* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

FAO 271/2019 & CM. APPL. 31033/2019

Reserved on : 09.11.2022
Pronounced on : 31.01.2023

IN THE MATTER OF:

MAHANAGAR TELEPHONE NIGAM LTD. ..... Appellant

Through: Ms. Suruchi Suri, Advocate.

versus

M/S RALHAN CONSTRUCTION COMPANY ..... Respondent

Through: Ms.Anusuya Salwan, Ms.Nikita Salwan, Mr.Bankim Garg and Mr.Rachit Wadhwa, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. By way of present appeal filed under Section 37(1)(b) of the Arbitration & Conciliation Act, 1996 (hereinafter, referred to as '*the Arbitration Act'*), the appellant has assailed order dated 16.04.2019 passed by the learned ADJ-07, South-East, Saket Courts, New Delhi in Arb. No. 212/2018, whereby its objections under Section 34 of the Arbitration Act to Award dated 09.05.2018 (and subsequent amendments thereto) were dismissed.

2. Though the present appeal was filed by the appellant seeking setting aside of the order dated 16.04.2019, the Award dated 09.05.2018, and the subsequent amendments thereto, learned counsel for the appellant, on instructions, restricted her challenge during the course of submissions only to respondent's claim Nos. 2 and 3, which were in relation to release of balance payment of security deposit lying with the Department, directed to be released to the respondent vide the Award.

3. Facts of the case, pithily put, are that the appellant had floated a tender dated 20.11.2007 for the civil and electrical portion of construction of Automobile Workshop-cum-Administrative building at *Rohini, Sector-VI, Delhi*. The said work was awarded to the respondent for a consideration amount of Rs. 18,68,11,252/-. The time stipulated for completion of the work was 18 months from the date of issuance of letter of award. Purportedly, the civil component of the work was completed on 31.12.2011 and the electrical part was completed on 07.06.2013.

A dispute arose between the parties relating to payments under the agreement, which led the respondent to initiate arbitration proceedings in terms of Clause 53 thereof. The matter was adjudicated by a Sole Arbitrator, who passed an Award dated 09.05.2018, allowing all claims of the respondent either partially or fully, except claim Nos. 18 and 20. Subsequently, two amendments dated 11.05.2018 and 12.05.2018 were made to the Award by the Arbitrator.

The appellant filed its objections under Section 34 of the Arbitration Act before the learned District and Sessions Judge, West, Saket Courts, praying that the Award dated 09.05.2018 (and the subsequent amendments

thereto) be set aside. However, the objections were dismissed vide the order impugned herein, i.e. order dated 16.04.2019.

4. Learned counsel for the appellant contended that the Arbitrator erred in interpreting Clause H, Special Conditions of Contract in the Agreement between the parties to conclude that it was the appellant's responsibility to file application for obtaining completion/occupancy certificate from local authorities. It was further contended that in reaching the above conclusion, the Arbitrator also erred in relying upon the '*Hand Book of Building Permit Procedure 2006, Delhi Development Authority*', as the same was not executed between the parties and was an extraneous document filed by the respondent. On strength of the aforesaid, it was argued that the impugned Award was arbitrary, capricious and beyond the scope of mutually agreed terms in the contract entered between the parties. Learned counsel also contended that the concerned Arbitrator misconducted himself by carrying out the proceedings in a biased and hasty manner. In support of her contentions, she relied on the decision in M/s L.G. Electronics India (P) Ltd. *v.* Dinesh Kalra reported as **2018 SCC OnLine Delhi 8367.**

5. On the other hand, Ms. Salwan, learned counsel for the respondent, defended the arbitral Award as well as the impugned order by submitting that it was the duty of the architect engaged by the appellant to apply for the completion certificate. In this regard, reference was made to an agreement executed between the appellant and the architect namely *M/s. R.K. & Associates*. It was also submitted that the said agreement was executed in relation to the subject work order and the respondent's obligation was to

make efforts and co-ordinate *after* the appellant had filed the application for obtaining the completion certificate.

Learned counsel further submitted that the work under the contract was completed in the year 2011 and even during the pendency of the arbitral proceedings, a suggestion was given that if the appellant files the requisite application, the respondent would also make the necessary efforts, but the appellant did not agree. Lastly, it was contended that the dispute raised herein does not fall under the scope of interference as outlined in Section 37 of the Arbitration Act. In support of the contentions, learned counsel placed reliance on the following decisions:

i) Food Corporation of India *v.* A.M. Ahmed & Co. and Another reported as **(2006) 13 SCC 779**;

ii) K.N. Sathyapalan (Dead) by Lrs *v.* State of Kerala and Another reported as **(2007) 13 SCC 43.**

iii) NTPC Ltd. *v.* Deconar Services Pvt. Ltd. reported as **2021 SCC OnLine SC 498**; and

iv) Reliance Industries Ltd. *v.* Gail (India) Ltd. reported as **2020 SCC OnLine Del 2041**;

v) UBV Infrastructure Ltd. *v.* National Highways Authority of India reported as **2020 SCC OnLine Del 60**;

vi) Manikaran Power Limited *v.* Valuehunt Advisors LLP reported as **2021 SCC OnLine Del 2774**;

6. I have heard learned counsels for the parties and perused the entire material placed on record.

7. The present appeal having been filed under Section 37 of the Arbitration Act, challenging dismissal of the appellant's objections under

Section 34, it is deemed apposite to recapitulate the law surrounding these provisions. In this regard, reference may profitably be made to Manikaran Power Limited (Supra), where a Division Bench of this Court, while declining to interfere in exercise of powers under Section 37 of the Arbitration Act, noted as follows:

> *"**15.** The counsel for the respondent, besides reminding us of narrow scope of interference in the proceedings under Section 37 of the Arbitration Act, has contended that in the present case there are concurrent findings in both fact and law in favour of the respondent and are not interfereable at this stage. Attention is drawn to paragraphs 8 to 10 of Reliance Industries Ltd. v. GAIL India Limited and to MMTC Ltd. v. Vedanta Limited (2019) 4 SCC 163. Reference is also made to Bharat Sanchar Nigam Limited v. Aksh Optifibre Limited (2021) 277 DLT 348 (DB). It is argued that it has been held therein that a plausible view taken by the Arbitral Tribunal is not to be disturbed."*

8. The scope of interference in an appeal under Section 37 of the Arbitration Act stands well-defined by a catena of decisions, which include UBV Infrastructure Ltd. (Supra), where this Court held as follows:

> *"7. At the outset, we may delineate the scope of interference in a Section 37 petition, as was discussed by us in a recent judgment in Ministry of Youth Affairs & Sports v. Swiss Timing Ltd., reported as 2019 SCC Online Del. 10934, relevant paras whereof are reproduced herein below:-*
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> *"19. We are also mindful of the law on interference by the courts in respect of findings of facts based on appreciation of evidence, returned by the Arbitral Tribunal. In Sutlej Construction Limited v. Union Territory of Chandigarh reported as(2018) 1 SCC 718 the Supreme Court has held as follows: -*

"11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the Court and would not include what the Court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be "justice". Associate Builders v. DDA, (2015) 3 SCC 49.

12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of reappreciating the evidence as the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. (Sudarsan Trading Co. v. State of Kerala [Sudarsan Trading Co. v. State of Kerala, (1989) 2 SCC 38; Harish Chandra & Co. v. State of U.P., (2016) 9 SCC 478 and Swan Gold Mining Ltd. v. Hindustan Copper Ltd., (2015) 5 SCC 739.

***13.** The learned Single Judge ought to have restrained himself from getting into the meanderings of evidence appreciation and acting like a second appellate court. In fact, even in second appeals, only questions of law are to be determined while the first appellate court is the final court on facts. In the present case, the learned Single Judge has, thus, acted in the first appeal against objections dismissed as if it was the first appellate court against a decree passed by the trial court."*

20. In Ssangyong Engineering Construction Co. Ltd. v. National Highways Authority of India reported as 2019 SCC Online SC 677, the Supreme Court has reiterated the aforesaid view in the following words:-

> *35. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar"*

understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

36. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, 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". This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality."

*21. Reliance is also placed on a recent judgment dated 18.10.2019 passed by the Supreme Court in **SLP No.13117/2019**, The State of Jharkhand v. HSS Integrated SDN, wherein it has been emphasised that the Award passed by an Arbitral Tribunal can be interfered with in proceedings under Sections 34 and 37 of the A&C Act only in a case where the finding is perverse and/or contrary to the evidence and/or the same is against public policy. In the instant case, none of the above circumstances exist for interference."*

***8.** Thus a scrutiny conducted under Section 37 of the Act is more in the nature of a judicial review, only to consider as to whether the learned Single Judge, in exercise of the powers under Section 34 of the Act has overlooked any patent error that may have crept in the Award or has taken a glaringly preposterous and legally unsustainable view, which would call for interference."*

9. This Court also analysed the scope of Section 34 of the Arbitration Act in Reliance Industries Ltd. *v.* Gail (India) Ltd. (Supra) and observed thus:

*"**31.** One of the key questions is whether the interpretation given by the Arbitrator can be impugned under Section 34 of the Act.*

The learned single judge relied upon the decision of the Supreme Court in Associate Builders (supra), wherein it has been held that, "the construction of terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair mind need or reasonable person could do". In the said judgment, the Supreme Court referred to the earlier judgments in the case of Mcdermott International INC v. Burn Standard Company Limited, (2006) 11 SCC 181, wherein it has been held that ***"once, thus it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the fact of the award"****. In MSK Projects India (JV) Limited v. State of Rajasthan, (2011) 10 SCC 573, the Supreme Court has held that if an Arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with the matter not allotted to him, he commits a jurisdictional error.*

32. *In Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran, (2012) 5 SCC 306 the Apex Court has held thatif a clause was capable of two interpretations and the view taken by the arbitrator was clearly a possible one if not a plausible one, it is not possible to say that the arbitrator had travelled outside his jurisdiction or that the view taken by him was against the terms of the contract. In the case of NHAI v. Progressive-MVR(JV), (2018) 14 SCC 688, the Supreme Court after considering catena of judgments, held that even when the view taken by the arbitrator is a plausible view, and/or when two views are possible, a particular view taken by the Arbitral Tribunal, which is also reasonable, should not be interfered with, in proceedings under Section 34 of the Act. In Maharashtra State Electricity Distribution company Ltd. v. Datar Switchgear Ltd., (2018) 3 SCC 133, the Court has held that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrator on the basis of evidence on record are not to be scrutinized as if the Court was sitting in appeal."*

10. Apparently, the Arbitrator in the present case, while interpreting Clause H, Special Conditions of Contract of the Agreement between the parties, arrived at the conclusion that primarily, it was the appellant's responsibility to apply for the completion certificate and the respondent had to co-ordinate in the efforts. The interpretation was upheld by the learned ADJ while deciding the objection petition filed by the appellant.

11. On a reading of the judicial dicta cited hereinabove, I find force in the submission of learned counsel for respondent that if a clause can be interpreted in two ways and the view taken by the Arbitrator is a possible one if not a plausible one, this Court would not interfere, the scope of enquiry being limited.

12. Besides, after going through Clause H, Special Conditions of Contract, I am satisfied that the appellant being the owner of the site was required to file the application for obtaining completion certificate. This opinion is fortified by a reading of clauses (i), (j) and (k) of the Agreement dated 26.03.1999 executed between the appellant and the abovementioned architect, which are extracted hereunder:

> *"(i) Obtaining the approval of all the competent authorities and other statutory bodies which is necessary according to the local acts, laws, Regulations etc. and make any changes desired by such authorities at no extra cost. The original documents of approval will be submitted to employer.*
> *(j) Prepare three-dimensional model of suitable scale as and when required by the employer/local authority at no extra cost.*
> *(k) Submission of completion plans and obtaining completion certificate from the local bodies."*

13. Therefore, I am of the considered view that the Award dated 09.05.2018 is not vitiated by any error of fact or law on the face of the

record, and that the Arbitrator did not misconduct himself within the meaning of the Arbitration Act. No ground for interference with the Award and/or the impugned order is made out. The appeal is dismissed, alongwith the pending application.

(MANOJ KUMAR OHRI)
JUDGE

JANUARY 31, 2023
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