

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

**DIVISION BENCH: THE HON'BLE MR. JUSTICE BISWANATH SOMADDER, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**

Arb. A. No. 1 of 2022

Union of India
Represented by Executive Engineer,
Border Road Project, Division II. CPWD,
Above Post Office,
Chungthang,
North Sikkim – 737120. Appellant

versus

M/s M.G. Contractors Pvt. Ltd.,
M.G. House,
1721, Sector-4,
Panchkula Haryana – 134109. Respondent

Appeal under section 37 of the Arbitration & Conciliation Act, 1996

Appearance:

Ms Sangita Pradhan, Deputy Solicitor General of India with Ms Purnima Subba and Ms Natasha Pradhan, Advocates for the appellant.

Mr. Zangpo Sherpa, Mr. Bhaichung Bhutia and Mr. Mohan Sharma, Advocates for the respondent.

and

Arb. A. No. 2 of 2022

M/s M.G. Contractors Pvt. Ltd.,
M.G. House, 1721, Sector-4,
Panchkula – 134109 (Haryana),
*Through Shri Prem Chand Das, C/o Manoranjan Das,
Resident of C/o: Manoranjan Das, Dabgram, Dabgram 2,
Near Health Centre, Madhya Hatiya Danga,
Dabgram (P), Police Station – Bhakti Nagar,
Jalpaiguri, West Bengal – 735135.
(Authorised Representative) Appellant*

versus

Union of India
Represented by Executive Engineer,
Border Road Project, Division – II (CPWD),
Above Post Office,
Chungthang,
North Sikkim – 737120.

..... Respondent

**Appeal under section 37(1)(b) of the Arbitration &
Conciliation Act, 1996**

Appearance:

Mr. Zangpo Sherpa, Mr. Bhaichung Bhutia and Mr. Mohan Sharma,
Advocates for the appellant.

Ms Sangita Pradhan, Deputy Solicitor General of India with Ms Purnima
Subba and Ms Natasha Pradhan, Advocates for the respondents.

Date of hearing : 3rd May, 2024
Date of judgment : 28th May, 2024

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. We propose to dispose the above two connected appeals under Section 37 of the Arbitration and Conciliation Act, 1996 assailing the final judgment dated 27.12.2021, one filed by the Union of India and the other by M/s M.G. Contractors Pvt. Ltd. The Union of India is aggrieved by the finding and grant of Claim no.7; associate interest under Claim No.13 and associate GST under Claim No.14, by the learned Sole Arbitrator and the challenge to it as being barred by limitation which has been rejected by the Learned Commercial Court, North Sikkim at Mangan. M/s M.G. Contractors Pvt. Ltd. assails the impugned judgment to the extent that the

learned Commercial Court *suo motu* modified the Award dated 23.03.2021 passed by the learned Arbitrator.

2. Before we deal with the issues raised in the two connected appeals, a brief summary of facts is necessary. Tender was invited by CPWD, Chungthang, for construction of ITBP road sometime in the year 2010. In response, M/s M.G. Contractors Pvt. Ltd. submitted its tender which was found to be lowest, accepted and awarded in its favour. The value of work awarded under the contract was Rs.70,65,65,490/- (Rupees seventy crores, sixty-five lakhs, sixty-five thousand, four hundred and ninety only) which was 24.55% above the estimated cost put to tender of Rs.56,72,94,653/- (Rupees fifty-six crores, seventy-two lakhs, ninety-four thousand, six hundred and fifty-three only). Twenty-four months to be reckoned from 22nd day after the date of issue of acceptance letter dated 10.09.2010 was the time allowed for carrying out the work. The stipulated date of start of work was 02.10.2010 and the date of completion was 01.10.2012. The Agreement was executed in the year 2011. The work was delayed due to various reasons and finally completed on 30.06.2015. Certain disputes arose between the parties and M/s M.G. Contractors Pvt. Ltd. invoked Arbitration Clause 25 of the Agreement. The Sole Arbitrator was appointed who entered reference vide letter dated 14.03.2020. M/s M.G. Contractors Pvt. Ltd. made 15(fifteen) claims by filing their Statement of Claims. The Union of India did not prefer any counter-claim. The total claim made by M/s M.G. Contractors Pvt. Ltd. was Rs.29,11,26,419/- (Rupees twenty-nine crores, eleven

lakhs, twenty-six thousand, four hundred and nineteen only) along with interest, GST and cost as actual.

3. Claim No.7 was for an amount of Rs.8,16,41,135/- (Rupees eight crores, sixteen lakhs, forty-one thousand, one hundred and thirty-five only) claimed as due and payable for escalation compensation for period October 2012 to June 2015.

4. Claim No.13 was for interest at the rate of 18% from due date to date of payment.

5. Claim No. 14 was the claim for GST at applicable rate as per actual on the claim amounts.

6. The learned Sole Arbitrator vide his Award dated 23.3.2021, awarded a sum of Rs.12,80,94,368/- (Rupees twelve crores, eighty lakhs, ninety-four thousand, three hundred and sixty-eight only) along with interest and GST under Claim No.13 and Claim No.14 in favour of M/s M.G. Contractors Pvt. Ltd. The Sole Arbitrator did not grant Claim Nos. 2, 4, 5, 8, 10, 11 and 12.

7. The Union of India filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 before the learned Commercial Court, being Arbitration Case No. 1 of 2021, in the matter of *Union of India vs. M/s M.G. Contractors Pvt. Ltd.* The Union of India prayed for setting aside Claim No.7 and associate interest under Claim No. 13 and associate GST under Claim No.14

granted in favour of M/s M.G. Contractors Pvt. Ltd on the ground that it was barred by limitation. The Union of India categorically asserted *"That the applicant had accepted the claim No.1,2,3,4,5,6,8,9,10,11,12,15 and associated interest under claim 13 and associated GST amount under claim 14."*

8. By the impugned judgment dated 27.12.2021, the learned Commercial Court concluded that the Award delivered by the learned Sole Arbitrator under Claim No.7 and associate interest under Claim No.13 and associate GST under Claim No.14 are not barred by law of limitation. We shall refer to this part of the impugned judgment as its first part.

9. The learned Commercial Court, however, was of the opinion that the decision given under Claim No.13, awarding interest at the rate of 8% per annum to the claimant under Claim No.1, 3, 6, 7 and 9 with effect from 17.02.2020 till the date of Award, i.e., 23.03.2021, is contrary to the provisions of Section 31(7)(b) of the Arbitration and Conciliation Act, 1996. Accordingly, the learned Commercial Court modified the Award to the extent that M/s M.G. Contractors Pvt. Ltd. is entitled for interest under Claim No. 1,3,6,7 and 9 at the rate of 8% per annum with effect from 23.03.2021 till payment of Award as per Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 barring the time period consumed during proceedings of the case before the learned Commercial Court. The learned Commercial Court, however, did not find any illegality in awarding Claim No.14. Thus, the Application under Section 34 of the

Arbitration and Conciliation Act, 1996 was partly allowed. We shall refer to this part of the impugned judgment as the second part.

10. The pivotal ground on which the Union of India challenges the impugned judgment is that since the learned Sole Arbitrator had himself considered Claim No.7 as a damage claim, as such, cause of action ought to have been reckoned from the last day of hindrance, i.e., the last day of breach of contract on 30.03.2015 instead of last day of bill on 09.03.2017 as per Article 55 of the Schedule to the Limitation Act, 1963. Although, the Union of India in its statement in defence had not taken the plea of limitation, it is submitted that the Sole Arbitrator had himself held that it was a duty cast upon him to examine whether the claims were barred by limitation and further he would be examining whether each of the claims was barred by limitation. However, the Sole Arbitrator failed to examine whether Claim No.7 was barred by limitation.

11. We are of the considered view that both these appeals can be disposed of in terms of the judgment of the Hon'ble Supreme Court in ***Project Director, National Highways No.45E and 220, National Highways Authorities of India vs. M. Hakeem and another***¹ and ***S.V. Samudram vs. State of Karnataka and Another***². In both these judgments, the Hon'ble Supreme Court has held that Section 34 does not empower the Court to modify the award passed by the Arbitrator.

¹ (2021) 9 SCC 1

² (2024) 3 SCC 623

12. In *M. Hakeem* (supra), the Hon'ble Supreme Court held that Section 34 of the Arbitration and Conciliation Act 1996 is modelled on the UNCITRAL Model Law on International Commercial Arbitration, 1985, under which no power to modify an award is given to a Court hearing a challenge to an award. It was further held that Section 34 of the Arbitration and Conciliation Act, 1996 provides only for setting aside awards on very limited grounds, such grounds being contained in sub-section (2) and (3) of Section 34. Secondly, as the marginal note of section 34 indicates, "recourse" to a Court against an arbitral award may be made by an application for *setting aside* such award in accordance with sub-sections (2) and (3). Noting the use and meaning of the word "recourse", it was held where the right itself is truncated, enforcement of such truncated right can also be only limited in nature and therefore an application can only be made to set aside an award. The Hon'ble Supreme Court held that there can be no doubt that given the law laid down by it, Section 34 cannot be held to include within a power to modify the award.

13. In *S.V. Samudram* (supra), against the total 11 claims, amounts were awarded against 9 claims. The State of Karnataka preferred a petition under Section 34 of the Arbitration and Conciliation Act, 1996. The award passed by the learned Arbitrator was modified and the State of Karnataka was directed to pay Rs.3,71,564/- (25% of tender amount) along with Rs.10,000/- as costs towards the Arbitration at 9% interest. The High Court vide its judgement under challenge before the Hon'ble Supreme Court

confirmed the modification of the arbitral award dismissing the application on the part of the appellant claimant. The Hon'ble Supreme Court was required to consider: *Whether the modification of the arbitral award as carried out by the learned Civil Judge as confirmed by the High Court was, justified within law?* While doing so, the Hon'ble Supreme Court examined its expositions on the scope to interfere with arbitral award under Sections 34 and 37 of the Arbitration and Conciliation Act, 1996. It noted that in **M. Hakeem** (supra), the Hon'ble Supreme Court had categorically held that any Court under Section 34 would have no jurisdiction to modify the arbitral award which at best, given the same to be in conflict with the grounds specified under Section 34, would be wholly unsustainable in law. It was also noted that the Hon'ble Supreme Court categorically observed that any attempt to "modify an award" under Section 34 would amount to "crossing the Lakshman Rekha". The Hon'ble Supreme Court also noted its decision on the same issue in **Dakshin Haryana Bijli Vitran Nigam Ltd. vs. Navigant Technologies (P) Ltd.**³ and the fact that the principle stood reiterated in **Larsen Air Conditioning & Refrigeration Co. vs. Union of India**⁴.

14. In the proceedings before the learned Commercial Court, whose judgment is impugned in Arb. A. No. 1 of 2022, the application under Section 34 of the Arbitration and Conciliation Act, 1996, was not for setting aside the Award as the Union of India categorically accepted the award of Claim Nos.

³ (2021) 7 SCC 657

⁴ (2023) 15 SCC 472

1,2,3,4,5,6,8,9,10,11,12,15 and associate interest under Claim 13 and associate GST under Claim No.14. Thus, the Union of India cannot seek the setting aside of Claim No.7 and associate interest under Claim No.13 and associate GST under Claim No.14 granted in favour of M/s M.G. Contractors Pvt. Ltd. That, in effect, would be to seek modification of the Award by the learned Commercial Court, which had no power to do so.

15. In Arb. A. No.2 of 2022, the contention of M/s M.G. Contractors Pvt. Ltd. that the learned Commercial Court *suo motu* modified the Award to the extent M/s M.G. Contractors Pvt. Ltd. is entitled for interest under Claim Nos. 1,3,6,7 and 9 at the rate of 8% per annum with effect from 23.03.2021 till payment of Award as per Section 31(7)(b) of the Arbitration and Conciliation Act, 1996, barring the time period consumed during proceedings of the case before the learned Commercial Court which was impermissible, must be accepted.

16. We are also of the opinion that in a proceeding under Section 37 of the Arbitration and Conciliation Act, 1996, we are not authorised to disturb concurrent findings of facts and law by the learned Sole Arbitrator and the learned Commercial Court. The learned Sole Arbitrator in paragraph 19.4 has concluded that the work was completed on 30.06.2015, bill was finalised on 9.03.2017 and arbitration was sought before the Chief Engineer of the Union of India on 17.02.2020 and thus, the arbitration was invoked within limitation period of three years from the date of finalisation of the

bill. The learned Commercial Court once again examined the issue raised by the Union of India, the relevant clauses and concluded that M/s M.G. Contractors Pvt. Ltd. completed its work on 30.06.2015 and finalised the bill on 09.03.2017. Accordingly, the learned Commercial Court was also of the opinion that the Award under Claim No.7 and its associate interest under Claim No.13 and associate GST under Claim No.14 was not barred by the law of limitation. In the circumstances, the Union of India has failed to make out a case for interference either under Section 34 or under Section 37 of the Arbitration and Conciliation Act, 1996.

17. We are, therefore, of the view that the first part of the impugned judgment of the learned Commercial Court, vis-à-vis, the challenge of the Union of India in its application under Section 34 of the Arbitration and Conciliation Act, 1996 need not be interfered with. The applications by the Union of India under Sections 34 and 37 were not maintainable. Accordingly, we dismiss Arb. A. No. 1 of 2022.

18. The second part of the impugned judgment, however, reflects that the learned Commercial Court on its own examined the Award minutely and modified the Award, vis-à-vis, Claim No.13. While doing so the learned Commercial Court exceeded its jurisdiction and crossed the "Lakshman Rekha". In view of the expositions of the law by the Hon'ble Supreme Court in **M. Hakeem** (supra) and reiterated in **S.V. Samudram** (supra), we have no

hesitation in setting aside the impugned judgment to the extent it modifies the Award. Accordingly, Arb. A. No. 2 of 2022 is allowed.

19. The two appeals before us stand disposed of accordingly.

20. Parties to bear their respective cost.

(Bhaskar Raj Pradhan)
Judge

(Biswanath Somadder)
Chief Justice

Approved for reporting : **Yes/No**
Internet : **Yes/No**

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