



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.11.2025

Pronounced on : .11.2025

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**THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN
and****THE HONOURABLE MR. JUSTICE MUMMINENI SUDHEER KUMAR****OSA (CAD) Nos.21 & 22 of 2022**

Bharat Heavy Electricals Limited,
Represented by its Executive Director
(Industry Sector),
Mr.J.P.Srivastava,
BHEL Industry Sector,
Integrated Office Complex, Lodhi Road,
New Delhi – 110 003.

... Appellant in both Appeals

Vs.

Parry Sugars Refinery India Private Limited
(Previously Known as Silkorad Private Limited),
Dare House, 234, N.S.C. Bose Road,
Chennai – 600 001.

... Respondent in both Appeals

Prayer in OSA (CAD) No.21 of 2022: Appeals filed under Order XXXVI Rule 1 of O.S. Rules r/w Section 37(1) (B) of the Arbitration and Conciliation Act, 1996 and Section 13 of the Commercial Courts Act, 2015 to set aside the judgement and decretal order dated 14.09.2021 in O.P.No.448 of 2018 and consequently allow this appeal.

Prayer in OSA (CAD) No.22 of 2022: Appeals filed under Order XXXVI



Rule 1 of O.S. Rules r/w Section 37(1) (B) of the Arbitration and Conciliation Act, 1996 and Section 13 of the Commercial Courts Act, 2015 to set aside the judgement and decretal order dated 14.09.2021 in O.P.No.449 of 2018 and consequently allow this appeal.

In both Appeals

For Appellant(s) : Mr.V.V.Sivakumar

For Respondent(s) : Mr.Rahul Balaji

COMMON JUDGMENT

These two original side appeals are between the same parties and in connection with the two agreements that were entered into between the parties, which are intrinsically connected and filed under Section 37(1) (B) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act, 1996') and as such, both the matters were taken up for consideration together and are being disposed of by this common judgment.

2. For the sake of convenience, parties are referred to as they are before the Arbitral Tribunal.

3. In response to the bids called for by the respondent herein, the



claimant submitted its bid in connection with the work of 'Supply of Gas Turbine Generator' and the work of "Gas Turbine Generator Erection and Commissioning Services' and became the successful bidder. Accordingly, the claimant and the respondent entered into two agreements dated 05.08.2008 in respect of the above said two works for a contract value of Rs.55.50 Crores and Rs.2.50 Crores respectively. The said agreements were named as Contract-A and Contract-B respectively by the parties. The time limit stipulated for completion of both the works is 11 months, while the date of commencement of work was agreed to be 07.09.2007 i.e., the date of issuance of letter of intent to the claimant herein. The agreed date of completion of the works covered under both the agreements was agreed to be 05.08.2008. However, the said works could not be completed within the time agreed between the parties and finally, the said works admittedly were completed only on 02.11.2009 i.e., after a delay of 64 weeks. In view of the said delay in completion of the works, the respondent imposed liquidated damages on the claimant in terms of Clause 2.12 and Clause 2.8 of Contract-A and Contract-B respectively. According to the claimant, the said liquidated damages withheld by the respondent is to the tune of Rs.3,23,00,675/-. However, according to the respondent, the said amount withheld/ recovered from the claimant is only Rs.2.90 Crores being the amount of liquidated damages



equivalent to 5% of the total contract value of both the contracts.

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4. In the light of the above, certain disputes arose between the parties resulting in invocation of the arbitration clause contained in both the contracts and accordingly, the Arbitral Tribunal was constituted, consisting of a Presiding Arbitrator and two members. The claimant herein filed two different claim statements before the Arbitral Tribunal claiming an amount of Rs.3,19,48,199/- and Rs.17,50,000/- respectively in respect of Contract-A and Contract-B and also sought for award of interest at the rate of 15.75% on the above said sums besides the cost of arbitration.

5. The respondent filed its defence statement denying its liability, and in response thereto, the claimant filed its rejoinder. It was thereafter, basing upon the pleadings, the following issues were framed:-

“a) Whether the Claimant is entitled to claims in the present Arbitral proceedings under the terms and conditions of contracts dated 05.08.2008 for supply of gas turbine generator, erection and commissioning services?

b) Whether the claim of the Claimant is barred by limitation?

c) Whether the delay in supply, erection and commissioning the gas turbine generator is due to the lapses and breach of terms and conditions by the Claimant or the Respondent?



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d) Whether the Respondent is entitled to with hold/adjust the amounts payable to the Claimant on account of liquidated damages and if so to what extent?

e) Whether the Claimant is entitled to claim interest and costs as prayed for?”

6. On the same day, the parties also agreed on the procedure to be followed in the arbitral proceedings. In terms of the said agreed procedure, the claimant agreed to file proof affidavit, list of documents and witnesses on or before 30.08.2016, and the respondent shall have to file its proof affidavit, list of documents and witnesses on or before 20.09.2016.

7. On behalf of the claimant, Exhibit C-1 to Exhibit C-54 were marked and on behalf of the respondent, Exhibit R-1 to Exhibit R-23 were marked. Out of 54 documents marked on behalf of the claimant, the respondent admitted 28 documents and their contents. Insofar as 21 documents are concerned, the respondent denied the contents of the said documents. Insofar as Exhibit C-26 is concerned, part of the contents were only admitted and rest were denied by the respondent. Similarly, in respect of 23 documents marked on behalf of the respondent, 8 documents were admitted by the claimant and in respect of 14 documents, though receipt of the same was admitted by the claimant, the contents of the said 14 documents were denied. Exhibit R-5 was

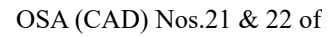


totally denied by the claimant.

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8. When the claimant was required to file proof affidavit for adducing oral evidence, the claimant had chosen not to do so contending that it is not necessary and he relied upon various citations in support of its contention. However, the respondent filed proof affidavit and examined RW-1 to prove the contents of the documents which were relied upon by the respondent and the claimant was allowed to cross-examine the RW-1. It was thereafter the learned Arbitrators concluded the proceedings and two out of three Arbitrators passed an award dismissing the claim made by the claimant, whereas the third Arbitrator has not agreed with the reasoning given by the majority and passed a dissenting award allowing the claim. It is aggrieved by the award passed by the majority of Arbitrators dated 15.10.2017, the claimant filed applications under Section 34 of the Act, 1996 vide O.P.Nos.448 & 449 of 2018. The said original petitions were dismissed by the learned Single Judge of this court by a common order dated 17.09.2021. It is aggrieved by the said common order passed by the learned Single Judge dated 17.09.2021, the present appeals were filed by the claimant.

9. Heard Mr.V.V.Sivakumar, learned counsel for the appellant and



10. The only contention urged by the learned counsel appearing for the appellant before us is that, in terms of Clauses 2.12 and 2.8 of Contract-A and Contract-B, providing for imposition of liquidated damages is not available to the respondent in the facts and circumstances of the case, as the claimant herein is not solely responsible for the delay in completion of the works in question. According to learned counsel for the appellant, it is only in case the delay in completion of the work is solely attributable to the claimant, the said clause can be invoked by the respondent but not otherwise. According to him, the respondent is also equally responsible for the delay in completion of the works in question and therefore, the action of the respondent in invoking the above said clauses for recovery of liquidated damages is contrary to the terms of the contract agreed between the parties. He also further submitted that the majority of Arbitrators as well as the learned Single Judge erred in concluding that the failure on the part of the claimant to adduce oral evidence in support of its case is fatal as the case of the claimant was established by way of cross-examination of RW-1 and according to him, RW-1 admitted about the delay on the part of the respondent. Thus, it is contended that, once it is admitted that the respondent is also responsible for the delay, the clauses in both the



contracts providing for deducting of liquidated damages are not available for the respondent. Thus, in a nutshell, it is the contention of the learned counsel for the appellant that the appellant is able to establish the delay on the part of the respondent as well and therefore, the claimant established his case and therefore, his claim ought to have been allowed by the Arbitrators.

11. On the other hand, Mr.Rahul Balaji, learned counsel appearing for the respondent contended that the scope of interference by this court under Section 37 of the Act, 1996 is very circumscribed and once the learned Arbitrators as well as the learned Single Judge have come to the conclusion on appreciation of facts and recorded specific findings, it is not open for this court exercising power under Section 37 of the Act, 1996 to interfere with the order of the learned Single Judge passed under Section 34 of the Act, 1996. He also further contended that the conclusions of the learned Arbitrators arrived at on appreciation of evidence are not amenable for interference either under Section 34 or under Section 37 of the Act, 1996 and therefore, there is nothing for this court to interfere with the orders under appeal.

12. He also further submitted that the claimant, by its letter dated 23.02.2015, confirmed that the total amount due from the respondent as on



31.12.2014 is only Rs.15,04,974/- and required the respondent to confirm the same by duly furnishing the statement and according to learned counsel for the respondent, the said amount was paid by the respondent thereafter. Thus, it is contended that the claimant himself admitted that the total amount due from the respondent as on 31.12.2014 is only Rs.15,04,974/- and therefore, the claim made by the claimant is only an afterthought and absolutely has no merits in the claim. He also further submitted that the learned Arbitrators as well as the learned Single Judge have rightly decided the matter and the same does not warrant any interference in an appeal.

13. He also placed reliance on the decisions of the Hon'ble Apex Court in the cases of ***“UHL Power Company Limited -vs- State of Himachal Pradesh”*** reported in (2022) 4 SCC 116, ***“Larsen Air Conditioning & Refrigeration -vs- Union of India”*** reported in (2023) 15 SCC 472 and ***“Ssangyong Engineering & Construction Company Limited -vs- National Highways Authority of India”*** reported in (2019) 15 SCC 131.

14. Having heard the learned counsel on either side at length and after perusing the entire material on record, we do not find any sustainable reason



or ground to interfere with the common order under appeal.

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15. The only contest is against the liquidated damages deducted by the respondent on the claimant under Clause 2.12 and 2.8 of Contract-A and Contract-B respectively. The clauses in both the contracts are identical in nature. Clause 2.8 of Contract-B is extracted hereunder for clarity.

“Liquidated damages for delay in completion schedule: The contractor shall endeavor to complete their scope of work within the time specified in the contract. It may be noted that "time is the essence of the contract" subject to clause 1.11 and 1.17 of the General Conditions of Contract. If due to reason solely attributable to contractor, the contractor fails to erect and commission any or all of the goods within the time period specified in the contract, the owner shall, without prejudice to their other remedies under the contract for reasons of delay attributable to the contractor, deduct from the contract price (exclusive of taxes and duties), as liquidated damages, a sum equivalent to 0.5% of the total contract price for each week of delay until actual performance, up to a maximum deduction of 5% of the total contract price (exclusive of taxes and duties), the total contract price being inclusive of subsequent modifications and price escalation, if contractual. Once the maximum is reached, the owner may consider termination of contract.

LD shall be leviable only in case commissioning gets delayed beyond a grace period of 15 days after the contractually agreed commissioning schedule or further extended period.”



instant case, for the reasons best known, the claimant failed to adduce oral evidence to prove the claim and the contents of the documents marked on its behalf and to establish that the claimant is not solely responsible for the delay or to show that the respondent is also responsible for the delay. Mere allegation that the respondent is also responsible for the delay and thereby drawing a presumption that the claimant is not solely responsible for the delay does not take the place of a proof, unless it is established in accordance with law. Further, as already noted above, in terms of the procedure agreed between the parties on 27.07.2016, the claimant as well as the respondent agreed to file proof affidavit and subject the witnesses to cross-examination. Having agreed for the said procedure, the claimant failed to file proof affidavit on oath to establish its case.

18. From the perusal of the award passed by the majority, it is evident that inspite of requiring the claimant to file proof affidavit, the claimant refused to do so and on the other hand, placed reliance on various decisions in support of his contentions for not filing the proof affidavit. Even before this court also, the learned counsel for the claimant contended that it is not necessary for the claimant to file proof affidavit and adduce oral evidence and it is suffice if the case of the claimant is admitted by the respondent witness



and according to him, the respondent witness admitted the case of the claimant. It is the claimant who made a claim against the respondent by initiating arbitration proceedings and is in the nature of a plaintiff in a suit. In a case where there is an assertion of fact by the plaintiff and denial of the same by the defendant, and if no party adduced any evidence, it is the plaintiff who would fail but not the defendant, thereby suggesting that the burden of proof is primarily on the plaintiffs and it is only in case if the plaintiff is able to discharge its burden then the same would shift to the defendant. This is a settled legal position. In the instant case, admittedly, the claimant failed to adduce oral evidence and thereby shirked its responsibility to establish its case before the Arbitral Tribunal.

19. On the other hand, the respondent adduced oral evidence by duly filing proof affidavit of oath. No doubt, RW-1 was cross-examined by the claimant, and it is not even case of the claimant that in the cross-examination of RW-1, there was any suggestion to the effect that the respondent is also responsible for the delay or any suggestion suggesting that the delay in completion of the works is not solely attributable to the claimant. In the absence of any of these two suggestions to the RW-1, it cannot be said that there was any admission on the part of RW-1. Though RW-1 has accepted



certain dates on which some of the works were executed beyond the stipulated date of completion, the same cannot be stretched to the extent of saying that RW-1 has admitted about the delay on the part of the respondent, especially in the absence of any of the suggestions as noted herein above.

20. The learned majority of Arbitrators, having taken note of the above, have rightly arrived at a conclusion that the claimant failed to establish its case and thereby dismissed the claim made by the claimant herein. When the matter came up before the learned Single Judge of this court under Section 34 of the Act, 1996, the learned Single Judge also having taken note of the detailed reasoning assigned by the learned Arbitrators, especially in Paragraph No.46, observed as under:-

“46.These averments have been denied by the respondents and therefore the onus in on the Claimant to proved each of them. The first step of establishing these facts, according to the procedure set down by the Arbitral Tribunal in its meeting dated 27.7.2016, is to file proof affidavit and examine witnesses who are in the know of facts asserted and to offer their evidence for cross examination by the Respondents. It is again a trite principle of law that a case is to be proved on facts proved by the plaintiff and not on the lapses or deficiencies in the case of the defendants. The onus will shift only if this primary obligation is discharged by Claimants. This unfortunately the claimant has failed to do.

Merely filing documents and cross examining the



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respondent's witness is not the manner of proving the facts in disputes especially so when the assertions are denied. It is elementary that the claimant must not only have asserted the facts necessary to establish that no delay could be attributed to them and therefore the deductions towards liquidated damages was illegal through an affidavit, but must have also offered their witness for cross examination in respect of the facts asserted. Without recourse to this procedure the Claimant cannot hope to shift the burden of proof in favour of the Respondent."

21. Keeping in view the above factual position, it is necessary to consider the scope of interference of this court under Section 37 of the Act, 1996.

22. The present appeal before us is an appeal under Section 37. The scope of appeal under Section 37 also has fallen for consideration before the Hon'ble Apex Court in the various matters, latest of which being the case of **"Bombay Slum Redevelopment Corporation Private Ltd., -vs- Samir Narain Bhojwani"** reported in (2024) SCC OnLine SC 1656, **"UHL Power Company Limited -vs- State of Himachal Pradesh"** reported in (2022) 4 SCC 116 and **"Larsen Air Conditioning and Refrigeration Company -vs- Union of India and others"** reported in (2023) 15 SCC 472. In the decision rendered by the Hon'ble Apex Court prior to the case of **Bombay Slum Redevelopment Corporation Private Limited's case**, it was held that the



scope of interference under Section 34 itself is narrow and when it comes to the scope of appeal under Section 37, the jurisdiction of the Appellate Court in examining an order setting aside or refusing to set aside the award is now more circumscribed. However, the Hon'ble Apex Court, having reconsidered the same issue and having taken note of the case of ***“MMTC Limited -vs- Vedanta”*** reported in (2019) 4 SCC 163, ***“UHL Power Co.Ltd., -vs- State of H.P”*** reported in (2022) 4 SCC 116 and ***“Konkan Railway Corpn Ltd -vs- Chenab Bridge Project”*** reported in (2023) 9 SCC 85, in the case of ***Bombay Slum Redevelopment Corporation Private Limited***, held as under:-

“In the decision of this Court in the case of Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking, in paragraph 18, it was held thus:

“18. At the outset, we may state that the jurisdiction of the court under Section 37 of the Act, as clarified by this Court in MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163: (2019) 2 SCC (Civ) 293], is akin to the jurisdiction of the court under Section 34 of the Act. [Id, SCC p. 167, para 14: “14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision.”] Scope of interference by a court in an appeal under Section 37 of the Act, in examining an order, setting aside or refusing to set aside an award,



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is restricted and subject to the same grounds as the challenge under Section 34 of the Act.”

(emphasis added)

16. 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 possess with the same constraints.”

23. In the light of the above latest decision of the Hon’ble Apex Court, it is the duty of the Appellate Court to decide whether the Court under Section 34 has exercised its power properly or failed to exercise its power. This court, while exercising the said appellate power, can exercise the same power and jurisdiction that Section 34 possess, subject to the same constraints. Thus, it is now well settled that the scope of power under Section 37 is co-extensive and on par with the power of the court under Section 34 of the Act, 1996.

24. The learned Single Judge, having taken note of the overall situation, came to the conclusion that this is not a fit case for interference under Section



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34 of the Act, 1996 and observed as under:-

“13. Admittedly, the claimant has not given any oral evidence to prove the documents which relied upon to prove the specific delay pleaded in the claim petition, which are attributed to the respondent herein. Without the proof of the particular document and correlating the same, the attempt of the claimant to rely upon the oral evidence and admission of the respondent namely RW1 and to contend that entire documents filed by the claimant has been proved, cannot be countenanced.

14. It is to be noted that the learned arbitrator has also considered the the nature of the questions of RW1. Totally there were 23 questions have been put. In fact the learned arbitral tribunal has found that none of the answers given by the respondent/RW1 witness prove the contents of the documents filed by the claimants. When the oral and documentary evidences properly analysed by the learned arbitral tribunal and found that the oral evidence of the RW1 do not prove the contents of the documents marked by the claimants, this Court exercising jurisdiction under Section 34 of the Act cannot re-appreciate the entire evidence once again

15. It is also relevant to note that the arbitral tribunal also recorded the specific finding in respect of Ex.R23/Statement of Accounts issued by the claimant, wherein the final account on date 31st December'2014 shown only as Rs.15,04,947/-. The statement of accounts issued after so called dispute arose between the parties. The learned arbitral tribunal also recorded that in fact the



claimant had given up the liquidated damages while drawing the final statement as on 31st December 2014 and recorded finding that when the very admitted claim of the claimant was only a sum of Rs.15,04,947/-, claimant making huge claim thereafter cannot be reliable. That was the reason Ex.R23 was not been confronted by the claimant during the arbitral proceedings. That apart, it is also to be noted that this Court has also gone through the questions and answers relied upon by the learned counsels, which has specifically put to the witnesses. The question Nos. 7,8,9,10,11 and 13 particularly brought to the notice of the Court to contend that the above answers will prove the contentions of the claimant that the delay is attributed to the respondent.”

25. In the light of the above, we are of the considered view that the learned Arbitral Tribunal has examined the matter in detail and basing upon the oral and documentary evidence adduced before it, came to the factual conclusion while examining the terms and conditions of Contract-A and Contract-B, that the claimant is not entitled for the claims made and dismissed the same. The learned Single Judge also rightly refused to interfere with the award passed by the learned Arbitral Tribunal as no ground is made out for interference under Section 34 of the Act, 1996.

26. In the light of the above, we do not find any ground to interfere with either the award passed by the Arbitral Tribunal or the order passed by



the learned Single Judge. Accordingly, both the appeals are **dismissed**. No costs. Connected miscellaneous petitions, if any, shall stand closed.

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27. Before parting with the case, we are constrained to observe that there appears to be deliberate inaction on the part of the officials of the claimant who dealt with the matter before the Arbitral Tribunal during the course of arbitral proceedings. The claimant, being a public sector undertaking, the concerned officials ought not to have behaved in such an absurd manner and by refusing to adduce oral evidence by filing the proof affidavit before the Arbitral Tribunal, especially after having agreed for such a procedure. This has prejudicially affected the interest of the claimant/ public sector undertaking. Therefore we are constrained to make this observation and leave it open to the head of the claimant to look into this aspect and take necessary action against the erring officials as may be deemed fit.

(Dr.G.J.,J.) (M.S.K.,J.)
.11.2025

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Index : Yes / No

Speaking order / Non-speaking order

Neutral Citation : Yes / No



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OSA (CAD) Nos.21 & 22 of

Dr.G.JAYACHANDRAN, J.

and

MUMMINENI SUDHEER KUMAR, J.

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Pre-Delivery Order made in
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