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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 322 of 2010

FOR APPROVAL AND SIGNATURE:
HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL Sd/-

and

HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**NO**
2	To be referred to the Reporter or not ?	**NO**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**NO**

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OIL & NATURAL GAS CORPORATION LTD
Versus
DAVID PARKAR CONSTRUCTION LTD C/O I B PATEL (P A HOLDER) & ANR.

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Appearance:
MR AJAY R MEHTA(453) for the Appellant(s) No. 1
MR PR THAKKAR(899) for the Defendant(s) No. 1
MR.J P THAKKAR(7116) for the Defendant(s) No. 1

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CORAM:**HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL**
and
HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE

Date : 12/06/2024

CAV JUDGMENT
(PER : HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE)

1. The present First Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (‘the Arbitration Act’ for

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sake brevity) impugns the judgment and order dated 31.3.2009 passed by the learned 7th Additional District Judge, Vadodara in Arbitration Misc. Application No.160 of 2002, whereby the learned Additional District Judge has allowed the application under Section 34 of the Arbitration Act and set aside the award dated 3.6.2002.

2. The relevant facts in the present case are that the appellant herein had invited tenders through its Superintending Engineer (Civil) for the work of construction of Multi-storied "D-Type" (20 residential units) for ONGC Township at Vadodara. The bid of the respondent contractor / claimant came to be accepted. Thereafter, an agreement came to be executed between the parties. As per the agreement, tender work was to commence from 31.3.1985 and was to be completed on or before 30.6.1986, and accordingly, work order dated 16.3.1985 came to be issued. That various disputes arose with respect to execution of the work between the parties. The respondent contractor filed Special Civil Suit No.110 of 1988 raising various claims. The appellant herein opposed the said suit and also filed an application stating that there was an arbitration agreement

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between the parties and the dispute, if any, had to be resolved through the arbitration mechanism. The said application came to be rejected by the learned Trial Court, which came to be confirmed by the High Court. Aggrieved, Special Leave Petition came to be filed before the Apex Court. With the consent of the parties, the Apex Court by its order dated 23.3.1999 in Civil Appeal No.5015 of 1989 referred the dispute to the Sole Arbitrator.

3. Pursuant to the reference, the respondent contractor / claimant filed its Statement of Claim. The appellant herein filed its reply as well as counter-claim against the respondent contractor. The parties completed the pleadings, placed the relevant documents on record and led the evidence in support of their case. After hearing the arguments, the learned Arbitrator by award dated 3.6.2002 was pleased to allow the two claims of the respondent contractor and rejected the rest of the claims. The learned Arbitrator also allowed the counter-claim of the appellant with respect to the liquidated damages and ordered the refund of the amount paid to the respondent contractor on the ground of escalation. Further, the learned Arbitrator has

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also awarded interest @ 12% per annum to the parties on the amount awarded.

4. Aggrieved, the respondent contractor/ claimant preferred Arbitration Misc. Application No.160 of 2002 in the District Court at Vadodara. By the judgment and order dated 31.3.2009, learned 7th Additional District Judge, Vadodara allowed the said application under Section 34 of the Arbitration Act and set aside the impugned award. Hence, this appeal.

5. Learned counsel Mr. Ajay R. Mehta, appearing for the appellant herein has submitted that the learned District Judge has gravely erred in setting aside the award on completely untenable grounds which are in contravention to the provisions of Section 34 of the Arbitration Act. He submits that the learned District Judge has set aside the well-reasoned award on extraneous grounds which are not recognized in law. He submits that in respect of claim No.1 of the respondent contractor, the learned Arbitrator has specifically recorded that the advocate for the respondent contractor/ claimant had argued few star items in claim No.1, but thereafter, it was

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agreed between the parties that in respect of claim No.1, the parties shall file their written submissions and on the basis of the same, the learned Arbitrator would decide the claim No.1. He submits that this action is not contrary to any public policy or perverse in law and, therefore, the learned District Judge ought not to have interfered with the said claim. He submits that claim No.1 was decided by the Arbitrator on the basis of the written submissions and was based on the cogent reasons. Mr. Mehta further submits that the learned Arbitrator had considered each claim as raised by the respondent claimant and the same was decided on the basis of the entries made in the measurement book maintained by the appellant and duly countersigned on behalf of the respondent claimant. He submits that the respondent contractor had not objected to any of the measurements which have been duly countersigned by him and the same were also paid in the running account bills. He submits that the learned District Judge did not consider all these aspects whereby the learned Arbitrator had rejected the claims of the respondent claimant. He submits that the learned District Judge has erred in holding that the learned Arbitrator

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did not appreciate the difference between the items of the work done and extra work which was done, as alleged by the respondent claimant. The learned counsel submits that once the measurements had become final after the same were countersigned by the respondent, the learned Arbitrator and the learned District Judge could not go beyond the said measurements which was as per the contractual terms. The learned counsel submits that the arbitral award was passed on the basis of the readings in the measurement book which was duly maintained by the appellant and countersigned by the respondent contractor. He further submits that the learned District Judge did not consider the fact that the respondent claimant could not substantiate its claim for escalation of the prices and no evidence was produced on record in respect of the same. Accordingly, the learned Arbitrator has rightly rejected such claim of the respondent claimant. He further submits that the learned District Judge has also erred in coming to the conclusion that the counter claim of the appellant was barred by limitation in view of the direction of the Hon’ble Supreme Court, which had referred the dispute to the Arbitral Tribunal for

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adjudication with consent of the parties. He submits that the counter claim was allowed by the learned Arbitrator in favour of the appellant on two aspects, being liquidated damages as well as over-payment in respect of the escalation as the same was contrary to clause 10(c) of the contract. He submits that in the present case, the learned District Judge has sat in appeal over the findings recorded by the learned Arbitrator and thereby passed the award in contravention to the provisions of Section 34 of the Arbitration Act. He submits that the learned District Judge could not have re-appreciated the evidence on record and sat in appeal to decide the application under Section 34 of the Arbitration Act. He, therefore, submits that the present First Appeal be allowed and the impugned judgment and order passed by the learned 7th Additional District Judge, Vadodara be quashed and set aside.

6. None appeared on behalf of the respondent at the time of hearing.

7. We have heard the learned counsel for the appellant and carefully perused the documents on record. In the present case,

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it can be seen that the respondent claimant had raised a defense of limitation, which was validly rejected by the learned Arbitrator, that there was a *bonafide* litigation pending in the Civil Court in the nature of civil suit by the respondent claimant and, therefore, the claims, as raised, were within time. It is further seen that the learned Arbitrator has taken note of the relevant clauses of the contract, in particular, clauses 7 and 8 thereof, which provide for a mechanism to get measurement of the work done and after signing of the same by both the parties, the respondent claimant is required to furnish bills for payment. The learned Arbitrator has also taken note of the fact that as per the contract, if there was any dispute with respect to any item, he must raise a dispute within a week from the date when such measurement becomes final and binding on the contractor. As per the contract, it was the Engineer of the appellant company who prepared the bill after finality of the measurements in the measurement book. The learned Arbitrator has also recorded that the respondent claimant has not submitted a single monthly running bill in accordance with the contract. Further, the representative of the contractor was present at the time of

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taking of the measurement. The company engineers had followed the procedure as required by the contract when the measurements are taken and thereafter, they have prepared the monthly bills. The representative / Director of the respondent claimant has signed the measurement books as to its correctness and received payment of the monthly bills as calculated on the basis of the measurement books. The learned Arbitrator records that this procedure as per the contract is followed till 27th running bill came to be prepared and paid in accordance with the measurement books. That, thereafter, the respondent claimant has submitted 28th bill on the ground of alleged escalation, which also came to be paid by the appellant company herein. That, thereafter, the respondent claimant has come out with a final bill for the entire period of contract running into 2 ½ years for the items by calling them extra work and thereby giving a go-bye to the terms of the agreement and the procedure envisaged under the contract. The learned Arbitrator has also observed that this final bill was not based on the measurement done as per the measurement book under the contract and which was signed by the partners of the

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respondent claimant and duly paid up by the company. The learned Arbitrator while considering this claim of the respondent claimant had called upon it to produce its books of accounts regarding material, vouchers for the period of contract, wage book, wage slips and relevant documentary evidence to show that he had paid higher charges and to substantiate its claim for escalation. It is specifically recorded in the award that the respondent claimant did not produce any material towards the proof for this claim of escalation. The learned Arbitrator has accordingly observed that in view of the measurements recorded for the work done, which has been duly countersigned by the respondent claimant and which had become final upto and including 28th bill, which was also paid up by the appellant company in terms of clauses 7 and 8 of the contract, the said issue had become final between the parties in terms of the contract. Further, it is observed by the learned Arbitrator that once an issue becomes final in terms of the contract between the parties, the Arbitrator loses its jurisdiction to go into such dispute, more so when no objection is raised by the respondent contractor/ claimant as per the terms of the

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contract executed between the parties within the stipulated time of one week. We do not find any fault either in law or in the facts and circumstances of the case as per the terms of the contract that the learned Arbitrator has erred on this count. The learned Arbitrator has rightly rejected such claim of the respondent claimant.

8. Further, since the escalation was claimed on various items, it was the advocate and the Power of Attorney for the respondent claimant who had suggested that the claim No.1 be decided on the basis of the submissions which came to be agreed to by the appellant company and accordingly, by consent, such a procedure was adopted to decide the claim No.1 of the respondent claimant. Such a procedure cannot be said to be unknown to law or contrary to the public policy. Further, the learned Arbitrator has given cogent reasons based on the evidence before him while deciding such claim.

9. With respect to claim No.2, the learned Arbitrator has specifically held that the claim of Rs.99,464.39 is *de hors* any evidence. It is specifically recorded that the respondent

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claimant did not produce any evidence to show that it had paid higher prices than those prevailing on the date when the contract was signed. Further, it is also specifically observed that the claim in respect of escalation also fails since the condition as prescribed by clause 10(c) of the contract has not been complied with by the respondent claimant. Thus, we find no infirmity in respect of the rejection of this claim by the learned Arbitrator.

10. It is further seen that the counter-claim as made by the appellant company herein has also been cogently dealt with by giving proper reasons by the learned Arbitrator. The learned Arbitrator has decided the disputes between the parties within the parameters of the contract/ agreement executed by them and on the basis of the evidence which is produced on record by both the parties. We do not find any error in the award as passed by the learned Arbitrator.

11. Coming to the impugned judgment and order, we find that the learned District Judge has decided the application under Section 34 of the Arbitration Act as an Appellate Court ignoring

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the provisions of Section 34 of the Arbitration Act. The findings as recorded by the learned District Judge are based on re-appreciation of evidence, which is not permissible. We find that the learned District Judge has re-appreciated all the claims, counter-claims, documents and the evidence on record while allowing the application under Section 34 of the Arbitration Act.

12. It is now well settled that the standard of scrutiny of award can be done only on the grounds envisaged under Section 34 of the Arbitration Act. Judicial review and re-appreciation of evidence are impermissible unless it is made out that the view taken by the Arbitrator is based on patent illegality or on the interpretation of the facts and terms of the contract, which are absolutely perverse. The Court does not sit in appeal over the arbitral award and can only interfere on merits on the limited ground as provided under Section 34(2)(b)(ii), if the award is against the public policy of India, and the award should be in compliance with the Statutes and judicial precedents while adopting a judicial approach and in compliance of the principles of natural justice. Further, it is well settled by the decisions of the Hon’ble Apex Court that patent illegality would constitute

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contravention of the substantive law of India, contravention of the Arbitration and Conciliation Act, 1996 and contravention of the terms of the contract. But, the interference by Courts in an arbitral award will not entail review on the merits of the dispute and has to be limited only to situations where it is found that the findings of the Arbitrator are arbitrary, perverse, shocking the conscience of the Court and where the illegality goes to the root of the matter. In the present case, we find that the view taken by the learned Arbitrator was a plausible view and in terms of the contract entered into between the parties. It is well-settled that the awards which contain reasons, when interpreting the contractual terms, are not to be interfered with lightly. Re-appreciation of evidence is not permissible. The learned Arbitrator has construed the terms of the contract in the correct perspective and hence, it was not open for the learned District Judge to interfere with the award.

13. Further, we find that no manifest illegality has been shown in the award before the learned District Judge nor any finding to that effect has been recorded by the learned District Judge. Further, there are apparent contradictions. In overall view of

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the matter, we find that the jurisdiction exercised by the learned District Judge under Section 34 of the Arbitration Act is contrary to the provisions contained therein, bad in law and hence, cannot be sustained.

14. In view of the aforesaid observations, the present First Appeal is ALLOWED. The impugned judgment and order dated 31.3.2009 passed by the learned 7th Additional District Judge, Vadodara in Arbitration Misc. Application No.160 of 2002 is accordingly quashed and set aside. The award dated 3.6.2002 passed by the learned Arbitrator is upheld and restored. No order as to costs.

Sd/-
(SUNITA AGARWAL, CJ)

Sd/-
(ANIRUDDHA P. MAYEE, J.)

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