

Neutral Citation No. - 2024:AHC:82292-DB

Reserved on 22.4.2024

Delivered on 8.5.2024

Chief Justice's Court

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 144 of 2023

Appellant :- Gaursons Promoters P. Ltd.

Respondent :- Aakash Engineers And Contractors

Counsel for Appellant :- Mayank Yadav, Nikhil Agrawal, Sanjay Kumar Mishra, Vivek Kumar Singh

Counsel for Respondent :- Abhay Mishra, Nirendra Mohan, Prateek Srivastava, Shailesh Kumar Tripathi, Shashank Dwivedi, Syed Safdar Ali Kazmi

Hon'ble Arun Bhansali, Chief Justice

Hon'ble Vikas Budhwar, J.

(Per: Vikas Budhwar, J.)

1. This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') against the order dated 5.7.2021 passed by the Presiding Officer, Commercial Court, Gautam Budh Nagar in Arbitration Case No.110 of 2018 (Gaursons Promoters Pvt. Ltd. vs. Akash Engineers and Contractors) whereby the application preferred by the appellant-objector under Section 34 of the Act for setting aside the award dated 15.6.2018 of the Sole Arbitrator was rejected.

2. The case projected by the claimant-respondent before the sole Arbitrator is that it claims to be a sole proprietorship firm by the name and style of Akash Engineers and Contractors having its office at L-303, Rail Vihar, Alpha-Greater Noida, Uttar Pradesh. According to the claimant-respondent the appellant-objector, Gaursons Promoters Pvt. Ltd. which is a company incorporated under the provisions of the Companies Act, 1956 engaged in the constructions of commercial and residential project in an around the National Capital Region (In short N.C.R.) approached the claimant-respondent sometime in the year 2011-12 with

relation to the advertised projects namely G.E.C. Capital-10 at Gaur City-2, Sector 16-C, Greater Noida for the construction of residential township.

3. It is also the case of the claimant-respondent that the claimant-respondent executed various works entrusted to it by the appellant-objector and in the year 2012-13 certain issues arose in respect of the project of the appellant-objector due to agitation by the villagers, erstwhile land owners which entailed a situation whereby the work was stalled.

4. The claimant-respondent further asserts in the claim petition that earlier it was granted work for block A, K, Extended Basement, F & G and G.C.-5 at Gaur City, Sector-4, Noida by one of the sister concern of the appellant-objector being Gaursons Hi-tech Infrastructures (P) Ltd. As the work of the claimant-respondent is stated to be upto the mark and satisfaction so the appellant-objector approached the claimant and requested it to execute balance work of Block C and D. In this regard two work orders were issued namely:-(a) work order no. GPPL/GC 10/CIV-C/260/13 (work order no.1) dated 1.11.2013 for INR.2,38,26,296.00 (b) Work Order No.GPPL/GC 10/CIV-D/261/13 (Work Order no.2) dated 1.11.2013 of INR.2,49,18,861.00.

5. As per the pleadings set forth in the claim petition filed before the sole Arbitrator the work assigned to the claimant was as under:-

Work Order no.1

S.No.	Description	Amount (INR)
A	Item as per Contract	
1	Total Work Done as per Actual Qty	4,36,41,944
2	Extra Civil Work (Material Rate Difference)	32,57,564
3	Incentive Timely Rewardes	7,40,245
4	Extra Incentive Timely Rewardes	7,40,245
5	Structure Steel Railing	26,53,786
	Total	5,10,33,783
B	Extra Item Entertained/Approved	

1	Extra for Pergola	55,380
2	P.C.C. Ground Floor	63,437
3	Extra Thickness in Plaster	21,58,774
4	Malba Cleaning	-1,00,000
	Total	23,77,591
C	Extra Item approved but not entertained in the first instance	33,69,720
D	Total Work Done (A+B+C)	5,67,81,095
E	Escalation	23,27,898
F	Less Gross work done for contractor Name Gajraj as per acc. Dept.	1,26,78,140
G	Total (D+E-F)	4,64,30,853
H	Service Tax 14% on 33% of Work Done	21,45,105
I	Total Work Done Amount (G+H)	4,85,75,958

Work Order no.2

S.No.	Description	Amount (INR)
A	Item as per Contract	
1	Total Work Done as per Actual Qty	4,36,41,944
2	Extra Civil Work (Material Rate Difference)	32,80,029
3	Incentive Timely Rewards	7,40,245
4	Structure Steel Railing	29,55,007
	Total	5,06,17,224
B	Extra Item Entertained/Approved	
1	Extra for Pergola	55,380
2	P.C.C. Ground Floor	63,437
3	Extra Thickness in Plaster	21,61,662
4	Malba Cleaning	1,00,000
	Total	23,80,479
C	Extra Item approved but not entertained in the first instance	38,90,729
D	Total Work Done (A+B+C)	5,68,88,432
E	Escalation	19,94,970
F	Less Gross work done for contractor Name Gajraj as per acc. Dept.	1,13,42,577
G	Total (D+E-F)	4,75,40,825
H	Service Tax 14% on 33% of Work Done	21,96,386
I	Total Work Done Amount (G+H)	4,97,37,211

6. Since, according to the claimant-respondent the appellant-objector did not honour its commitment as per the work order and the agreement executed between them, the disputes and differences occurred which occasioned the claimant-respondent to take recourse to the proceedings under Section 11(4) of the Act.

7. Pursuant to the orders passed by this Court under Section 11(4) of the Act the sole Arbitrator was appointed. The claimant-respondent filed claim petition stating in para 57 as under :-

“That, as on date, despite repeated requests, Respondent has only made payments for an amount of Rs.5,70,00,000/- (Rupees Five Crore Seventy Lakh Only). However, an amount of Rs.4,85,75,958/-(Rupees Four Crore Eighty Five Lakh Seventy Five Thousand Nine Hundred and Fifty Eight Only) is due and payable to the Claimant till date (excluding interest). The Claimant has completed the work to the satisfaction of the Respondent, however, despite the same, the Respondent has withheld the amounts illegally and without any basis thereof. Therefore the Claimant is entitled to an amount of Rs.4,23,15,030/- (Rupees Four Crore Twenty Three Lakh Fifteen Thousand and Thirty).”

seeking following reliefs:-

“a). Award an amount of Rs.4,23,15,030/- (Rupees Four Crore Twenty Three Lakh Fifteen Thousand and Thirty) on account of Outstanding due and payable to the Claimant.

b). Award an amount of Rs.50,00,000/- (Rupees Forty lakh Only) on account of loss caused to the Claimant.

c). Award the costs of arbitration in favour of the Claimant.”

8. The claim set up by the claimant-respondent before the Arbitrator was contested by the appellant-objector while filing statement of fact and counter claim. Relevant extracts are as under:-

“28.That the averments mentioned in para no. 35 to 42 are misconceived and totally false as respondent has already paid Rs. 5,70,00,000) (Five crore seventy lakh rupees) which is the admitted position of the claimant and the same has been paid as per the procedure laid down under the work order and the joint measurement was conducted of the work executed at the site vide dated 19.08.2015 which was duly admitted by the claimant and accordingly it was admitted by the claimant that total quantity of the work done in C & D block is amounting of cumulative bill of Rs. 4,23,15.030/- whereas, claimant in through present claim has wrongly shown a total outstanding of Rs. 9,93,15.030 which in no manner matching the work executed by the claimant at site and beyond the scope of the work order. More so, it can be easily ascertain that the claimant has

already been extra and the same needed to be refunded back to the respondent along with the interest.”

37. That the averments mentioned in para no. 54 to 57 are totally false and have no basis whereas, the correct facts are placed here under exhibiting actual amount of work done by the claimant and the difference of claim is mentioned herein below:-

Final Bill of BLOCK C			
Description	Final	Total	Difference between Akashvs GPPL
Work Done	4,24,43,362	4,17,28,538	19,13,406
Less Incentive @ Rs. 5/- Per Sqfts	-7,14,824		
Rate difference for Bricks	14,22,872		
Rate difference for coarse sand for Brick work	2,37,412	25,77,191	6,80,373
Rate difference for coarse sand for Plaster	9,16,907		
Incentive/Penalty	13,21,100		
		13,21,100	1,59,390
Railing fabrication work	21,94,928	21,94,928	-4,58,858
Total			-32,12,027
	4,78,21,757	4,78,21,757	
Extra item Entertained/Approved			
Extra work (pergola)	43,400	43,400	-11,980
N/A			-63,437
Coarse sand's rate difference in extra thick Cement plaster	4,53,528	4,53,528	-17,05,246
Malbashing	75,000	75,000	-25,000
Total	5,71,928	5,71,928	-18,05,663
N/A			-38,16,761
Total work done (A+B+C)			-88,34,451
	4,83,93,685	4,83,93,685	
As above in S.No. 2			-23,59,667
Less work done by Prev. Cont			2,00,000
	1,28,78,140	1,28,78,140	
Total (D+E+F)			
	3,55,15,545	3,55,15,545	1,13,94,118
Deductions			

Cementer wastage	2,19,345	2,19,345	2,19,345
Recovery of Bricks (supplied by GPPL)in Tower	2,61,899	2,61,899	2,61,899
Direct Payment to Plaster work Contractor (MurshidAlam)	6,76,731	6,76,731	6,76,731
Recovery of Steel used in Brick work	2,87,361	2,87,361	2,87,361
Extra measured of Reinforcement steel	59,663	59,663	59,663
Total	15,04,999	15,04,999	15,04,999
	3,40,10,546	3,40,10,546	1,28,99,117
Service Tax of 3.8% i/c SBC & KKC	13,49,591		-8,17,636
Total (G+H)			
	3,53,60,137	3,53,60,137	1,37,16,753

Final Bill of Block D			
Description	Final	Total	Difference between Akashvs GPPL
Work Done			
	4,26,13,200	4,18,98,376	17,43,568
Less Incentive @ Rs. 5/- Per Sqft.	-7,14,824		
Rate difference for Bricks	14,33,933		
Rate difference for coarse sand for Brick work	2,53,176	26,05,274	6,74,935
Rate difference for coarse sand for Plaster	9,18,165		
Incentive/Penalty	13,21,100	13,21,100	5,80,855
Railing fabrication work	24,95,690	24,95,690	-4,59,317
Total			-22,96,965
	4,83,20,440	4,83,20,440	
Extra item Entertained/Approved			
Extra work (Pergola)	24,200	24,200	-31,180
N/A			-63,437
Coarse sand's rate difference in extra thick Cement plaster	4,53,528	4,53,528	-17,07,953
Malbashing	75,000	75,000	-25,000
Total	5,52,728	5,52,728	-18,27,570
N/A			-43,37,769

Total work done (A+B+C)			-84,62,304
	4,88,73,168	4,88,73,168	
As above in S. No. 2			-20,26,739
Less Work done by Prev. Cont			2,00,000
	1,15,42,557	1,15,42,557	
Total (D+E+F)			
	3,73,30,591	3,73,30,591	1,06,89,043
Deductions			
Cement wastage	2,19,345	2,19,345	2,19,345
Recovery of Bricks (supplied by GPPL) in Tower	8,85,680	8,85,680	8,85,680
Direct payment to Plaster work Contractor			
Recovery of Steel used in Brick Work	3,08,589	3,08,589	3,08,589
Extra measured of Reinforcement steel			
Total	14,13,614	14,13,614	14,13,614
	3,59,16,977	3,59,16,977	1,12,02,657
Service Tax of 3.8% i/c SBC & KKC	14,18,562	14,18,562	-7,99,945
Total (G+H)			
	3,73,35,539	3,73,35,539	1,29,02,602

“38. That the averments made in Para 56 to 61 containing points a) to d) are in a form of claim made by the Claimant. However, the present Claim petition is devoid details of merit and no such claim as prayed by the Claimant is maintainable. In reply it is submitted that the Claimant has claimed Rs 5,70,00,000 but the detail of which has not been given, however, as per the stand of the Respondent, the payment has been done strictly in accordance with the schedule mentioned in the work order. The Claimant is also demanding the interest of Rs. 50,00,000/- which itself is not maintainable as the payment was already done as per schedule and the present claim is not maintainable. That the Respondent has suffered a huge loss due to delay in the project, and as such, they are not liable to pay for the cost and expenses which have been stated in the Para under reply. A true copy of summary along with the details of statement regarding the payment made to M/s. Akash Engineering and suppliers.”

9. In the counter claim of the appellant-objector INR 4,69,62,127.00 was claimed under various heads from the claimant-respondent.

10. The sole arbitrator after hearing the respective parties pronounced the award dated 15.6.2018 holding that the total amount payable for Block

C & D by the appellant-objector to the claimant-respondent comes to be INR.3,67,29,767.00 + INR.3,86,66,734.00 = INR.7,53,96,501.00 and amount of INR.5,02,00,000.00 has been received by the claimant-respondent from the appellant-objector, thus the balance amount comes to INR.2,51,46,501.00 and while rounding the same the claimant-respondent was made entitled to the payment of INR.25000000.00 along with the interest @ 16% per annum w.e.f. the 1st April, 2015 till the making of the award and the interest payable thereafter till the date of payment would be at the rate prescribed specified in Section 31(7) (b) of the Act and so far as the cost payable by the appellant-objector to the claimant-respondent, the same was quantified to INR. 12,00,000/-.

11. Aggrieved against the award dated 15th December, 2018 of the learned sole Arbitrator, the appellant-objector preferred an application under Section 34 of the Act before the Commercial Court, Gautam Budh Nagar which was registered as Case No.110 of 2018, (Gaursons Promoters Pvt. Ltd. vs. Akash Engineers) which on contest came to be rejected on 5.7.2021.

12. Questioning the order dated 5.7.2021 passed by the Presiding Officer, Commercial Court, Gautam Budh Nagar in Arbitration Case No.110 of 2018, (Gaursons Promoters Pvt. Ltd. vs. Akash Engineers and Contractors) and the award dated 15.6.2018 of the sole Arbitrator in the matter of Gaursons Promoters Pvt. Ltd. vs. Akash Engineers and Contractors, the present appeal has been preferred.

13. On the presentation of the appeal this Court passed the following order on **5.10.2021**.

“Heard Shri Nikhil Agrawal, learned counsel for the appellant and Shri Syed Safdar Ali Kazmi, learned counsel for the respondent.

Submission of learned counsel for the appellant is that the specific application filed by the appellant seeking discovery of the books of the account of the claimant-respondent remained undisposed by the learned arbitrator. Relying mostly on the unsubstantiated claim, the award has been made and an excessive amount has been awarded. He would further submit, once the tax deducted at source (TDS) was acknowledged by the

claimant-respondent, it had to be accepted that the full payment had been made by the appellant for the actual work done by the third party engaged by the claimant-respondent. However, in absence of the books of account produced by the respondent-claimant, that verification could not have been possible.

On the other hand, Shri Kazmi submits that this award is based on the admitted amounts as per the books of the appellant/contractee.

Matter requires consideration.

Let lower court record be summoned.

List again on 01.12.2021.

Till the next date of listing, the operation effect of the award may remain stayed subject to the appellant depositing the entire awarded amount within a period of three weeks' before the court below. Upon such deposit being made, Rs. 50 lakhs may be released in favour of the respondent-claimant without security and the balance amount be retained in separate interest bearing term deposit with a Nationalized Bank. It shall abide by the further orders of this Court."

14. On Civil Misc. Clarification Application No.6 of 2021 the following order was passed on **7.12.2021**.

Ref:- Civil Misc. (Clarification) Application No.6 of 2021

Heard learned counsel for the parties.

In the order dated 05.10.2021, we had provided for stay of the execution of the impugned order, subject to certain conditions. Clearly, the conditions stipulated were with respect to payment of the principal amount of compensation excluding interest. Accordingly, the application is disposed of.

Order on Appeal:-

List in due course.

15. This Court on **15.3.2024** proceeded to pass the following order:-

1. Heard Sri Shashi Nandan, learned Senior Advocate assisted by Sri Mohit Yadav & Sri Mayank Yadav, learned counsel for the appellant and Sri Vinayak Mittal, learned counsel for the respondent.

2. Learned counsel for the parties pray for time to prepare short notes on the dispute pertaining to the amount of TDS for which the claim of the appellant is that the amount was deducted and deposited and, therefore, the respondent is not entitled to seek that amount all over again and has been wrongly awarded by the Arbitrator whereas the claim of the respondent is otherwise.

3. Learned counsel for the respondent made submissions that as the dispute pertains to the sum of Rs. 68 Lakhs only of TDS and on account of the interim order, granted by this court, a sum of Rs. 2 Crores, along with interest, is lying in deposit and the respondent is being deprived of the

said amount, after retaining a sum of Rs. 68 Lakhs, which is the amount in dispute, rest of the amount may be ordered to be disbursed to the respondent.

4. Learned counsel for the appellant resisted the said submission.

5. However, in view of the fact that in the submissions made, it has been specifically indicated that the dispute pertains to the amount of Rs. 68 Lakhs of TDS, we deem it appropriate and, therefore, order that the interim order granted by this court on 05.10.2021 as clarified on 07.12.2021, shall stand modified to the extent that except for a sum of Rs. 68 Lakhs and the interest accrued thereon, in terms of the directions given by this Court, rest of the amount, i.e. Rs. 1,32,00,000/-, along with interest accrued on the said amount, would be paid to the respondent, on respondent filing undertaking before the Commercial Court, Gautambudh Nagar that in case the appeal filed by the appellant is allowed, subject to any further directions by this Court, the amount shall be refunded back along with interest i.e. 6% per annum by the respondent.

6. List the appeal on 09.04.2024.

16. On 22.4.2024 the following order was passed:-

“While entertaining the aforesaid appeal, defects were cured while giving a regular number summoning for the lower court records, however the appeal is yet to be admitted.

Heard Sri Shashi Nandan, learned Senior Counsel assisted by Sri Mayank Yadav and Sri Mohit Yadav for the appellant-objector and Sri Vinayak Mithal, learned counsel for the respondents at length.

Admit.

Since respondent is represented, thus there is no need to issue notice.

A joint statement has been made by the counsels for the rival parties that they do not propose to file paper book and the appeal be heard on merits, dispensing with the requirement of filing paper book.

In view of the said submission, we dispense with the requirement of filing of paper book.

Judgement is reserved.”

17. Sri Shashi Nandan, learned Senior Counsel assisted by Sri Mayank Yadav and Sri Mohit Yadav for the appellant-objector have sought to argue that the award passed by the sole Arbitrator dated 15.6.2018 as well as the order dated 5.7.2021 rejecting the application under Section 34 of the Act in Arbitration Case No.110 of 2018 suffers from patent illegality, thus, it is liable to be set aside.

18. Elaborating the said submissions it is being urged that the sole arbitrator travelled beyond the pleading and created a new case inasmuch

as the claimant-respondent in claim petition had only claimed INR 4,23,15,030/- as due and outstanding amount after deduction of INR.5,70,00000/- out of total works executed by it, INR 98313169/- but the amount awarded was INR.25146501/- which was based upon no evidence at all. It is further submitted that there was a clear cut admission of the claimant-respondent in the claim petition that INR 5,70,00000/- was received by it but the sole arbitrator on presumption without there being an iota of evidence has come to conclusion that only INR. 5,020,0000/- was paid to claimant-respondent.

19. It is also the submission of Sri Shashi Nandan, learned Senior Counsel for the appellant-objector that the sole arbitrator has completely overlooked and misread the documents available on record as it was specifically pleaded in statement of facts and counter claim that INR.46,96,2127/- was recoverable to it with respect of following payment made by it under various heads :- (a) other petty contactors, (b) claim of payment made to petty contractors of claimant, (c) claim of delay in construction of block C & D, (d) claim of payment made to suppliers of claimant due to its default, (e) claim of piece work not executed by the claimant, (f) claim of recovery of cement bags, (g) claim direct of payment of Sub-Contractor claimant for executing plaster work (h) claim of recovery of reinforcement steel used in 115mm thick brick work.

20. While inviting attention of the court towards para 33 of the objections filed under Section 34 of the Act, it is submitted that there was a specific pleading that till 22.3.2017 total payment made to claimant-respondent was INR.7,60,30,739.22 for block C & D. Further attention was invited towards paragraph 33 of the order of Commercial Court dated 5.7.2021 while contending that appellant-objector had made payment of INR.71605696/- and TDS deposited was INR.735159/- the same was though noticed but brushed aside and not considered. Further reference was made to the Brief Notes and Relevant Documents as well as Judgment Compilation so as to show that in Assessment Years 2014-15,

2015-16, 2016-17 the total amount paid was INR.7,16,05,696.00 and the TDS deducted and deposited was INR.7,16,059.00. Thus, the submissions of the learned Senior Counsel for the appellant-objector is that once the appellant-objector has paid the entire outstanding amount and the TDS has also been deducted and it is reflected in the website of the Income Tax Department and also as per the statement of account of the appellant-objector, then, the learned sole Arbitrator committed patent illegality in passed an award which is bereft of any evidence and beyond the subject matter, thus it is liable to be set aside.

21. It has also been submitted that once the entire payment due & outstanding has been paid to claimant-respondent, there remained no dispute to be adjudicated by the Arbitrator and in failing to consider the said legal aspect the learned Arbitrator has transgressed its jurisdiction and erred in passing the award in favour of the claimant-respondent.

22. Though according to the learned Senior Counsel for the appellant-objector the said grounds was neither raised before the Arbitral Tribunal nor Commercial Court but, the same being purely legal and going to the root of matter tantamount to patent illegality, the same can be raised and addressed by this Court in present proceedings.

23. It is thus urged that in view of the amendments made in Section 34 of the Act while inserting Section (2-A) which came into effect from 23.10.2015 now an arbitral award arising out of arbitrations other than International Commercial Arbitrations can be set aside by the Court if the Court finds then the award is vitiated by “patent illegality” appearing on the face of the award based upon no evidence or perverse finding.

24. Reliance has also been placed upon the judgement in the case of *Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI) AIR 2019 SC 5041*, *PSA Sical Terminals Pvt. Ltd. vs. The Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin & Ors., AIR 2021 S.C. 4661*, *Associate Builders vs. Delhi*

Development Authority AIR 2015 SC 620, Oil and Natural Gas Corporation Ltd. vs. Discovery Enterprises Pvt. Ltd. & Ors. AIR 2022 SC 2080, Alpine Housing Development Corporation vs. Ashok S. Dhariwal and others AIR 2023 SC 558, Dakshin Haryana Bijli Vitran Nigam Ltd. vs. Navigant Technologies Pvt. Ltd. AIR 2021 SC 2493 and State of Chhattisgarh & others vs. Sal Udyog Pvt. Ltd. AIR 2021 SC 5503 so as to contend that a finding of an arbitrator based on no evidence at all or award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside and more so the ambit of interference with respect to the domestic award under Section (2-A) of the Section 34 of the Act is wide enough once patent illegality is writ large.

25. Lastly, it has also been argued on behalf of the appellant-objector that an application was preferred by the appellant-objector under Order XI Rule 12 of the C.P.C. for discovery of the Books of Accounts/Ledger qua the project works in question which is in the possession of the claimant-respondent before the arbitrator, in which on 6.11.2017, the Arbitral Tribunal passed the following order.-

“ in view of the payment chart referred above the respondent application for discovery filed today will be considered only if any of the items in the payment chart are disputed by the claimant, because burden of proving the plea of claimant regarding delay on account of short payment is upon the claimant who can adduce evidence regarding the amount of work done (including extra work if any) upto a certain date and the payment received from the respondent till that date. Hard copies of all aforesaid documents may be filed by respective parties on the next date.”

26. Submission is that despite the fact the aforesaid application was legally maintainable and the onus was upon the claimant-respondent to substantiate its claim from its books and account while producing it before the Arbitral Tribunal but the learned Arbitral Tribunal kept the application pending and fastened the liability upon the appellant-objector . It is thus submitted that the said procedural irregularity tantamounts to miscarriage of justice and in contravention of the fundamental policy of the Indian Law. In case the said application would have been allowed then the complete picture would have surfaced.

27. Countering the said submissions, Sri Vinayak Mithal, learned counsel for the claimant-respondent submitted that the award passed by the learned sole Arbitrator on 15.6.2018 and the order dated 5.7.2021 of the Commercial Court rejecting the Section 34 application, needs no interference as the scope under Section 34 of the Act is limited and it cannot in any manner whatsoever be akin to the Appellate jurisdiction against the orders of the Trial Courts. He submits that in view of the language employed in Section 34 of the Act the appellant-objector has to draw its case within the parameters earmarked under Section 34 of the Act and the appellant-objector cannot insist the court to rehear and re-appropriate facts.

28. Submission is that there are contradictions and inconsistency in the stand of appellant-objector as different figures have been shown in different stages of proceeding which have no co-relation with each other that to not reliable as the same are not based upon statutory requirements.

29. Lastly, it is argued that mere non disposal of application by Sole Arbitrator for discovery of accounts and ledger would not be fatal as the amounts paid to the claimant-respondent was as per the admission of appellant-objector. No prejudice has been caused to appellant-objector. The same can be at best said to be a trivial irregularity but not a patent illegality exposing the award to be set aside under Sub-Section (2-A) of the Section 34 of the Act.

30. In view of the argument advanced by the rival parties the following issues falls for determination before this Court:

(a) Whether the arbitral tribunal committed patent illegality by traveling beyond the pleadings and granting relief in excess to what was claimed?

(b) Whether the claimant/respondent discharged its burden to prove its claim and the onus stood shifted upon the appellant/objector?

(c) What would be the import and the impact of the admissions made by the appellant/objector in cross examination?

(d) Legal effect of non-disposal of application under Order XI Rule 12 of the CPC by Arbitral Tribunal for discovery of book & account/ledger by claimant-respondent.

(e) Whether it is open for the appellant/objector to raise legal issues going into the root of the matter in Appellate proceedings under Section 37 of the Act for the first time?

31. We have heard the learned counsel for the parties and perused the record carefully.

32. Before delving into the tenability of the arguments of the rival parties it would be apposite to have a quick survey of the scope, ambit and the parameters under which the Appeal under Section 37 of the Act, is to be decided.

33. To begin with it would be apposite to quote the provisions contained under Section 34 & 37 of the Arbitration and Conciliation Act in extenso.-

“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 1[establishes on the basis of the record of the arbitral tribunal 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 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.”

“37. Appealable orders.—*(1) [Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—*

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a Court from an order of the arbitral tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or takeaway any right to appeal to the Supreme Court.”

34. The aims and the objects for enacting the Arbitration and Conciliation Act, 1996 was to provide a mechanism to the public to resolve their disputes in a process less rigorous, technical and formal that of litigation coupled with the fact that the same should be more accessible, efficient and even cost effective for the parties involved whether at individual level or at the level of a business or corporation. The basic concept stems from alternative dispute mechanism which is advantageous for the general public at large who are involved in dispute giving wheels for effective disposal and release of burden on the Courts.

35. Section 34 of the Act was deliberately engrafted in a couched manner bearing in mind the fact that there should be limited intervention of Courts in arbitral proceedings especially after the proceedings have been concluded and the award has been pronounced by the arbitral tribunal.

36. Notably, the yardsticks and the parameters under which intervention by the courts of law in the proceedings against the award stands bracketed in Section 34 of the Act which obviously starts with caveat that the arbitral award may only be set aside by the Court if the party making the application establishes on the basis of the record of the arbitral tribunal;

(i) was under some incapacity;

(ii) the arbitral agreement is not valid under the law for the time being in force;

(iii) a party making the application was not given proper notice of appointment of arbitrator or he was unable to present his case;

(iv) the arbitral award deals with a dispute not contemplated or not falling within the terms of the submission of the arbitrator;

(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 the provisions;

(vi) the subject matter of dispute is not capable of settlement by arbitration under law for the time being in force;

(vii) the arbitral award is in conflict with the public policy of India.

37. Importantly, by virtue of Act No. 3 of the 2016 (with effect from 23.10.2015) Section 34 of the Act along with other sections underwent amendment and Section 2(A) came to be inserted in Section 34 whereby it was provided that an arbitral award arising out of arbitrations other than international commercial arbitrations may also be set aside by the Court if the Court finds that the award is vitiated by “patent illegality” appearing on the face of the award with a caveat that award shall not be set aside merely on the ground of erroneous application of law or by appreciation of evidence.

38. Nonetheless, while assailing the order passed under Section 34 of the Act either setting aside the award or upholding the award an appeal is provided under Section 37 of the Act, however, the contours of the proceedings under Section 37 also is limited to the scope and the ambit of challenge under Section 34 of the Act.

39. The aforesaid proposition of law stands culled out in the umpteen number of decisions of the Hon'ble Apex Court, also in the case of *Associate Builders (supra)*, *Ssangyong Engineering & Construction Co. Ltd. (supra)*, *Sal Udyog Private Limited (supra)*, *PSA Sical Terminals Pvt. Ltd. (supra)*, *Batliboi Environmental Engineers Vs. Hindustan Petroleum Corporation Limited & Another AIR (2024) SCC 375*. In the recent judgment of Hon'ble Supreme Court in *Civil Appeal No. 8067 of 2019 (S.V. Samudram Vs. State of Karnataka & Another)* decided on 4.1.2024.

Issues No. (a), (b) & (c)

40. Since the issues No. (a), (b) & (c) are interwoven, thus, they have being decided compositely.

41. In order to address the said issues it would be appropriate to briefly set out the case of the parties as apparent from the record. The claimant-respondent in its claim petition had pleaded that it had executed works under two work orders No. 1 and 2 for an amount of INR 4,85,75,958/- and INR 4,97,37,211/- totalling to INR 9,83,13,169/- out of the said amount, claimant-respondent claimed that it had received an amount of INR 5,70,00,000/- and as per the prayer clause INR 4,23,15,030/- remained outstanding and payable to it. In the statement of facts and counter claim of the appellant-objector it was acknowledged that INR 5,70,00,000/- had been paid to the claimant-respondent and the counter claim was of INR 4,69,621.27/-.

42. Essentially, the dispute is two fold firstly, whether the claimant-respondent received the total outstanding amounts against the work

executed by it and secondly, inconsistency in the two figures i.e. the claim of the appellant-objector that it paid INR 5,70,00,000/- as whereas according to the claimant-respondent it received INR 5,02,00,000/-.

43. The Arbitral Tribunal while passing the award on 15.6.2018 came to the conclusion that the total amount payable with respect to Blocks C and D comes to (INR 3,67,29,767+3,86,66,734) = INR 7,53,96,501/-, against which the claimant received INR 5,02,00,000/-, thus, INR 2,51,46,501/- after rounding up to INR 2,50,00,000/- was liable to be paid to the claimant-respondent.

44. Learned Senior Counsel for the appellant-objector has assailed the said findings while contending that it was never the case of either claimant-respondent or the appellant-objector that INR 5,02,00,000/- was paid and received by the claimant rather to the contrary it was a clear admission of the claimant-respondent in the claim petition that it had received INR 5,70,00,000/-, thus, the award suffers from perversity.

45. In order to test the said argument, we have meticulously scanned the entire records available before the Court. We find that in the claim petition the claimant-respondent had acknowledged the receipt of INR 5,70,00,000/- and the said fact also stood admitted by the appellant-objector in its statement of facts. The chapter in normal circumstances would have been closed there, however, the Court finds from the Lower Court records that on 20.2.2018 Sri Rohit Sharma, the C.O.O. of the Gaursons Group who was at that point of time Senior Vice President in its cross-examination being paper No. 71 while replying to the following question replied as under:-

“Question:- How much payment was made to the claimant for the two Towers (C & D)

R.S.- Refer affidavit, page 16 to 20. Amount paid is as follows:

S.No.	Particulars	Amount (In Rs.)
1.	Amount paid to the M/s. Akash Engineers	5,02,69,435

	<i>and Contractors</i>	
2.	<i>Amount paid on behalf of the suppliers</i>	<i>1,48,68,487</i>
3.	<i>Amount paid on behalf of the sub-contractors</i>	<i>9,71,109</i>
<i>Total</i>		<i>6,61,09,031/-</i>

46. Perusal of the cross examination of Sri Rohit Sharma reveals that the appellant-objector as per their record had paid INR 5,02,69,435/- to the claimant-respondent, INR 1,48,68,487/- on behalf of the suppliers and INR 9,71,109/- on behalf of the Sub-Contractors totaling to INR 6,61,09,031/-.

47. Now a question arises whether an admission made in the cross examination is required to be given weight or not.

48. Here, in the present case there are certain redeeming features which also needs to be noticed. The claimant had set out its case in the claim petition particularly paras 56 and 57 which has been quoted in the earlier part of the judgment, which came to be replied by the appellant-objector in para 37 of the statements of fact and counter claim where neither any definite figure has been disclosed nor the amount outstanding or paid has been indicated.

49. The learned Arbitrator had summarized the final bills of Block-C and D, the payment to be made as per the claim of the claimant-respondent and the appellant-respondent, thereafter, derived the figure which is recapitulated hereinunder:-

Block C				Awarded Amount	Brief Comments
Sr. No.	Description	As per Respondent	As per claimant		
1	Word Done	4,24,43,362	4,36,41,944	4,24,43,362	
2	Less Incentive @ Rs. 5/- Per Sq ft.	-7,14,824		Nil	Incentive was payable
3	Rate difference for Bricks	14,22,872		14,22,872	

4	Rate difference for coarse sand for Brick work	2,37,412		2,37,412	
5	Rate difference for coarse sand for Plaster	9,16,907		9,16,907	
6	Incentive	13,21,100	7,40,245+7,40,245=14,80,490	13,21,100	
7	P.C.C. Ground Floor		63,437	63,437	As per findings
8	Railing fabrication work	21,94,928	26,53,786	21,94,928	
9	Extra thickness in plaster		21,58,774	Nil	
	Extra items Entertained/Approved				
10	Extra Work (Pergola)	43,400	55,380	43,400	As claimed by claimant in all other pergolas
11	Coarse sand's rate difference in extra thick Cement plaster	4,53,528	21,58,774	4,53,528	No cogent proof by claimant
12	Malba shifting	75,000	1,00,000	1,00,000	See second last item on page 146 of the claimant's documents in the other case
13	Extra items approved but not entertained in the first instance		33,69,720	Nil	Items not clear
14	Less Work done by Prev. Contractor	(-) 1,28,78,140	(-) 1,26,78,140	(-) 1,28,78,140	
	Deductions				
15	Cement Wastage	-2,19,345		Nil	As per findings

					above
16	Recovery of Bricks (supplied by GPPL) in Tower	-2,61,899		(-)2,61,899	
17	Direct payment to Contractor (Murshid Alam)	-6,76,731		(-)6,76,731	Admitted by claimant
18	Recovery of Steel used in Brick work	-2,87,361		Nil	As per findings
19	Extra measured of Reinforced cement steel	-59,663		Nil	As per findings
20	Service Tax of 3.8% i/c SBC & KKC	13,49,591	21,45,105	13,49,591	As per findings
	Total	3,53,60,137		3,67,29,767	

Block D				Awarded Amount	Brief Comments
Sr. No.	Description	As per Respondent	As per claimant		
1	Word Done	4,26,13,200	4,36,41,944	4,26,13,200	
2	Less Incentive @ Rs. 5/- Per Sq ft.	-7,14,824		Nil	Incentive was payable
3	Rate difference for Bricks	14,33,933		14,33,933	
4	Rate difference for coarse sand for Brick work	2,53,176		2,53,176	
5	Rate difference for coarse sand for Plaster	9,18,165		9,18,165	
6	Incentive	13,21,100	7,40,245	13,21,100	
7	Railing fabrication work	24,95,690	29,55,007	24,95,690	

8	Extra civil work (material rate difference)		32,80,029	Nil	No details or proof
	Extra item Entertained/ Approved				
9	Extra work (Pergola)	24,200	55,380	24,200	
10	P.C.C. Ground Floor		63,437	63,437	
11	Extra thickness in plaster		21,61,662	Nil	Covered by rate difference
12	Coarse sand's rate difference in extra thick Cement plaster	4,53,528		4,53,528	
13	Malba shifting	75,000	1,00,000	1,00,000	See second last item on page 146 of the claimant's documents in the other case
14	Extra item approved but not entertained in the first instance		38,90,729	Nil	No particulars
15	Escalation		19,94,970	Nil	No proof
16	Less work done Prev. Contractor	-1,15,42,577	-1,13,42,577	-1,15,42,577	
	Deductions				
17	Cement wastage	-2,19,345		Nil	As per findings
18	Recovery of Bricks (supplied by GPPL) in Tower	-8,85,680		-8,85,680	
19	Recovery of Steel used in Brick work	-3,08,589		Nil	As per findings

20	Service Tax of 3.8% i/c SBC & KKC	14,18,562	21,96,386	14,18,562	As per payment of claimant
	Total	3,44,98,415		3,86,66,734	

50. Notably, the appellant-objector is a private limited company, thus, while making payments to the contractors or sub-contractors or in case of suppliers adherence to the provisions contained under Section 194C of the Income Tax Act, 1961 as amended from time to time is mandatory.

51. The same is:-

“194C. Payments to contractors.—(1) Any person responsible for paying any sum to any resident (hereafter in this section referred to as the contractor) for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified person shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to—

(i) one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family;

(ii) two per cent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family, of such sum as income-tax on income comprised therein.

(2) Where any sum referred to in sub-section (1) is credited to any account, whether called “Suspense account” or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.”

52. As per Section 194C of the Income Tax Act, a duty is cast upon a person responsible for paying a sum to any resident (hereinafter referred to any contractor) for carrying out any work in pursuance of the contract between the contractor and a specific person at the time of the credit of the sum to an account of the contractor or at the time of the payment thereof in cash or by issue of cheque or draft or by other mode whichever is earlier and a deduction of amount equal to 1% where payment is being made or credit is being given to an individual or Hindu undivided family and 2% in other cases.

53. Admittedly, in the present case there is no dispute that works contract came to be executed between the appellant-objector and the claimant-respondent. Therefore, the provisions of Section 194C of the Income Tax Act is applicable. Though in the cross examination of Sri Rohit Sharma dated 28.2.2018 INR 6,61,09,031/- is stated to have been paid but the actual amount as per the statement, bifurcation whereof was INR 5,02,69,435/- to the claimant-respondent and amount paid on behalf of suppliers and sub-contractors was INR 1,48,68,487/- and INR 9,71,109/-.

54. Apparently, in the counter claim of the appellant-objector in subparagraph (i) to (viii) it was averred that payments were made to the suppliers and the sub-contractors. As per the mandate of 194C of the Income Tax Act a statutory duty was cast upon the appellant-objector to make necessary deductions (TDS) but, there is nothing on record to show that any deductions were made.

55. For the very first time, in application under Section 34 of the Act filed before the Commercial Court in para 33 it was averred that the appellant-objector till 22.3.2017 had made a total payment of INR 7,60,30,739.22/- for both the blocks and the appellant-objector had filed payment summary with its counter claim. Furthermore, during the course of the arguments before the Commercial Court it was also argued by the appellant-objector that total amount paid was INR 7,16,05,696/- and tax deducted was 7,35,159/-. Even before this Court in the brief note and the relevant document compilation dated 5.3.2023 page 1 it has been mentioned that a total amount INR 7,16,05,689/- was credited in the account of the claimant-respondent for the Assessment Year 2014-15, 2015-16, 2016-17 and an amount INR 7,16,054/- was deducted as TDS. In the said background, the Court finds that the appellant/objector is taking inconsistent stand at different stages in the proceedings which does not inspire the confidence of the Court. More so, when figures are not matching and there is no plausible explanation offered by it.

56. Much emphasis has been laid down upon the fact that in the award of the Arbitrator there are material contradictions, since on one hand it has been observed that claimant did not produce any document to show that TDS or a part of it was not credited in its account, therefore, TDS cannot be claimed, however, on the other hand, liability has been fastened upon the appellant-objector while holding that its version was not accurate and reliable and there was an admission in the statement of facts and counter claim that INR 5,02,00,000/- was paid to the claimant-respondent instead of INR 5,70,00,000/- though there was no admission at all. In our opinion, the said contradiction would not be of any aid or help to the appellant-objector particularly when from the records it is borne out that there is a clear cut admission of the appellant-objector by way of deposition in cross examination of Sri Rohit Sharma that INR 5,02,00,000/- had been paid to the claimant-respondent. Minor contradictions cannot be permitted to demolish a case particularly when the same is writ large from an admission of a party. The arbitral tribunal in the award has drawn a comparative chart of the claim set up by the appellant-objector and the claimant-respondent and thereafter proceeded to derive the actual figures which was due and outstanding and liable to be paid to the claimant-respondent. In absence of any challenge made to the said figures by the appellant-objector either in the proceedings under Section 34 of the Act or before this Court in the present proceedings, this Court is not required to go into the said issues.

57. Another facet which needs to be noticed is that the claimant-respondent was paid incentives for the works executed by it. Though a feeble attempt was made based upon the allegations in the counter claim that since the entire work was not executed by the claimant-respondent so the said works were got executed by the appellant-objector from the sub-contractors /suppliers but the Court finds that the findings of payments of incentive remains unassailable particularly when no challenge has been raised either before the Commercial Court or before us.

58. Though, ordinarily in view of the provisions contained under Section 101 read with Section 102 and Section 114 of the Evidence Act, 1872 the burden of proof stood upon the claimant-respondent to prove its case but in the present case in hand once there is a clear admission of the appellant-objector admitting a particular fact which remains intact without any challenge being raised to the same then it cannot be said that the Arbitral Tribunal committed any patent illegality in awarding the said amount.

59. Moreover, the Hon'ble Apex Court in the case of ***Sushil Kumar Vs. Rakesh Kumar reiterated in (2003) 8 SCC 673*** while relying upon the earlier judgment in the case of ***Thiru John Vs. Returning Officer (1977) 3 SCC 546 in para 63*** observed as as under:-

63. In Thiru John Vs. Returning Officer the law is stated in the following terms: (SCC page 545, para 15)

“15. It is well settled that a party's admission as defined in Sections 17 to 20, fulfilling the requirements of Section 21 of the Evidence Act, is substantive evidence proprio vigore. An admission, if clearly and unequivocally made, is the best evidence against the party making it and though not conclusive, shifts the onus on to the maker on the principle that 'what a party himself admits to be true may reasonably be presumed to be so and until the presumption was rebutted, the fact admitted must be taken to be established'.”

Issue No. (d):

60. So far as the next issue regarding non-disposal of the application under Order XI Rule 12 CPC for discovery of the books of accounts/ledgers of claimant-respondent rendering the award to be fatal and vitiated is concerned, the same at first blush appears to be attractive but it may not have any substance for the simple reason that Sri Rohit Sharma in his cross examination had given a specific figure of the amount paid to the claimant-respondent.

61. Importantly, it is also not the case of the appellant-objector either before the Arbitral Tribunal or in the proceedings under Section 34 of the Act or before this Court that the deposition made during cross examination was actuated by fraud, coercion or misconception or he was not authorized and not competent to make the said statement. Further there is no application even for recalling the said statements also. The position might have been different, in case, the appellant-objector would have demonstrated from the record that the INR 5,70,00,000/- was paid to the claimant-respondent, but, since the same is lacking, thus, mere irregularity of non-disposal of the said application would not render the award to be suffering from patent illegality making it vitiated.

Issue No. (e):

62. There is no quarrel to the proposition of law that a legal issue going into the root of the matter can be raised for the very first time in the appellate proceedings. However, the question is dependent upon the facts of a particular case. Here, the Court finds that the said principle would not apply and make any difference for the variety of reasons: (i) admission is best piece of evidence; (ii) the deposition of the witness, Rohit Sharma on behalf of the appellant-objector which remains intact; (iii) inconsistency in the stand of the appellant-objector which has not been explained; (iv) non-challenge to the quantum awarded to the claimant-respondent under various heads; (v) waving of counter claim; (vi) acceptance of the fact that incentives were paid to the claimant-respondent for the works executed by it and of course; (vii) resiling from the admissions at appellate stage.

63. Viewing the case from four corners of law we are of the firm opinion that the appellant-objector has miserably failed to show any patent illegality warranting interference in the present appeal. Moreso, when the scope of interference under Section 34 is limited and within the contours of the ground specified under Section 34 of the Act.

64. Resultantly, the appeal sans merit and is liable to be dismissed and is **dismissed**

65. Interim order stands vacated.

Order Dated:- 8.5.2024

Piyush/Rajesh

(Vikas Budhwar, J.)

(Arun Bhansali, C.J.)