THE HONOURABLE SMT. JUSTICE M.G.PRIYADARSINI

CIVIL MISCELLANEOUS APPEAL No.718 OF 2009

J U D G M E N T:

Aggrieved by the Common Order dated 24.03.2009 in O.P.No.750 of 1998 passed by the learned III Additional Chief Judge, City Civil Court at Hyderabad (for short 'the Court below'), the appellant-respondent No.1 filed this Civil Miscellaneous Appeal to set aside impugned Common Order dated 24.03.2009 and to restore the Award dated 24.03.1998 passed by respondent Nos.2 and 3.

02. For the sake of convenience, hereinafter, the parties will be referred as per their array before the Court below.

03. The brief facts of the case as can be seen from the record available before this Court are as under:

The respondent No.1-Contractor entered into contract with the petitioner-Union of India, Railways, for construction of staff quarters/Type-II/15 units at Manikghar vide Agreement No.640/DEN/VBRE/KZJ/89 dated 03.08.1989 and the value of the work was Rs.5,58,743.53. As per the agreement, the work has to be completed within 6 months from the date of issuance of the acceptance letter. The petitioner has issued acceptance letter on 09.01.1989. Though the petitioner has delivered the

site to respondent No.1 along with acceptance letter, work was not commenced. Respondent No.1 has not properly organized the work and has not moved the men and material to the site to keep the work as per schedule. Respondent No.1 expressed his inability and requested the petitioner several times for grant of extension of time. Respondent No.1 also categorically gave an assurance to the petitioner that he will not claim any compensation or extra rates for the extended period and assured the petitioner that he will execute the work as per original rate. The petitioner as per Clause-17(3) of the General Conditions of Contract has granted leniently extensions of time to Respondent No.1 for execution of the work and the time was extended about 10 times. Inspite of granting extensions of time, Respondent No.1 has not completed the work. Respondent No.1 failed to complete the works as agreed in the contracts and contract period was extended from time to time and finally, the contracts were terminated. The reasons for non-completion of works are:

i. Non-execution of agreement itself during the period original currency.

ii. Non-availability of departmental supervisors at or near the work station within quick reach and avoidable delays in arranging on account of payments.

iii. Undue delay in making payment of final bill and refund of S.D. in respect of a completed work under the same organization which had a telling effect on the progress of this work.

iv. Frequent bandhs called by radical elements effecting labour and material movements.

v. Continuous unfavourable weather and three consecutive and successive cyclones (depressions).

vi. Political agitations in the wake of Rajiv Gandhi assassination, during which period movement of men and material was affected.

vii. Non-availability of required sizes of M.S. angles in the market and delay in obtaining approval for use of alternative sizes.

viii. Frequent issue of notices threatening termination, revocal without releasing payments due to the tune of Rs.1,57,000/-.

04. The petitioner left with no option except to terminate the contract as per General Conditions of Contract and accordingly, terminated the contract on 18.03.1992, forfeited the security deposit and payment of the final bill. Respondent No.1 sought for appointment of Arbitrators vide

letter dated 20.11.1992 raising various claims amounting to Rs.13,11,000/- plus interest.

05. Respondent No.1 approached this Court by way of Writ Petitions vide W.P.No.10922 of 1994 and W.P.No.721 of 1995 wherein a direction was issued to the General Manager, South Central Railway, to appoint the Arbitrators for adjudication of the disputes and the General Manager, South Central Railway by its order dated 09.11.1995 appointed Respondent Nos.2 and 3 as Joint Arbitrators.

06. Respondent Nos.2 and 3 have entered reference on 10.04.1996 and conducted the arbitration proceedings on various dates and passed award on 24.03.1998 after considering the rival contentions of the petitioner and Respondent No.1. The said award was received by the petitioner on 18.05.1998. The Joint Arbitrators awarded an amount of Rs.35,438/- towards refund of security deposit of the work recovered from on account bills, an amount of Rs.9,000/- towards illegal recovery of penalities, an amount of Rs.25,000/- towards amount due to work done but not recorded by Administration on previous CC bills, an amount of Rs.1,35,000/- towards loss of advance paid to material, an amount of Rs.95,000/- towards loss of advance paid to labour,

an amount of Rs.1,10,000/- towards loss of centering material and wastage of concrete miller for the last 3 ½ years, an amount of Rs.45,000/- towards loss of advance for material transportation, an amount of Rs.1,80,000/- towards establishment charges for staff watchmen and other connected staff for the last 3 ½ years (42 months), an amount of Rs.36,000/- towards maintenance loss of site-office and store room rents for the last 3 ½ years, an amount of Rs.1,24,000/- towards loss arising due to delay in payment and not handling over the site in time and departmental lapses etc., due to increase in cost for the last 3 ½ years + 35% for completed work value for Rs.2,00,000/-, an amount of Rs.80,000/- towards loss of profit 15% on agt., value of Rs.5,58,000/-. In total, Joint Arbitrators granted an amount of Rs.8,74,438/- plus interest @ 18% per annum from 18.03.1992 till the date of Award.

07. Aggrieved by the said award, the petitioner has filed O.P.No.750 of 1998 under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter will be referred as 'the Act') before the Court, which was allowed by setting aside Award dated 24.03.1998. Aggrieved by the same, the appellant-respondent No.1 filed the present Civil Miscellaneous Appeal to set aside the impugned Common Order dated 24.03.2009.

08. Heard both sides and perused the record available before this Court.

09. The first and foremost contention of the learned counsel for the appellant-respondent No.1 is that the scope of interfering with the arbitration award is very limited until and unless there is error apparent on the face of the record and there is perversity in the award.

10. In ***NTPC Limited v. Deconar Services Private Limited***[1], wherein the Honourable Supreme Court held as under**:**

> *"12. Further, it is also a settled proposition that where the arbitrator has taken a possible view, although a different view may be possible on the same evidence, the Court would not interfere with the award. This Court in Arosan Enterprises Ltd.v. Union of India, (1999) 9 SCC 449 held as follows:*
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> > *'36. Be it noted that by reason of a long catena of cases, it is now a well – settled principle of law that reappraisal of evidence by the Court to re-appraise the evidence is known to proceedings under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. IN the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. IN the event however two views are possible on a question of law*

[1] 2021 SCC OnLine SC 498...

> *as well, the Court would not be justified in interfering with the award.*
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> *37. The common phraseology "error apparent on the face of the record" does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The Court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined…'*
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> *From the above pronouncements, and from a catena of other judgments of this Court, it is clear that for the objector/appellant in order to succeed in their challenge against an arbitral award, they must show that the award of the arbitrator suffered from perversity or an error of law or that the arbitrator has otherwise misconducted himself. Merely showing that there is another reasonable interpretation or possible view on the basis of the material on the record is insufficient to allow for the interference by the Court."*

11. Even in the case on hand, there is no material to show that there is an error apparent on the face of the record or that there is perversity in award. Moreover, when two views are possible on a question of law as well, the Court would not be justified in interfering with the award. In the case on hand, the respondent failed to bring to the notice of this Court that there is question of law involved in this case. In fact, all the grounds raised by the learned counsel for the respondent are based on questions of fact and they are not based on question of law. Furthermore, even for the sake of arguments, if any questions of law are involved in the case on hand, as held above, when two

views are possible, there is no justification on the part of the Court to interfere with the award.

12. In ***Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited***[2]**,** the Honourable Supreme Court held as under:

> *"This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by courts while examining the validity of the arbitral awards. The limited grounds available to courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the courts. There is a disturbing tendency of courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.*

[2] 2022 Live Law (SC) 452

25. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression 'patent illegality'. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the 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(2-A) 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. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression 'patent illegality'.

26. Section 34 (2) (b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set

aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression 'public policy of India' and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice."

13. In the above authority, it was made clear that re-appreciation of evidence cannot be permitted under the ground of patent illegality appearing on the face of the award. In the instant case on hand, the respondent has not brought to the notice of this Court about any fraud or corrupt practice adopted by the appellant during the course of transaction between the parties in violation of Section 75 or Section 81 of the 1996 Act. Even the respondent failed to bring to the notice of this Court that there is any patent illegality on the face of the record or that the learned Arbitrators have committed illegality or irregularity while passing the impugned arbitral award. In such circumstances, this Court is of the considered view that the learned Arbitrators after adjudicating all the aspects has rightly passed the impugned Award and the interference of this Court in the impugned award is unwarranted, more particularly,

when the scope of interference in the arbitral awards passed under Sections 34 and 37 of the Arbitration and Conciliation Act, is very minimum.

14. Learned Deputy Solicitor General of India appearing for the respondent No.1 submitted that there shall not be even number in composition of Arbitrators as per Section 10 of the Act, 1996 and the Award shall be set aside on this sole ground itself.

15. Learned counsel for the appellant submitted that the said objection with regard to composition of Arbitrators shall be taken at initial stage itself but not later stage as per Section 4 of the Act, 1996 and relied upon a decision rendered by the Honourable Supreme Court in ***Narayan Prasad Lohia v. Nikunj Kumar Lohia and others***[3] wherein it was held that:

> *"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 furnishes 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*

[3] (2002) 3 Supreme Court Cases 572

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."

The said Act was enacted to consolidate and amend the law relating to domestic and international commercial arbitration and for matters connected therewith and incidental thereto. One of the objects of the said Act is to minimise the role of Courts in the arbitration process. It is with this object in mind that Section 5 has been provided. Judicial authorities should not interfere except where so provided in the Act. Further Section 34 categorically provides that the award can be set aside by the Court only on the grounds mentioned therein. Therefore one of the aspects which would have to be

considered is whether the 1st and 2nd Respondents case fell within any of the categories provided under Section 34."

It was further held that:

"In our view, Section 34(2)(a)(v) cannot be read in the manner as suggested. Section 34(2)(a)(v) only applies if "the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties". These opening words make it very clear that if the composition of the arbitral tribunal or the arbitral procedure is in accordance with the agreement of the parties, as in this case, then there can be no challenge under this provision. The question of "unless such agreement was in conflict with the provisions of this Act" would only arise if the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties. When the composition or the procedure is not in accordance with the agreement of the parties then the parties get a right to challenge the award. But even in such a case the right to challenge the award is restricted. The challenge can only be provided the agreement of the parties is in conflict with a provision of Part I which the parties cannot derogate. In other words, even if the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties but if such composition or procedure is in accordance with the provisions of the said Act, then the party cannot challenge the award. The words "failing such agreement" have reference to an agreement providing for the composition of the arbitral tribunal or the arbitral procedure. They would come into play only if there is no agreement providing for the

composition of the arbitral tribunal or the arbitral procedure. If there is no agreement providing for the composition of the arbitral tribunal or the arbitral procedure and the composition of the arbitral tribunal or the arbitral procedure was not in accordance with Part I of the said Act then also a challenge to the award would be available. Thus so long as the composition of the arbitral tribunal or the arbitral procedure are in accordance with the agreement of the parties, Section 34 does not permit challenge to an award merely on the ground that the composition of the arbitral tribunal was in conflict with the provisions of Part I of the said Act. This also indicates that Section 10 is a derogable provision. Respondents 1 and 2 not having raised any objection to the composition of the arbitral tribunal, as provided in Section 16, they must be deemed to have waived their right to object."

16. In view of the above facts and circumstances, viewed from any angle, this Court is of the opinion that the learned Arbitrators after considering all the aspects has passed the impugned Award and the Court below erred in interfering with the same. Moreover, there is no conflict between both the Arbitrators in passing Award. Therefore, the Common Order dated 24.03.2009 in O.P.No.750 of 1998 passed by the learned Court below is hereby set aside and the Award dated 24.03.1998 passed by Joint Arbitrators-respondent Nos.2 and 3 is hereby restored.

17. Accordingly, the Civil Miscellaneous Appeal is allowed setting aside the Common Order dated 24.03.2009 in O.P.No.750 of 1998 passed by the learned Court below and the Award dated 24.03.1998 passed by Joint Arbitrators-respondent Nos.2 and 3, is hereby restored. There shall be no order as to costs.

As a sequel, pending miscellaneous applications, if any, shall stand closed.

JUSTICE M.G.PRIYADARSINI

Date: 09-JAN-2024
KHRM

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THE HONOURABLE SMT. JUSTICE M.G.PRIYADARSINI

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