

A.F.R.

Neutral Citation No. - 2024:AHC:171241-DB

Judgment Reserved on 12-09-2024

Judgment Delivered on 25.10.2024

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 590 of 2023

Appellant :- State Of Uttar Pradesh and 2 others

Respondent :- M/S Virat Construction

Counsel for Appellant :- Ankur Agarwal

Counsel for Respondent :- Jagat Narayan Mishra

Hon'ble Mahesh Chandra Tripathi,J.

Hon'ble Prashant Kumar,J.

(Delivered by Hon'ble M.C. Tripathi, J.)

1. Heard Sri Manish Goyal, learned Additional Advocate General assisted by Sri Devansh Rathore, learned Additional Chief Standing Counsel for the State-appellants and Sri Jagat Narayan Mishra, learned counsel for the opposite party.

2. The instant appeal under Section 37 of 1996 Act¹ has been filed seeking quashing of the impugned judgment and order dated 14-02-2023 passed by the Presiding Officer, Commercial Court, Jhansi in Arbitration Case No. 31 of 2022 (State of U.P. Vs. M/S Virat Construction), arising out of Arbitration Case decided between the parties by the Sole Arbitrator on 03-05-2022.

Relevant factual aspects and background

3. A tender was invited on 01-08-2008 by the appellants for the construction of Head Regulator at Km.0.410 of Margin Bandh to protect the Banda City from the flood of Cane River. In response to it, the contractor/opposite party no.2/claimant applied and his bid was found to be responsive, when tender was opened on 10-09-2008. Accordingly, the tender was awarded to the claimant and letter of acceptance was issued on 07-11-2008. In accordance with the letter of acceptance dated 07-11-2008, the claimant was required to submit the balance security money plus stamp duty within ten days, which was duly complied by him. Thereafter both the

1. Arbitration and Conciliation Act, 1996

parties entered into a contract agreement on 22-11-2008. As per the contract agreement the cost of the work was Rs.4,96,92,893.00 only. The date of commencement of the work was given as 22-11-2008 and the period of completion of the work was nine (09) months, hence the stipulated date of completion was given as 21-08-2009.

4. It is claimed by the opposite party no.2/claimant that since the time for execution of the contract was only nine months, so he immediately mobilised his equipments, machines, labours, staffs and other construction materials to the site with sincere intention to complete the work within stipulated time. However, he could not start the work because the appellants failed to finalise the logistics of the work before execution of the contract. The appellants also failed to issue the stock materials namely cement and tor steel of different dia within stipulated time. The failure to finalise the logistics resulted in a prolonged delay and also resulted in a financial loss to the claimant.

5. The work remained suspended/closed at various times, due to which the claimant's staff, labours and machinery remained idle at work site without doing any work, and this was duly intimated to the appellants by the claimant. The effect of this delay was that the project started after lapse of six months and this delay could not be attributed to the contractor. Because of this inordinate delay and various other issues, the claimant claims that he had suffered a huge loss, which resulted into a dispute between the parties. As per the agreement, the matter was referred to the Arbitrator.

6. As per agreement, the Chief Engineer (Betwa) Irrigation and Water Resources, Department of U.P., Jhansi, who was actually the project proponent, appointed a Sole Arbitrator vide order dated 05-02-2021 for adjudication of the dispute. After the Arbitrator entered into the reference, the claimant had filed the statement of claims and the appellants filed the statement of defence. Thereafter, pleadings were complete, evidences were adduced and the parties were heard.

7. The Sole Arbitrator had considered the pleadings of the parties and contractual terms and conditions. He had also considered the oral/written arguments and legal submissions made by both the parties. He also considered the agreement and the provisions of I.D. Form No.111, which formed part of the contract as well as general conditions of the contract. He had also examined Clause 2 (A) of I.D. Form No.111, which stipulated that the time is the essence of contract. The Sole Arbitrator also considered and examined Clause-5 (Extension of time) of I.D. Form No.111, which provided the extension of time for completion of work on the ground of an avoidable hindrance to its execution, whereas G.C.C. Clause-5 (Construction Programme) also provided for progress of the work in different time period.

Arbitration proceedings and award

8. Finally, the Sole Arbitrator had summarized 17 points of issues, which were to be finalised in terms of the arguments/discussion. After long-drawn proceedings of arbitration with filing of claim, reply and counter claim, filing of various applications and written submission, the Sole Arbitrator passed the award on 03.05.2022. For ready reference, relevant paragraph nos.53 to 61 of the award are reproduced herein below:-

“53.00 Now therefore, the total awarded amount in respect of all claims comes as below:-

Claim No.	Particulars	Claimed Amount (In Rs.)	Awarded Amount (In Rs.)
1.	Claim No.1 for payment of As-Executed work which uncontractually and illegally withheld/kept pending XIth alleged to be final	1,13,22,751.00	1,13,22,751.00
2.	Claim No.2 payment regarding payment of compensation for idling resources i.e. Labour, Staff and Machinery on account of holdups and stoppage of works.	1,02,84,060.00	44,38,585.00
3.	Claim No. 3 for payment of Overhead charges due to Idling and under utilization of resources on account of prolongation of Contract period	1,52,52,937.00	70,00,000.00
4.	Claim No. 4 for payment of loss of productivity & profit due to deduction in turn over as a result of prolongation of contract period	1,49,77,644.00	NIL
5.	Claim No. 5 for payment of Price Adjustment during the Extended/ Prolongated period of Contract	70,02,135.00	35,01,067.00

6.	Claim No. 6 for payment on a/c of solatium/compensation for mental harassment and loss of business.	As per Decision of Ld, Sole Arbitrator	NIL
7.	Claim No.7 for the cost of Arbitration as per section-31A of Arbitration & Conciliation Act-2015	10,00,000.00	8,54,990.00
8.	Claim No. 8 payment of As-Executed Extra Items	3,50,000.00	3,50,000.00
9.	Claim No.9 for refund of 4% VAT, which wrongfully deducted more from Claimant's bills.	8,38,136.00	7,00,192.00
	Total amount Rs.	6,10,27,633.00	2,81,67,585.00
10.	Claim No. 10 regarding payment of interest as per Section 31(7) of Arbitration & Conciliation Act-2015	@18% per annum	Interest @7% per annum since 01.05.2022 to 03.05.2022 (Date of award) on amounting Rs. 2,73,12,595.00 only (on awarded item No.1 to 6, 8 & 9) which comes to Rs. 95,75,122.00
	Total amount Rs.	Rs. 6,10,27, 633.00	Rs. 3,77,42,707.00
	Say	Rs. 6,10,27,000.00	Rs. 3,77,42,700.00

Thus, total awarded amount comes to Rs.3,77,42,700.00 only (Rupees Three Crore Seventy Seven Lac Forty Two Thousand Seven Hundred only).

54.00 Accordingly, the Respondent/State of U.P. is directed to make payment of Rs.3,77,42,700.00 only (Rupees Three Crore Seventy Seven Lac Forty Two Thousand Seven Hundred only) and plus (+) to refund the security deposit's F.D.R. amounting Rs.6,25,000.00 along with Bank Interest of F.D.R. upto date to the Claimant (M/s Virat Construction) as per this award.

55.00 The Claimant shall further be entitled to receive the future interest @ 7% p.a. (simple) from the Respondent on this awarded amount Rs.3,77,42,700.00 only (Rupees Three Crore Seventy Seven Lac Forty Two Thousand Seven Hundred only) from the date of award to the date of actual payment.

56.00 The Sole Arbitrator had directed the claimant to submit stamp papers of appropriate value for declaring the award. Accordingly, this award is being made and published on the stamp papers of the value of Rs.1000.00 supplied by the Claimant. Balance stamp papers as and when necessary shall have to be supplied by the Claimant. The Claimant shall, however, be entitled to recover 50% cost of such stamp papers from the Respondents.

57. The total awarded cost Rs.3,77,42,700.00 only (Rupees Three Crore Seventy Seven Lac Forty Two Thousand Seven Hundred only) and plus (+) to refund the security deposit F.D.R. amounting Rs.6,25,000.00 along with Bank interest upto date shall be payable to the Claimant by the Respondent within three months from the date of award for which

no additional interest shall have to be paid. However, in case of failure of payment within three (03) months of the declaration of the award, interest @ 7% p.a. (simple) shall have to be paid w.e.f. date of award to till release of payment on amount of Rs.3,77,42,700.00 only (Rupees Three Crore Seventy Seven Lac Forty Two Thousand Seven Hundred only) in addition to the awarded amount.

58.00 This Arbitral Award has been made by the Sole Arbitrator after considering all the documents, contractual provisions, pleadings of parties, documents, letters/correspondence and other documents filed on record, citations, oral and written arguments made and submitted by both the parties/Claimant and Respondent.

59.00 The Sole Arbitrator has deeply considered all aspects of this referred case and has duly applied his mind in making a fair and reasonable award against the Respondents as described above.

60.00 This arbitral award has been made and declared by me, Chob Singh Verma, Sole Arbitrator at Ghaziabad on 3rd May, 2022.

61.00 The Sole Arbitrator has set his hands to this award on the 3rd day of May, 2022 as under and have initiated each page having verified the contents of each page.”

Challenge to the award under Section 34 of 1996 Act.

9. The award so made by the Sole Arbitrator was challenged by the State appellant under Section 34 of the 1996 Act before the Commercial Court. A vast variety of contentions urged on behalf of the parties were considered by the Commercial Court and the relevant points were answered in favour of the claimant and thereby, the award was upheld while rejecting the application under Section 34 of the 1996 Act. While questioning the award the appellants had taken broadly two grounds for setting aside the award in the application. The grounds taken in the application were:-

“1. Whether the opposite party which is unregistered firm can file his statement of claim before the Arbitrator and the same has not been considered by the Arbitrator, which amounts to illegality.

2. Whether the award dated 03-05-2022 ought to be set aside on the basis of grounds raised in the application”

10. The learned Commercial Court, Jhansi, after taking note of the submissions of parties, framed the points for determination and then, dealt with every point on the anvil of Section 34 of the 1996 Act. The court had also examined the award and found that the award was passed after

hearing the parties and considering the conditions of the agreement, and thereafter vide judgment and order dated 14-02-2023 rejected the application filed by the appellants under Section 34 of the 1996 Act. The operative portion of the order dated 14-02-2023 passed by the learned Commercial Court, Jhansi is quoted hereunder:-

“जहां तक आपत्ति में यह बिन्दु उठाया जाना कि बिना साक्ष्यों का विश्लेषण किये या संविदा से परे जाकर अपने निष्कर्ष निकाले गये हैं। इस सम्बन्ध में पूर्व में विश्लेषण किया जा चुका है कि संविदा के बिन्दुओं का उल्लेख अवार्ड में आया है। किसी साक्ष्य को गलत विश्लेषण या गलत विवेचना मात्र ही किसी अवार्ड को इस न्यायालय के द्वारा समाप्त करने का अधिकार नहीं होगा, क्योंकि यह स्थापित सिद्धान्त दोनों ही पक्षों के द्वारा प्रस्तुत निर्णय से स्पष्ट हो जाता है कि साक्ष्यों व तथ्यों का विश्लेषण होना चाहिये तथा यदि विश्लेषण के दो निष्कर्ष हो सकते हैं जिन से एक निष्कर्ष आर्बीट्रेटर के द्वारा दिया गया है तथा एक निष्कर्ष उन्होंने नहीं लिया है। मात्र इस आधार पर कि दूसरा निष्कर्ष भी सम्भव था। आर्बीट्रेटर का अवार्ड अपास्त नहीं किया जायेगा। केवल उन तथ्यों में अवार्ड अपास्त होगा जब किया गया विश्लेषण प्रथमदृष्टया ही किसी भी प्रकार से विश्वसनीय न हो अर्थात् वह Patent illegality on the face of record की श्रेणी में आता हो। बिलों का जहां तक अधिक भुगतान का प्रश्न है इन बिन्दुओं को भी पूर्व में देखा जा चुका है। पक्षकारों के द्वारा प्रस्तुत अभिलेख के द्वारा भी टिप्पणी की जा चुकी है। सर्वप्रमुख यह बिन्दु सामने आता है कि एक बार ठेकेदार के बिलों का भुगतान करने के सन्दर्भ में विभाग व ठेकेदार की सहमति बनी तथा यह भी सहमति बनी कि वह आर्बीट्रेशन नहीं करेगा। जब ठेकेदार के द्वारा आर्बीट्रेशन कर दिया गया। तब यह आपत्ति उठा दी गयी। इस प्रकरण में आरम्भ में ही विभाग का रुख रक्षात्मक रहा है अर्थात् उनके द्वारा बिलों को भी स्वीकार किया गया। विलम्ब के कारणों को भी स्वीकार किया गया। जैसा विपक्षी के द्वारा प्रस्तुत अभिलेखों से विदित होता है तो उपरोक्त परिस्थितियों में अवार्ड को निरस्त करने का कोई आधार नहीं बनता है।

उपरोक्त विश्लेषण से स्पष्ट है कि अवार्ड दिनांकित 03.05.2022 में ऐसी कोई भी त्रुटी नहीं है जो धारा-34 माध्यस्थम् एवं सुलह अधिनियम 1996 के अन्तर्गत उसे अपास्त करने योग्य बनाता हो। प्रार्थीगण के द्वारा प्रस्तुत प्रार्थना पत्र निरस्त होने योग्य है।”

(English version)

As far as the objection raised that conclusions have been drawn without analyzing the evidence or by going beyond the contract, this has already been analyzed earlier, where it has been established that the terms of the contract have been mentioned in the award. Merely a wrong analysis or wrong interpretation of evidence is not a ground for this court to annul an award, because it is a well-established principle that both the parties have clarified through the decision presented that the evidence and facts should be analyzed, and if two conclusions can be drawn, with one being given by the arbitrator and the other not considered, the award will not be set aside merely on the

ground that another conclusion was also possible. The award will only be nullified when the analysis is prima facie unreliable or falls under the category of "patent illegality on the face of the record."

As far as the question of overpayment of bills is concerned, these points have also been examined earlier. Comments have also been made based on the records presented by the parties. The most important point that emerges is that once the department and the contractor agreed on the payment of the contractor's bills and also agreed that there would be no arbitration, the objection was raised when the contractor went for arbitration. In this case, from the beginning, the stance of the department has been defensive, meaning they accepted the bills as well as the reasons for the delay, as is evident from the documents presented by the opposing party. Therefore, in the above circumstances, there is no basis to nullify the award."

Appeal under Section 37 of the 1996 Act

11. Laying challenge to the order dated 14.02.2023 as passed by the Commercial Court, the State preferred Commercial Appeal under Section 37 of the 1996 Act on the grounds that the claimant had failed to fulfil the basic obligations and responsibilities, whereas the claimant had to complete the work within nine months but he started the work late, so the delay cannot be attributed to the appellant; the availability of stock material had been made in time by the appellant and no hindrance was created by the farmers/any third party; the payment of the firm was not released because of the unavailability of fund; the sufficient staff labours and machineries were not available at the site due to which the progress of the work got delayed and hence, penalty ought to be imposed on the claimant for delayed work. The claim nos.2 to 6 were not correct and the claim no.7 was not in accordance with the terms and conditions of the contract.

12. The claimant had not done any extra work or supplied any extra item; the interest awarded by the Arbitrator and approved by the Commercial Court was not correct as the same should have been in accordance with Section 31(1)(7)(b) of the 2016 Act; it was due to the revision of Drawing by I.I.T. Roorkee, the cost of the project has

increased; the work of Erection of Gates were to be done by the Mechanical Division, Kanpur but due to delay in erection of Gates, the construction of Civil work was not to be affected; the award was passed contrary to the material available on record and evidence adduced in support thereof. The Arbitrator has not considered the measurement of work as per the measurement book; the Arbitrator has wrongly awarded the claim on account of extension of period of construction; towards infringement of the conditions of contract; 20,000 sacks of soil were placed in the river to avoid flood was not correct as there was no flood in that year; the delay cannot be attributed towards the appellant and the interest @ 7 per cent awarded by the Arbitrator was highly excessive.

13. During the pendency of the present appeal, the appellants firstly moved Civil Misc. Amendment Application No.06/2023 with a prayer to permit the applicant/appellant to amend the grounds preferred in the Arbitration Appeal and also to permit the applicant to take additional grounds for adjudication of the instant appeal. Another application was also moved under Order 41 Rule 27 Civil Procedure Code to permit the applicant to adduce additional evidence. The applications were moved with a plea to bring on record the tender document/agreement dated 22.11.2008 as the said document contains the arbitration clause, which was invoked by the claimant. It was also claimed that the said document was never placed before the Sole Arbitrator and the Sole Arbitrator, without examining the said document, proceeded to pass the impugned award dated 03.05.2022. Admittedly, fresh additional grounds/issues, which were neither raised before the Sole Arbitrator nor before the Commercial Court, Jhansi, in an application under Section 34 of the 1996 Act. For the first time, the appellants tried to press the applications in the instant appeal.

Rival Submissions.

14. Sri Manish Goyal, learned Additional Advocate General assisted by Sri Devansh Rathore, learned Additional Chief Standing Counsel for the State-appellants had vehemently submitted that even though the scope of interference under Section 37 of the 1996 Act is limited and restricted to the grounds mentioned in Section 34 thereof, and if the view of the Arbitrator is a plausible view, the Court will not interfere or substitute its own view with that of the Arbitrator. He submitted that re-appreciation of evidence or review on merits is not permissible under the provisions of the 1996 Act unless the award is shown to be in conflict with the 'public policy of India' or vitiated by 'patent illegality appearing on the face of the award'.

15. Sri Manish Goyal, learned Senior Advocate submitted that the Sole Arbitrator had proceeded to pass the impugned award dated 03.05.2022 without even perusing the document/agreement dated 22.11.2008, which contained the arbitration clause, which was invoked by the opposite party. However, the said documents were never placed before the Sole Arbitrator and he, without examining the said document, proceeded to pass the award dated 03.05.2022. He submitted that only in this backdrop, both the applications were pressed to bring on record the document/agreement dated 22.11.2008 and therefore, the impugned award is vitiated by patent illegality appearing on the face of the award.

16. Even on merit, learned Senior Advocate submitted that the Commercial Court had erred in law in not considering the factual aspect of the matter that the claimant had not even started the concerned work even after substantial time of six months and indulged in malpractices by resorting to various excuses in relation to non-availability of cement, TNT bar and sometimes weather condition specially rains were also taken as excuses for non-commencement of the work and without completing the work, the Sole Arbitrator had passed an award in favour of the

claimant/opposite party and in arbitrary manner, the same has been approved by the Commercial Court in appeal. Even the Sole Arbitrator had also erred in declaring an imaginary and far-fetching award in favour of the claimant ignoring the material fact/evidences adduced by the appellants in support of their case.

17. Sri Manish Goyal, learned Senior Advocate had strenuously argued that the Sole Arbitrator had passed an award without having the glance of the agreement and in absence of any consideration of the relevant clauses of the contract, such award is patently illegal. (Ref. **State of Chhattisgarh and ors v. Sal Udyog Pvt. Ltd.**² and **Associate Builders vs. Delhi Development Authority**³). Hence, it was contended that the award would also be liable to be set aside on the ground of patent illegality under Section 34 (2A) of the 1996 Act as the Commercial Court had failed to consider the said aspect of the matter. The Sole Arbitrator and the Commercial Court could not re-write the contract between the parties in absence of the material evidence, i.e. agreement document and the award was made in ignorance of vital evidence. He submitted that therefore, the award as well as impugned judgement and order dated 14.02.2023 passed by the Commercial Court are liable to be set aside.

18. Per contra, Sri Jagat Narayan Mishra, learned counsel for the opposite party/claimant vehemently opposed the instant appeal and submitted that the applications filed by the appellants were also moved with inordinate delay of more than two years just to delay the disposal of the instant appeal. He further submits that as per Section 34 and 37 of the 1996 Act, the scope of interference by the Court is very limited and the Court can only interfere in a situation where the award is found to be contrary to the fundamental policy of Indian Law or is against the interest of India or the award suffers from justice or morality or if it is patently illegal. To buttress his argument, learned counsel for the opposite party

2. (2002) 2 SCC 275

3. (2015) 3 SCC 49

had placed reliance on a judgment passed by Hon'ble Supreme Court in the matter of *Reliance Infrastructure Ltd. Vs. State of Goa*⁴.

19. We have given anxious consideration to the rival submissions and have examined the record with reference to the law applicable.

Relevant Statutory provisions.

20. Since the present appeal relates to an arbitral award, which was carried in challenge under Section 34 of the 1996 Act and in appeal under Section 37 of the 1996 Act; and looking to the variety of submissions made, we may usefully take note of the relevant statutory provisions contained in Section 26, 28, 34, and 37 of the 1996 Act as follows:

“26. **Expert appointment by arbitral tribunal.**-(1) Unless otherwise agreed by the parties, the arbitral tribunal may—

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

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28. **Rules applicable to substance of dispute.**-(1) Where the place of arbitration is situate in India,—

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration,—

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

4. 2023(0) Supreme (SC) 495

(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex-aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.]

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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) 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

(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.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]

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37. Appealable orders.-(1) 15[Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:--

- (a) refusing to refer the parties to arbitration under Section 8;
- (b) granting or refusing to grant any measure under Section 9;
- (c) setting aside or refusing to set aside an arbitral award under Section 34]

(2) An Appeal shall also lie to a court from an order of the arbitral tribunal.-

- (a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
- (b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”

12.1 Section 31 (7) of the Act of 1996 as regards interest in award may also be usefully noticed which reads as under:-

“31. **Form and contents of arbitral award.**-

xxx xxx xxx

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b), A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation.-The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978)]

xxx xxx xxx”

The scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the Act

21. Having regard to the contentions urged and the issues raised, it shall also be apposite to take note of the principles enunciated by the Apex Court in some of the relevant decisions on the scope of challenge to an arbitral award under Section 34 of the 1996 Act and the scope of appeal under Section 37 of the 1996 Act.

22. The Hon’ble Supreme Court in the matter of **MMTC Limited v. Vedanta Limited**⁵ has held as follows:-

“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 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.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b) (ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not

5. (2019) 4 SCC 163

trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts.”

23. The Hon’ble Supreme Court in **Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd**⁶ held as follows:-

“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 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.

30. 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.**”

In view of the above judicial pronouncement and the trite principles of the law of pleadings and estoppel and no patent illegality has been alleged against the award nor any submission to the effect of the same being against the public policy of India has been averred, thus the grounds so raised by the appellants may be deemed to be outside the purview of Section 37 of Arbitration and Conciliation Act, 1996.

31. **The Award made by the Arbitral Tribunal are not amenable to interference either on the Section 34 or Section 37 of the Arbitration Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties or ex facie, perverse that interference by this Court, is absolutely necessary. The Arbitrator/Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Arbitration Act.**”

(Emphasis supplied)

24. In the matter of **Vastu Invest & Holdings Pvt. Ltd. vs Gujarat Lease Financing Ltd.**⁷, it was held that that a ground not initially raised in the petition to challenge the award could not be permitted to be subsequently raised by an amendment, if the application for amendment itself was

6. 2019 SCC online SC 1656

7. 2000 SCC online Bombay 729

beyond the period of limitation fixed for filing of the petition, challenging the award.

25. The Hon'ble Supreme Court in the matter of **The Project Director, National Highways No. 45E and 220, National Highways Authority of India v. M. Hakeem & Anr.**⁸, wherein the Hon'ble Court whilst canvassing the jurisprudence behind scope of Section 14 Arbitration and Conciliation Act, 1996 concluded as follows:-

“40. It can therefore be said that this question has now been settled finally by at least 3 decisions of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the ‘limited remedy’ under Section 34 is co- terminus with the ‘limited right’, namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.”

26. In **PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and others**⁹ the Apex Court highlighted the limited scope of challenge under Section 34 of the 1996 Act and explained the relevant tests as under:-

“43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and re-appreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of “public policy of India”, which has been held to mean “the fundamental policy of Indian law”. A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34 (2) (a) (iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, re-appreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.”

8. (2021) 9 SCC 1

9. (2021) SCC Online SC 508

27. Hon'ble Supreme Court in the matter of *Delhi Airport Metro Express Private Limited Vs. Delhi Metro Rail Corporation Limited*¹⁰ has observed that contravention of law not linked to public policy or public interest is beyond the scope of expression 'patent illegality'. What is prohibited is for Courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them.

28. Hon'ble Supreme Court in the matter of *Haryana Tourism Ltd. Vs. Kandhari Beverages Ltd.*¹¹ has opined that in the appeal under Section 37 of the 1996 Act, reappreciation of evidence was not permissible at all.

29. The Hon'ble Supreme Court in the matter of *Reliance Infrastructure Ltd. Vs. State of Goa*¹² has held that restraint is required to be shown while examining the validity of arbitral award by the Courts, else interference with the award after reassessing the factual aspects would be defeating the object of the Act of 1996. This is apart from the fact that such an approach would render several judicial pronouncements of this Court redundant if the arbitral awards are set aside by categorizing them as "perverse" or "patently illegal" without appreciating the contours of these expressions.

30. The Hon'ble Supreme Court in a plethora of judgments has clearly laid down that the scope of judicial intervention under Section 34 or Section 37 of 1996 Act should be minimum and the Court ought not to

10. 2022 (1) SCC 131

11. (2022) 3 SCC 237

12. 2023(0) Supreme (SC) 495

interfere with the findings of the Arbitrator unless the same is perverse, illegal and capricious and the award is such that shakes the conscience of the Court.

31. As far as allowing the appellants to adduce fresh evidence at the appellate stage is concerned, the Hon'ble Supreme Court in the matter of *State of Maharashtra Vs. Hindustan Construction co. Ltd.*¹³ has held that the amendment in a pleadings under Section 37 of the 1996 Act cannot be allowed after expiry or limitation period as stated under Section 34 (3) of the 1996 Act. The Apex Court has held as follows:-

“16. Pleadings and particulars are required to enable the court to decide true rights of the parties in trial. Amendment in the pleadings is a matter of procedure. Grant or refusal thereof is in the discretion of the court. But like any other discretion, such discretion has to be exercised consistent with settled legal principles. In *Ganesh Trading Co. v. Moji Ram* [(1978) 2 SCC 91 : (1978) 2 SCR 614] , this Court stated: (SCC p. 93, para 2)

“2. Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take.”

17. Insofar as the Code of Civil Procedure, 1908 (for short “CPC”) is concerned, Order 6 Rule 17 provides for amendment of pleadings. It says that the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

18. The matters relating to amendment of pleadings have come up for consideration before the courts from time to time. As far back as in 1884 in *Clarapede & Co. v. Commercial Union Assn.* [(1883) 32 WR 262 (CA)] —an appeal that came up before the Court of Appeal, Brett M.R. stated:

“... The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made....”

19. In *Charan Das v. Amir Khan* [(1919-20) 47 IA 255] the Privy Council expounded the legal position that although power of a court to amend the plaint in a suit should not as a rule be exercised where the effect is to take away from the defendant a legal right which has accrued to him by lapse of time, yet there are cases in which that consideration is outweighed by the special circumstances of the case.

13. 2010 (4) SCC 518

20. A four-Judge Bench of this Court in *L.J. Leach & Co. Ltd. v. Jardine Skinner & Co.* [AIR 1957 SC 357 : 1957 SCR 438] while dealing with the prayer for amendment of the plaint made before this Court whereby the plaintiff sought to raise, in the alternative, a claim for damages for breach of contract for non-delivery of the goods relied upon the decision of the Privy Council in *Charan Das* [(1919-20) 47 IA 255] granted leave at that stage and held: (*L.J. Leach case* [AIR 1957 SC 357 : 1957 SCR 438] , AIR p. 362, para 16)

“16. It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice.”

21. Again, a three-Judge Bench of this Court in *Pirgonda Hongonda Patil* [AIR 1957 SC 363 : 1957 SCR 595] in the matter of amendment of the plaint at the appellate stage reiterated the legal principles expounded in *L.J. Leach & Co. Ltd.* [AIR 1957 SC 357 : 1957 SCR 438] and *Charan Das* [(1919-20) 47 IA 255].

23. Do the principles relating to amendment of pleadings in original proceedings apply to the amendment in the grounds of appeal? Order 41 Rule 2 CPC makes a provision that the appellant shall not, except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the appellate court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the court. Order 41 Rule 3 CPC provides that where the memorandum of appeal is not drawn up as prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended. The aforesaid provisions in CPC leave no manner of doubt that the appellate court has power to grant leave to amend the memorandum of appeal.

25. In light of the aforesaid legal position governing the amendment of pleadings in the suit and memorandum of appeal, the immediate question to be considered is: **whether the same principles must govern the amendment of an application for setting aside the award or for that matter, amendment in an appeal under Section 37 of the 1996 Act.**

27. In *Popular Construction Co.* [(2001) 8 SCC 470] this Court, while considering the question whether the provisions of Section 5 of the Limitation Act, 1963 are applicable to an application challenging an award under Section 34 of the 1996 Act, held: (SCC pp. 474-75, paras 12-15)

“12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are ‘but not thereafter’ used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase ‘but not thereafter’ wholly otiose. No principle of interpretation would justify such a result.

13. Apart from the language, ‘express exclusion’ may follow from the scheme and object of the special or local law:

‘17. ... [Even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would

nonetheless be open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation.’ [Ed.: As observed in *Hukumdev Narain Yadav v. Lalit Narain Mishra*, (1974) 2 SCC 133, p. 146, para 17.]

14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendable by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need ‘to minimise the supervisory role of courts in the arbitral process’ [Ed.: Part 4(v) of the Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996.] . This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:

‘5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.’

15. The ‘Part’ referred to in Section 5 is Part I of the 1996 Act which deals with domestic arbitrations. Section 34 is contained in Part I and is therefore subject to the sweep of the prohibition contained in Section 5 of the 1996 Act.”

28. Again in *Consolidated Engg. Enterprises* [(2008) 7 SCC 169] this Court observed: (SCC p. 180, para 19)

“19. A bare reading of sub-section (3) of Section 34 read with the proviso makes it abundantly clear that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 will have to be made within three months. The period can further be extended, on sufficient cause being shown, by another period of 30 days but not thereafter. It means that as far as application for setting aside the award is concerned, the period of limitation prescribed is three months which can be extended by another period of 30 days, on sufficient cause being shown to the satisfaction of the court.”

(Emphasis supplied)

32. The history of scheme of Arbitration and Conciliation Act, 1996 supports the conclusion that the time limit prescribed under Section 34 to challenge the award is absolute and unextendable by Court. There is no application of Section 5 of the Limitation Act qua Section 34 of the Act, 1996. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives is the need to minimise the supervisory role of Court in the arbitral process. This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention. The part referred to in Section 5 is part I of 1996 Act, which gave the domestic arbitration and therefore, it is subjective to the sweep of the prohibition contained in Section 5 of the 1996 Act. Hence, any amendment in the appeal would attract the revision of the Limitation Act.

Analysis by the Court

33. We have carefully considered the submissions advanced by the learned counsel for the respective parties. With their able assistance, we have proceeded to peruse the pleadings, grounds taken in the appeal, annexures appended thereof.

34. Section 34 of the 1996 Act lays down that the application can only be entertained if the party making application establishes that the award made by the Arbitrator is contrary to (a) fundamental policy of Indian Law; or (b) the interest of India or ; (c) justice or morality; and (d) if it is patently illegal.

35. Patent illegality should be such an illegality which goes to the root of the matter. Even in other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. What is prohibited is for Courts to re-appreciate the evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award.

36. We have also carefully examined the award passed by the Sole Arbitrator. As mentioned above, the Sole Arbitrator while analysing and returning the findings in para-22 (i) & (ii) clearly proceeded to observe that the agreement is subject to the provisions of Form I.D. III forming part of the contract as well as to the general conditions of the contract. He had also considered Clause 2 (A) of the I.D. Form No.111, which stipulated that the time is the essence of the contract. All the 17 issues were considered in detail and categorical finding had been returned.

37. We also find that while preferring an appeal under Section 34 of the 1996 Act, no such ground had been taken by the appellant. Even the instant appeal had been preferred with considerable delay of around two years and no such ground had been taken. At this belated stage, an attempt had been made to bring on record the additional evidence.

Conclusion

38. In this case the Sole Arbitrator appointed by the appellants had passed an award which was challenged by the appellants under Section 34 of the 1996 Act and the same was dismissed by means of the speaking order. Against which, the present appeal under Section 37 of the 1996 Act has been filed.

39. The appellant cannot be allowed to amend the appeal or to raise fresh grounds at the appellate stage in view of the ratio laid down by the Hon'ble Supreme Court in the matter of *State of Maharashtra Vs. Hindustan Construction co. Ltd.(supra)*. The amendment obtained or raising fresh grounds virtually amounts to file a fresh appeal and would be barred by limitation as laid down under Section 34(3) of the 1996 Act. Hence, it is not open for the appellant to raise any new ground or adduce any fresh evidence in an appeal under Section 37 of 1996 Act.

40. As per Section 34 read with Section 37 of the 1996 Act, the award can only be set aside if the same is found to be contrary to (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality and (d) if it is patently illegal. In the present case, none of these aforesaid exceptions are said to be attracted in the present case.

41. The learned Commercial Court, Jhansi, after taking note of the submissions of parties, framed the points for determination and then, dealt with every point on the anvil of Section 34 of the 1996 Act. The learned Commercial Court dealing with Section 34 application was not acting as a Court of Appeal. Yet, looking to the long-drawn arguments, the Commercial Court enumerated the issue raised and then returned findings after examining the record and while rejecting the submissions made on behalf of the State-appellant. There had been no such flaw in the judgment and order passed by the Commercial Court which call for interference by this Court under the limited scope of Section 37 of the 1996 Act.

42. The ratio laid down in the aforesaid cases clearly postulate that the scope of judicial intervention in Section 34 or Section 37 of 1996 Act is minimum. The Court ought to intervene only if the findings of the Arbitrator are arbitrary, capricious or perverse, or the award is such that it shakes the conscience of the Court. Further, if the illegality in award is not trivial but goes to the root of the matter, then only the Court in extraordinary circumstances would interfere in the award passed by the Arbitrator. It has also been settled that the Court while entertaining Section 34 or 37 application does not sit in an appeal over the award and can only interfere on merits on a limited ground encapsulated under Section 37(2) of 1996 Act.

43. In view of the aforesaid facts and circumstances, we have no hesitation to hold that the appellants have failed to make out any case for interference under Section 37 of the 1996 Act. The Arbitrator after considering all the evidences and record had passed a detailed speaking award, dealing with every aspect of the claim separately, which is also approved by the Commercial Court. The appellants herein have failed to make out any case, which may call for interference by this Court.

44. Under the facts and circumstances, we do not find any merit to entertain both the applications and accordingly, the same stand rejected.

45. The present appeal under Section 37 of the 1996 Act, lacks merit, and is, accordingly **dismissed**.

46. Let original record be returned to learned counsel for the State appellants.

Order Date :- 25.10.2024

pks/RKP