been exercised rightly or wrongly. While doing so, the Appellate Court can exercise the same power and jurisdiction that Section 34 Court possesses with the same constraints."

It is thus clear that the scope & jurisdiction under Section 37 of the Act is even limited than the one under Section 34 of the Act.

8. It is settled position of law that any award passed by the Tribunal, which is contrary to the terms of the contract, is not sustainable as the same is considered against the public policy. In this regard, reference can be made to the judgment of Hon'ble Supreme Court in case of Indian Oil Corporation Limited vs. Shree Ganesh Petroleum Rajgurunagar, (2022) 4 SCC 463. It would be relevant to take note of paragraph 46 of the judgment, which reads thus:

"46. In Associate Builders (supra), this Court held that an award ignoring the terms of a contract would not be in public interest. In the instant case, the award in respect of the lease rent and the lease term is in patent disregard of the terms

and conditions of the lease agreement and thus against public policy. Furthermore, in Associate Builders (supra) the jurisdiction of the Arbitral Tribunal to adjudicate a dispute itself was not in issue. The Court was dealing with the circumstances in which a Court could look into the merits of an award."

9. Here in this case, record indicates that the claim was made before the Authorities under clauses 51 and 52 to the extent of Rs. 254.45 lacs. Whereas the statement of claim came to be filed for Rs. 474.41 lacs. It is pertinent to note that neither in the statement of claim nor in the rejoinder before the Arbitral Tribunal, it is claimed by the Appellant that the amount so claimed is increased on account of miscalculation or error in computation. It is sought to be claimed by Counsel for the Appellant that items in respect of which claim was made remained the same. The question arises before this Court is as to whether it is sufficient for the Appellant to claim so in order to seek enhancement of the claim which was never made before concerned Authorities under clauses 51 and 52 of the conditions of contract. In this regard reference is made by the Counsel for the Appellant to the case of

Mcdermott International Inc (supra). Perusal of the said judgment indicates that in the said proceeding no objection was raised to the enhanced claim before the Arbitral Tribunal, which in the instant case duly raised before the Tribunal. Apart from this, having regard to the facts of the said case, it can be said that there was a issue of miscalculation and not the additional claim. Herein this case, objection was raised by filing written statement to the enhanced claim so also in the statement of claim it is not contended by the Appellant that on account of error in calculation the enhancement has taken place. It is immaterial as to whether the claim is in respect of the same items. The question is that if the claim is in respect of same items but for different period, it has to be first raised before the Authorities as nominated/contemplated under clauses 51 and 52 of the contract. Admittedly, this has not been done. Thus, this Court, therefore, finds substance in the contention of learned Counsel for Respondent that the claim before the Arbitral Tribunal ought not to have been entertained in entirety. Once a case is made out for causing interference even in the portion/part of

the award, in view of the present settled position of law, the award needs to be set aside in entirety and cannot be modified.

10. Having regard to the aforestated reasons, this Court finds no reason to cause interference in the impugned order in its extremely limited jurisdiction under Section 37 of the Act. Hence, Appeal stands dismissed.

(R. M. JOSHI, J.)