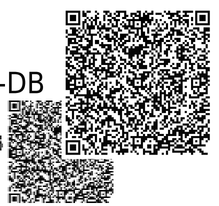

2024:PHHC:149676-DB

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO-CARB-3-2020 (O&M)
Reserved on: 09.09.2024
Pronounced on: 18.11.2024

Active Promoters Private Limited

….Appellant

Versus

Desh Raj and Others

....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN PALLI
HON'BLE MR. JUSTICE VIKRAM AGGARWAL

Present: Mr. Vipul Sharma, Advocate
for the appellant.

Mr. Aashish Chopra, Senior Advocate with
Ms. Rupa Pathania, Advocate;
Ms. Gurpreet Randhawa, Advocate and
Ms. Nitika Sharma, Advocate
for the respondents.

VIKRAM AGGARWAL, J.

1. By way of the present appeal, the appellant challenges the order dated 16.10.2019 passed by the Special Commercial Court, Gurugram vide which the petition preferred by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act') was dismissed.

2. The respondents are owners of land measuring 39 Kanals 11 Marlas (fully described in the pleadings) (hereinafter referred to as the 'land') situated in village Tigra, Tehsil and District Gurugram.

3. A development agreement (Ex. C2) (hereinafter referred to as the 'agreement') was executed between the appellant and the respondents on 02.09.2005 as regards utilization of the land for development of a Commercial Complex/IT Complex.

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4. Various terms and conditions were set out in the agreement. As per the agreement, the appellant would develop the land at its own costs and expenses and with its own resources after procuring/obtaining the requisite licenses, permissions, sanctions and approvals of all competent authorities and would construct a Commercial Complex/IT Complex. A sum of Rs.50,00,000/- had been paid to the respondents as interest free refundable security deposit which was agreed to be refunded within 15 days from the issuance of the occupation certificate.

5. Time for completion of the Commercial Complex/IT Complex was agreed to be the essence of the contract and a period of 06 years from the date of execution of the agreement was fixed for completion of the project. In case of default on the part of the appellant, the entire security amount was to be forfeited and it was agreed that the agreement would automatically stand cancelled and all documents executed between the parties would become null and void. There was also a clause as regards *force majeure* and it was agreed that the agreement would be subject to the same. It had also been agreed between the parties that if during the subsistence of the agreement, the Government of Haryana or the Land Acquisition Collector or any other authority acquired the land, the security amount would be forfeited and the agreement would stand cancelled and the appellant would not claim any expenditure or amount or lien on the land.

6. There were various others terms and conditions also which would not be relevant for the purposes of the decision of the present appeal. On 12.12.2008, land measuring 29 Kanals 11 Marlas out of the total land was notified under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the '1894 Act'). By this time, License No.164 of 2008 had been granted. However, declaration under Section 6 was issued on 11.12.2009 and award was also

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announced subsequently on 23.11.2011. Accordingly, some land out of the total land came under acquisition whereas for some portion, license had been granted. Some other litigation had also taken place.

7. Ultimately, a legal notice dated 23.03.2012 (Ex. R2) was issued by the respondents informing the appellant that the agreement stood cancelled and that the respondents would be at liberty to use the land in any manner whatsoever and that the appellant would not be left with any concern or interest in the land. The legal notice was followed by some more communications.

8. Eventually, since disputes had arisen between the parties, the arbitration clause was invoked by the appellant and Mr. Justice V.K. Jhanji, a former Judge of this Court was appointed as the sole Arbitrator.

9. Certain claims were set up by the appellant and counter claims were set up by the respondents. After examining the evidence led by both sides, the claim of the appellant and counter claims of the respondents were rejected. Costs of Rs.4,00,000/- were imposed upon the appellant which were ordered to be paid as litigation expenses to the respondents.

10. Aggrieved by the award, a petition under Section 34 of the 1996 Act was preferred by the appellant which came to be declined by the Special Commercial Court, Gurugram vide impugned order dated 16.10.2019, leading to the filing of the instant appeal.

11. Learned counsel representing the respective parties were duly heard.

12. It was strenuously urged by learned counsel representing the appellant that the Special Commercial Court, Gurugram erred in rejecting the petition under Section 34 of the 1996 Act. It was submitted that the learned Arbitrator had in fact set aside the entire development plan which was not within the purview of the Arbitrator. It was further submitted that efforts had been made

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by the appellant for release of the land and for this purpose, the appellant pursued litigation before the High Court and the Supreme Court and engaged top lawyers. It was further submitted that time had never been agreed to be the essence of the agreement and that the respondents were reaping benefits of the development agreement till a very late stage and only when the land was about to be released from acquisition, the respondents became dishonest and attempted to make a unilateral exit from the development agreement. It was submitted that the Special Commercial Court, Gurugram rejected the petition under Section 34 of the 1996 Act on flimsy grounds without appreciating the controversy in the correct perspective.

13. Per contra, learned Senior counsel representing the respondents defended the impugned order while laying emphasis upon the provisions of Sections 34 and 37 of the 1996 Act and the law on the subject. It was submitted that a petition under Section 34 of the 1996 Act is not an appeal and an award can be interfered with only on the limited grounds available under Section 34 of the 1996 Act. Learned Senior counsel submitted that the learned Arbitrator considered every possible aspect and dealt with the same extensively and, therefore, no interference is called for.

14. We have considered the submissions made by learned counsel for the parties and have also perused the record which was duly summoned.

15. Before adverting to the merits of the case, it would be essential to notice the provisions of Sections 34 and 37 of the 1996 Act. Section 34 (1) states that an arbitral award can be challenged by way of an application moved in accordance with the provisions of Section 34 (2) and 34 (3). Section 34 (2) and Section 34 (3) lay down as under:-

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"34. Application for setting aside arbitral award.

- - - - - - - - - -

(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) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(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) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

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(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-
For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:
Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re appreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:
Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

16. After the petition under Section 34 is decided, an appeal can be preferred under Section 37 of the 1996 Act. As per Section 37 (1) (c), an appeal can be preferred from an order setting aside or refusing to set aside an arbitral award under Section 34 of the 1996 Act.

17. Coming to the law on the subject, it is well settled that the jurisdiction of the Court under Section 34 of the 1996 Act is relatively narrow and the jurisdiction of the Appellate Court under Section 37 is all the more circumscribed and, therefore, the scope for interference is limited. This settled view was recently reiterated by the Supreme Court of India in the case of '***National Highways Authority of India Vs. M/s Hindustan Construction Company Limited', 2024***

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AIR (SC) 2383. While referring to the judgments in the case of ***'Associate Builders Vs. DDA', (2015) 3 SCC 49, 'McDermott International Inc. Vs. Burn Standard Co. Ltd.', (2006) 11 SCC 181, 'MMTC Ltd. Vs. Vedanta Ltd.'., (2019) 4 SCC 163*** and other judgments, it was held by the Supreme Court as under:-

> **"We may note here that the impugned judgments in all connected appeals are based on the impugned judgment in Civil Appeal no. 4702 of 2023. In this case, we are dealing with concurrent findings arrived at by the Arbitral Tribunal, the learned Single Judge in a petition under section 34 of the Arbitration Act, and the Division Bench in appeal under section 37 of the Arbitration Act. In this case, we are concerned with the construction of the terms of a contract between the parties. In the case of Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd. (2019) 7 SCC 236, in paragraphs 9.1 and 9.2, this Court held thus:**
>
> > ***'9.1. In Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], this Court had an occasion to consider in detail the jurisdiction of the Court to interfere with the award passed by the Arbitrator in exercise of powers under section 34 of the Arbitration Act. In the aforesaid decision, this Court has considered the limits of power of the Court to interfere with the arbitral award. It is observed and held that only when the award is in conflict with the public policy in India, the Court would be justified in interfering with the arbitral award. In the aforesaid decision, this Court considered different heads of "public policy in India" which, inter alia, includes patent illegality. After referring section 28(3) of the Arbitration Act and after considering the decisions of this Court in McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181], SCC paras 112-113 and, Rashtriya Ispat Nigam Ltd. V. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306], SCC paras 43-45, it is observed and held that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if an Arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. It is further observed and held that construction of the terms of a contract is primarily for an Arbitrator to decide unless the Arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do. It is further observed by this Court in the aforesaid decision in para 33 that when a court is applying***

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the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is further observed that thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.

9.2. Similar is the view taken by this Court in NHAI v. ITD Cementation (India) Ltd. [NHAI v. ITD Cementation (India) Ltd., (2015) 14 SCC 21 : (2016) 2 SCC (Civ) 716], SCC para 25 and SAIL v. Gupta Brother Steel Tubes Ltd. [SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16], SCC para 29.

8. This Court laid down the law regarding the scope of interference in a petition under section 34 of the Arbitration Act in the case of MMTC Ltd. v. Vedanta Ltd. (2019) 4 SCC 163. Paragraph 11 reads thus:

'11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.'

9. This Court, in the case of UHL Power Company Ltd. v. State of Himachal Pradesh (2022) 4 SCC 116 held that the jurisdiction of the Court under Section 34 is relatively narrow and the jurisdiction of the Appellate Court under section 37 of the Arbitration Act is all the more circumscribed.

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In the light of the limited scope for interference under Section 37 appeal, we will have to deal with the submissions."

18. Reference in this regard can also be made to the judgment of a Three Judges Bench of the Supreme Court of India in the case of '***Konkan Railway Corporation Limited Vs. Chenab Bridge Project Undertaking'. (2023) 9 SCC 85:-***

"14. Analysis: 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., (2019) 4 SCC 163 is akin to the jurisdiction of the court under Section 34 of the Act. 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, is restricted and subject to the same grounds as the challenge under Section 34 of the Act.

15. Therefore, the scope of jurisdiction under Section 34 and Section 37 of the Act is not akin to normal appellate jurisdiction. It is well-settled that courts ought not to interfere with the arbitral award in a casual and cavalier manner. The mere possibility of an alternative view on facts or interpretation of the contract does not entitle courts to reverse the findings of the Arbitral Tribunal. In Dyna Technologies Private Limited v. Crompton Greaves Limited (2019) 20 SCC 1, this Court held:

'24. There is no dispute that section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of

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contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under section 34 of the Arbitration Act.'

16. In the present case, the Arbitral Tribunal interpreted the contractual clauses and rejected the Respondent's claims pertaining to Disputes I, III and IV. The findings were affirmed by the Single Judge of the High Court in a challenge under Section 34 of the Act, who concluded that the interpretation of the Arbitral Tribunal was clearly a possible view, that was reasonable and fair-minded in approach."

19. Reverting to the facts, it would be essential to notice that the learned Arbitrator considered the matter in detail and detailed findings were returned. The argument as regards the *force majeure* clause was dealt with *in extenso* and it was observed that the same had not been set up in the claim petition but was argued at the time of arguments. It was held that this argument had no basis because out of total land measuring 39 Kanals 11 Marlas which formed a part of the agreement, only land measuring 8 Kanals 7 Marlas was the subject matter of acquisition which too was prior to the date of execution of the agreement and the rest of the land measuring 31 Kanals 4 Marlas was not a subject matter of acquisition either at the time of the execution of agreement or at the time when the claimant had submitted its application for the grant of license in the first instance i.e. on 12.03.2007. It was held after discussing the entire issue in detail that the claimant i.e. the appellant herein had failed in its obligations. The submissions as regards the appellant not being able to carry out its obligations on account of de-licensing of their land etc. was found to be erroneous and misleading.

20. As regards the argument that although time was the essence of the agreement, the said time had not started as the possession of the land had not been handed over was also found to be an attempt to justify their failure to carry out

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their obligations in time. It was held that the appellant herein had failed to get the license for the total land due to its own acts of omission. Similarly other arguments were also dealt with extensively and were rejected.

21. The Special Commercial Court, Gurugram also dealt with the matter strictly in accordance with law and rightly held that the petition under Section 34 had been drafted in such a manner as if it was an appeal against the award. It was rightly noticed that the entire thrust and in the petition was upon the facts and the evidence produced before the Arbitrator which, in any case, could not be reappraised. It was held that nothing had been brought before the Court which could even remotely establish that any finding of the Arbitrator was against the Public Policy of India or that the learned Arbitrator had violated the law. The Court further held that the findings of fact recorded by the Arbitrator could not be set aside simply even if a different view could be taken. While noticing the law on the subject, the Special Commercial Court, Gurugram rightly rejected the petition. We do not find any illegality in the same for the reasons aforementioned.

In view of the facts and circumstances as have been discussed in the preceding paragraphs and keeping in mind the law on the subject, we find the appeal to be completely devoid of merit and accordingly dismiss the same.

(ARUN PALLI)
JUDGE

(VIKRAM AGGARWAL)
JUDGE

18.11.2024
Prince Chawla

Whether speaking/reasoned : *Yes/No.*
Whether reportable : *Yes/No.*

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