

THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE
AND
THE HON'BLE SRI JUSTICE J.SREENIVAS RAO

CIVIL MISCELLANEOUS APPEAL No.1079 OF 2006

JUDGMENT: *(Per the Hon'ble the Chief Justice Alok Aradhe)*

Mr. K.R.S.Prakash Rao, learned counsel representing Ms. A.V.S.Laxmi, learned counsel for the appellant.

Mr. Srinivasa Rao Boduluri, learned counsel for the respondent No.1 appeared through video conferencing.

2. This appeal under Section 37(1) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") has been filed against the judgment dated 24.07.2006 passed by the Court of the III Additional Chief Judge, City Civil Court, Hyderabad (hereinafter referred to as "the Commercial Court") by which the objection preferred by the appellant under Section 34 of the 1996 Act has been dismissed. In order to appreciate the challenge of the appellant to the order impugned in this appeal, relevant facts need mention, which are stated infra.

3. The Andhra Pradesh State Trading Corporation (hereinafter referred to as “the Corporation”) entered into an agreement on 27.07.1995 with Government of Bangladesh for supply of 50,000 Metric Tons (MTs) of non-basmati parboiled rice. The Corporation entrusted the work to three sub-contractors. Accordingly, a sub-contract dated 01.11.1995 for supply of 12,500 MTs of rice was executed between the appellant and the respondent No.1 (hereinafter referred to as “the sub-contractor”). Thereafter, a supplemental deed of agreement was executed on 23.02.1996. The sub-contractor furnished on 11.03.1996, a performance bank guarantee of Rs.56,09,275/-. The Corporation invoked the said bank guarantee on 26.11.1998 on the ground that the sub-contractor has caused the breach of performance of the contract. The sub-contractor filed a suit, namely O.S.No.1329 of 1998 seeking an order of injunction against the encashment of the bank guarantee. In the aforesaid civil suit, interim order of *status quo* was granted and subsequently, the civil suit was dismissed on 19.11.1999.

4. The sub-contractor moved an application under Section 11(6) of the 1996 Act, namely A.A.No.11 of 1999 seeking appoint of an arbitrator. A Bench of this Court by an order dated 13.10.1999 appointed a former Judge of the Andhra Pradesh High Court as sole arbitrator. The arbitral tribunal issued a notice to the parties to appear on 22.11.1999. However, the appellant did not appear on 22.11.1999 and the proceedings before the arbitral tribunal was adjourned to 27.11.1999. On the said date, the Corporation did not appear. Thereupon, the arbitral tribunal, as an interim measure, restrained the Corporation from encashing the bank guarantee dated 11.03.1996. The proceedings were posted for 11.12.1999. However, on 11.12.1999, the proceedings were adjourned to 18.12.1999 which was attended by the Corporation as well as the sub-contractor. On 27.12.1999, the Corporation requested for grant of time to file the counter. The Corporation thereupon filed an application on 05.03.2000 seeking vacation of the interim order which was decided by the arbitral tribunal on 27.03.2000. Thereupon, the Corporation filed another application seeking vacation of the interim order on

01.04.2000 which was decided by the arbitral tribunal vide order dated 03.04.2000.

5. The sub-contractor made several claims before the arbitral tribunal. The arbitral tribunal by an award dated 01.06.2000 allowed some of the claims and rejected the remaining claims. The arbitral tribunal awarded the claim of the sub-contractor to the extent of Rs.98,98,687/- along with interest 21% per annum.

6. The Corporation challenged the aforesaid award in a petition under Section 34 of the 1996 Act, *inter alia*, on the ground that reasonable opportunity of hearing was not given to the Corporation, the award was passed in hot haste, and while passing the award the arbitral tribunal misinterpreted the terms of agreement and the impugned order suffers from patent illegality. The validity of the award is also challenged on the ground that the arbitral tribunal erred in granting *ex parte* order restraining the Corporation from encashing the bank guarantee and after a long lapse of time, i.e., on 03.04.2000, the orders were passed on an application seeking vacation of

stay. The trial Court vide impugned order dated 24.07.2006 has dismissed the objection filed by the Corporation. Hence, this Appeal.

7. Learned counsel for the Corporation submitted that reasonable opportunity was not given to the Corporation in the proceeding before the arbitral tribunal and the award was passed in haste. It is further submitted that the arbitral tribunal erred in granting *ex parte* order restraining the Corporation from encashing the bank guarantee. It is submitted that the arbitral tribunal misinterpreted the terms of agreement and the award passed by the arbitral tribunal is patently illegal. It is contended that the arbitral tribunal grossly erred in relying on Section 39 of the Sale of Goods Act, 1930, which had no application to the facts and circumstances of the case. In support of his submission, reliance has been placed on the decision of the Supreme Court in **Delhi Metro Rail Corporation Limited vs. Delhi Airport Metro Express Private Limited**¹.

¹ (2024) 6 SCC 357

8. On the other hand, learned counsel for the respondent No.1 has supported the impugned order and has submitted that reasonable opportunity was given to the Corporation to appear in the proceeding before the arbitral tribunal. It is contended that out of several claims, only few of the claims have been awarded. It is urged that no ground under Section 34 of the 1996 Act is made out warranting interference with the award passed by the arbitral tribunal.

9. We have considered the submissions made on both sides and have perused the record.

10. The relevant extract of Section 34 of the 1996 Act as it stood prior to its amendment in the year 2015 reads as under:

“34. Application for setting aside arbitral award.-

(1) xxxxxxxx.

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnish proof 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 - Without prejudice to the generality of sub clause (ii) of clause (b) it is hereby declared for the avoidance of any doubt that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

...”

11. From a careful scrutiny of the decisions of the Supreme Court in **Rashtriya Ispat Nigam Ltd. vs. Diwan Chand Ramasaran**², **Sutlej Construction Ltd. vs. Union Territory of Chandigarh**³ and **Post Graduate Institute of Medical Education and Research, Chandigarh vs. Kalsi Construction Company**⁴, the following principles emerge with regard to scope of interference under Section 34 of the 1996 Act:-

² (2012) 5 SCC 306

³ (2018) 1 SCC 718

⁴ (2019) 8 SCC 726

(i) Even though Arbitral Tribunal may have committed mere error of fact or law in reaching its conclusion on the disputed questions of law submitted to it for adjudication, the Court has no jurisdiction to interfere with the award.

(ii) The Court while dealing with application under section 34 of the Act, cannot act as an appellate Court and substitute its own findings and cannot correct error of law or fact.

(iii) If two views are possible then, the view taken by the Arbitrator shall prevail and the court would not interfere with the Award passed.

(iv) The Arbitrator cannot re-write the contract in the guise of interpretation.

(v) If an Award on the face of it, is passed in violation of statutory provisions, it cannot be said to be in public interest, as the same is likely to affect administration of justice. Thus an award can be set aside if it is contrary to fundamental policy of Indian law, the interest of India, Justice or Morality or if it is patently illegal and such illegality goes to the root of the matter.

(vi) The Award can be interfered with even if it is contrary to terms of the contract, as the same would be patently illegal and opposed to public policy of India.

(vii) The expression 'Fundamental Policy of Indian Law' would *inter alia* include that every determination by Court or Authority which affects the right of citizen must adopt judicial approach, and should record reasons in support of its decision and perversity and irrationality of decision would be tested on the touch stone of Wednesbury Principle.

(viii) In the absence of agreement to the contrary between the parties section 31(7)(a) of the Act confers jurisdiction on the arbitral tribunal to award interest unless otherwise agreed by the parties, at such rate as the arbitral tribunal considers necessary.

12. The scope of Section 37 of the 1996 Act has also been delineated by a three-Judge Bench of the Supreme Court in **State of Chattisgarh vs. Sal Udgyog Private Limited**⁵ and it was held that the grounds on which the award can be set aside

⁵ 2021 SCC OnLine 1027

can also be raised in an appeal. Thus, the Court while exercising jurisdiction under Section 37 of the 1996 Act has power akin to a Court dealing with the objections under Section 34 of the 1996 Act.

13. In the backdrop of the aforesaid settled legal principles, we may now advert to the facts of the case in hand. Admittedly, the Corporation had entered into an agreement on 01.11.1995 for sale and purchase of non basmati parboiled rice with Government of Bangladesh. The Corporation entered into a sub contract dated 23.02.1996 with the sub contractor. A Bench of this Court by an order dated 13.10.1999 passed in A.A.No.11 of 2019 appointed the sole arbitrator to resolve the dispute between the parties.

14. The arbitral tribunal entered into a reference on 12.11.1999 and issued the notice to the parties on 12.11.1999. The parties entered appeared through their counsel and the sub contractor sought time for filing claim statement and documents till 27.11.1999. The sub contractor filed the claim petition along with documents on 27.11.1999. However, on

the said date, no appearance was made on behalf of the Corporation. The proceeding were adjourned to 11.12.1999. On account of personal difficulty, the arbitral tribunal could not hold the sitting and the next date in the proceeding was fixed for 18.12.1999.

15. On the said date, a counsel appeared on behalf of the Corporation and sought time to file the counter on behalf of the Corporation. The proceeding therefore were adjourned to 16.01.2000. On the said date, Corporation filed a counter and a counter claim. Thereafter, the sub contractor filed the rejoinder to the counter and counter claim of the Corporation. With the consent of the parties, the arbitral tribunal marked the documents on behalf of the parties. Ex.C1 to C34 except Ex.C6 were marked on behalf of the sub contractor, whereas documents, namely B.1 to B.268, were marked on behalf of the Corporation.

16. The parties made oral submissions. The counsel for sub contractor was heard on 19.02.2000, 26.02.2000 and completed his arguments on 28.02.2000. The counsel for the

Corporation made his submissions on 28.02.2000, 05.03.2000, 11.03.2000, 17.03.2000 and 21.03.2000. The sub contractor on 25.03.2000, filed additional counter claim and the proceeding before the arbitral tribunal were adjourned to 10.04.2000. On the said date, the proceeding were adjourned to 24.02.2000 and eventually fixed for 03.05.2000. On the said date, the Corporation sought time seeking vacation of the interim order granted by the arbitral tribunal. In the light of the order dated 28.04.2000 in CMA No.1121 of 2000, in which a direction was given by this Court to dispose of the arbitration proceeding expeditiously, the prayer for adjournment made on behalf of the Corporation was declined and the proceeding were fixed for 10.05.2000.

17. On the said date, the Corporation filed an application under Sections 12 and 13 of the Act. The proceedings therefore, were fixed for 11.05.2000 for filing counter to the aforesaid application. The said counter was filed on 11.05.2000 and the proceedings were fixed for filing reply on 13.05.2000. On 13.05.2000, the Corporation filed a reply to the counter and sought an adjournment on the ground that

the arguing counsel was unwell. The proceedings before the arbitral tribunal were fixed for 15.05.2000.

18. Thereafter, the parties were informed by the arbitral tribunal that the case shall be heard between 20.05.2000 to 26.05.2000 on day-to-day basis from 10.30 am to 5.00 pm. However, again on 20.05.2000, Corporation sought adjournment. Thereupon the arbitral tribunal fixed the proceeding on 21.05.2000. The counsel for the sub contractor argued on 22.05.2000 and 23.05.2000. The arbitral tribunal fixed the proceedings from 24th to 26th May 2000 to enable the Corporation to address the arguments. However, none appeared on behalf of the Corporation. The arbitral tribunal therefore closed the arguments on 26.05.2000 and reserved the matter for passing an award. An award was passed on 01.06.2000.

19. From the aforementioned facts, it is evident that the contention of the Corporation that reasonable opportunity was not given to it in the proceeding before the arbitral tribunal and the award was passed in haste, does not deserve

acceptance. The arbitral tribunal has power to grant an interim order under Section 17 of the Act and therefore, merely because the arbitral tribunal passed an *ad interim* order against the corporation restraining it from encashing the bank guarantee, the same does not vitiate either the proceeding or the award passed by the arbitral tribunal in any manner.

20. From careful scrutiny of the agreement dated 27.07.1995 executed between the Corporation and the Government of Bangladesh and sub contract dated 01.11.1995 executed between the Corporation and the sub contractor, it is evident that the clauses of the aforesaid agreements are *pari materia*. Under the sub contract dated 01.11.1995, the sub contractor had to supply 12,500 MTs of par boiled rice on or before 20th November, 1995. The sub contractor was also required to open an irrevocable inland letter of credit in favour of the Corporation. Clause 8 of the sub contract mandated the sub contractor to furnish performance guarantee in favour of the Corporation to the tune of Rs.53,82,031/- i.e., 5% of the total value of the sub contract. Under clause 12 of the sub contract the cargo was required to be sold by the Government of

Bangladesh. The sub contract contains the stipulations with regard to packing, marking, quality inspection, sampling and shipment transport etc.

21. After the execution of the sub contract, a meeting on 08.11.1996 was held between the Corporation and the sub contractor. The minutes of the meeting have been placed on record as Ex.C3. In the aforesaid meeting, the parties agreed to modify the terms of the contract and a supplemental agreement (Ex.C4) dated 23.02.1996 was executed. It was mutually agreed that instead of furnishing the bank guarantee, the sub contractor shall supply 1000 Mts of rice to the Corporation and value of the said quantity will be withheld towards performance guarantee and the sub contractor can operate the packing credit limit instead of inland letter of credit. The schedule of shipment was extended from 15.03.1996 to 20.11.1996.

22. The sub contractor furnished the performance bank guarantee on 11.03.1996 and supplied 11,885.700 MTs of parboiled rice and submitted clean bills of lading which were

received and accepted by the Corporation. However, instead of making payment of the amount to the sub contractor, the Corporation on 30.04.1996 unilaterally debited a sum of Rs.67,19,744/- on the ground that Government of Bangladesh has not released the aforesaid amount. The sub contractor thereupon raised a demand on 10.12.1996 (Ex.C6) seeking payment of the aforesaid amount. The Corporation sometime in the month of November, 1998 tried to encash the bank guarantee furnished by the sub contractor. The trial Court by an order dated 30.11.1998 passed in OS No.1329 of 1998 restrained the Corporation from encashing the bank guarantee.

23. The Corporation contested the claim of the sub contractor *inter alia* on the ground that sub-contractor was required to satisfy the government of Bangladesh with regard to quality and quantity of the parboiled rice and was responsible to the shipping schedule. The Corporation made a counter claim for a sum of Rs.51,30,112.63. However, it was admitted that sub contractor had supplied 11885.700 MTs Of parboiled rice in four vessels. However, a stand was taken that there was a shortfall in the quantity of parboiled rice

supplied to the Government of Bangladesh, and the rice was not of prescribed quality.

24. By way of rejoinder, the sub-contractor pleaded that the terms of the main contract are integral part of the sub contract and it was required to supply 12,500 MTs of parboiled rice at the rate of Rs.8611.25 per MT.

25. The arbitral tribunal found that admittedly 11885.700 MTs of parboiled rice was supplied in four vessels to the Government of Bangladesh. The arbitral tribunal further found that admittedly the sub-contractor was not associated with drawing of samples, at the time of post landing inspection. It was further found that the action of Government of Bangladesh in not associating the sub-contractor with the drawing of samples is *dehors* the contract and the sub-contractor cannot be made liable for the consequences. It was held that the sub-contractor had nowhere admitted that it had supplied sub standard parboiled rice. The arbitral tribunal further held that the sub-contractor did not commit any breach and performed its part of contract under the contract

dated 01.11.1995 as amended by supplement deed dated 23.02.1996, by entrusting the goods to the carrier.

26. The sub-contractor made claims under different heads. The arbitral tribunal by an award dated 01.06.2000 decreed the claim of the sub contractor as follows:

“(1) Under Claim No:1:

- (a) Principal sum of Rs.18,50,445/- and interest thereon at the rate of 21% p.a from 30.04.96 till the date of payment.
- (b) Interest on illegal debit and delayed payment of Rs.48,69,299 at the rate of 21% p.a for the period between 30.4.96 to 30.11.96.

(2) Under Claim No.2(a):

Principal amount of Rs.99,000/- and interest thereon at the rate of 21% p.a from 31.3.96 to till the date of payment.

(3) Under Claim No:2(f):

Principal amount of Rs.4,50,000/- and interest thereon at the rate of 21% p.a from 31.3.96 to till the date of payment.

(4) Under Claim No.2 (h):

Principal sum of Rs.4,14,919/- and interest thereon at the rate of 21% p.a from 31.3.96 to till the date of payment.

- (5) Under Claim No.2(i):
Principal sum of Rs.8,27,508/- and interest thereon at the rate of 21% p.a from 30.4.96 to till the date of payment.
- (6) Under Claim No.3:
Principal sum of Rs.2,54,891/- and interest thereon at the rate of 21% p.a from 30.12.96 to till the date of payment.
- (7) Under Claim No.5:
Principal sum of Rs.3,92,649/- and interest thereon at the rate of 21% p.a from 27.11.99 to till the date of payment.
- (8) Under Claim No.6:
The Claimant is entitled for return of Bank Guarantee dt:11.3.96 furnished in favour of the Respondent for Rs.56,09,275/- duly discharged and the claimant is no more under an obligation to keep the Bank guarantee alive and the Claimant is also entitled to recover the Bank guarantee charges on the sum of Rs.56,09,275/- covered under the said Bank guarantee at the rate of 2% p.a. from 27.11.99 to till the date of discharge of the same.”

27. The arbitral tribunal rejected rest of the claims made by the sub-contractor, as well as the counter claim made by the Corporation.

28. The trial Court by impugned order dated 24.07.2006, *inter alia*, held that the Corporation has failed to prove that proceeding before the arbitral tribunal are conducted with bias or against the rules and procedure. The trial Court further found that the award passed by the arbitral tribunal cannot be said to be illegal. It was further held that challenge of the Corporation to the award on the ground of violation of Sections 12 and 13 of the Act is misconceived. It was also held that even if the award is erroneous on a point of law or fact, the same cannot be interfered under Section 34 of the Act. Accordingly, the petition was dismissed.

29. Thus, from perusal of the award dated 01.06.2000 as well as the order passed by the trial Court dated 24.07.2006, it is evident that the arbitral proceedings were conducted in accordance with the procedure. This Court in exercise of powers under Section 34 of the Act cannot act as court of appeal and substitute its own finding and cannot correct an error of law and fact. The award passed by the arbitral tribunal cannot be said to be in violation of any statutory provision and can by no stretch of imagination be termed as

contrary to fundamental policy of Indian law, justice or morality. The award is also not patently illegal. The contention that while passing the award, the arbitral tribunal has misinterpreted the terms and conditions of the agreement, is also misconceived. We concur with the findings recording by the trial Court that no ground for interference under Section 34 of the Act with the award is made out.

30. In the result, the appeal fails and is hereby dismissed.

Miscellaneous petitions, pending if any, shall stand closed.

ALOK ARADHE, CJ

J.SREENIVAS RAO, J

05.11.2024
Pln/vs