HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 245 OF 2002

The State of Maharashtra,
Through the Chief Engineer (Special Projects),
Public Works Department and another ... Petitioners
vs.
Bharat Constructions ... Respondent

Mr. Kedar Dighe, AGP for petitioners-State.

Mr. M. P. Vashi, Senior Counsel a/w. Ms. Prachi Khandge, i/by. M. P. Vashi & Associates for respondent.

CORAM : MANISH PITALE, J
RESERVED ON : 22nd NOVEMBER, 2022
PRONOUNCED ON : 6th DECEMBER, 2022

JUDGEMENT

. The State of Maharashtra, through the Chief Engineer (Special Projects), Public Works Department, Mumbai and the Executive Engineer, Public Works Department, Thane, have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996, to challenge Award dated 29th March, 2002, passed by the arbitral tribunal constituted in terms of arbitration agreement executed between the parties.

2. The arbitration proceeding had to be undertaken in the light of disputes that arose between the parties pertaining to the project of Bhiwandi-Wada Road and Palghar-Manor-Wada Road. The bid offered by the respondent was accepted for the aforesaid project and on 1st November, 1990, work order was issued in favour of the respondent. As per the

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agreement executed between the parties, the respondent was required to complete the work in 30 calendar months, to be reckoned from 1st December, 1990. It is an admitted position that the work was delayed and the petitioners granted extension of time for completion of work to the respondent and it is in the backdrop of the aforesaid events that the disputes arose between the parties, as regards the amounts due and payable to the respondent.

3. Eventually, the matter went to arbitration before a arbitral tribunal consisting of three learned arbitrators. The respondent raised various claims that were adjudicated by the tribunal. On 29th March, 2002, the impugned award came to be passed, wherein one of the learned arbitrators pronounced a dissenting award. The majority arbitrators partly upheld the claims of the respondent.

4. The present petition filed by the petitioners was admitted on 18th November, 2002, passed by a learned Single Judge of this Court and it was recorded that the challenge in the petition was limited to the majority award on claim No.2, which pertained to compensation for losses incurred due to delay in completion of work. While admitting the petition, inadvertently, it was recorded by the learned Single Judge that the petition stood disposed of, due to which, the respondent filed Review Petition, that was eventually allowed and the observation that 'the petition stood disposed of' was deleted. The petition has now come up for final hearing.

5. Mr. Dighe, learned AGP appearing for the petitioners-State submit that the majority award erroneously partly allowed claim No.2 raised by the respondent towards compensation for losses incurred due to delay in

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completion of work, for the reason firstly, that the respondent was specifically informed in the tender notice itself that the tenderer shall be deemed to have full knowledge of the site, whether he inspects it or not and no extra charges, consequent on any misunderstanding or otherwise, shall be allowed. It was submitted that despite the specific clause, the respondent had raised claim No.2, primarily on the ground that the delay occurred due to certain clearances to be taken from State departments, which had consumed unreasonable period of time. This was the major factor for delay in completion of work. It was submitted that having entered into the agreement as per the tender notice, it could not lie in the mouth of the respondent that he was not aware about the condition of the site and the clearances that were to be taken from various authorities for execution of the work.

6. Secondly, it was submitted that even if the claim of the respondent for losses incurred due to delay in completion of work was to be considered on merits, the respondent was required to place on record cogent material before the arbitral tribunal and to lead evidence to support its claim regarding specific amount of compensation. The learned AGP submitted that in the absence of any such evidence being led on behalf of the respondent, the majority members of the arbitral tribunal clearly erred in partly allowing the said claim. It was emphasized that the minority award rejected the claim precisely on this ground. The learned AGP relied upon judgment of the Supreme Court in the case of *Dakshin Haryana Bijli Vitran Nigam Ltd. v/s. Navigant Technologies Pvt. Ltd.*, (**2021 SCC Online Sc 157**), to contend that this Court, while considering the petition under Section 34 of the said Act, was not precluded from considering the findings and conclusions of the dissenting opinion of the minority member of the arbitral tribunal. On this

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basis, it was submitted that this Court may accept the reasoning and finding of minority member of the arbitral tribunal in the present case and he prayed for setting aside the award to the extent of claim No.2.

7. On the other hand, Mr. M. P. Vashi, learned senior counsel appearing for the respondent submitted that the law regarding narrow scope of jurisdiction under Section 34 of the aforesaid Act for interfering in the arbitral award is, by now, well-settled by a series of judgments of the Supreme Court. Reference was made to a number of judgments and emphasis was placed on judgment of the Supreme Court in the case of *McDermott International Inc. v/s. Burn Standard Co. Ltd. and others*, [**(2006) 11 SCC 181**], to contend that interference even on the ground of 'patent illegality' is permissible only when the same goes to the root of the matter. It is only if the award appears to be so unfair and unreasonable that it would shock the conscience of the Court that interference would be justified in an arbitral award under Section 34 of the said Act.

8. Learned Senior Counsel also placed reliance on the judgment of Supreme Court in the case of *Associate Builders v/s. Delhi Development Authority*, [**(2015) 3 SCC 49**], to contend that the arbitrator is the ultimate master of the quantity and quality of evidence while drawing the arbitral award and that the Court, while exercising jurisdiction under Section 34 of the said Act, does not act as a Court of appeal. It was further submitted that a perusal of relevant portion of the majority award would show that the learned arbitrators had applied a reasonable formula for calculating the amount of compensation payable to the respondent under claim No.2 and that the same did not deserve interference at the hands of this Court. It was submitted that the opinion of the minority member of the arbitral tribunal

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that the respondent ought to have placed on record detailed evidence to support the quantum of compensation claimed, was an erroneous view, which this Court may ignore while considering the present petition.

9. Heard the learned counsel for the parties and perused the material on record. The extent of controversy in the present petition is limited to the correctness of the majority opinion in the arbitral award, partly allowing claim No.2 raised by the respondent. Before embarking upon consideration of correctness of the majority view and as to whether the minority view in the award ought to prevail, it would be appropriate to first refer to the position of law.

10. This Court is of the opinion that there could be no quarrel with the proposition that while deciding the petition under Section 34 of the said Act, this Court is certainly not precluded from considering the findings and conclusions of the dissenting opinion of a minority member of the arbitral tribunal. To that extent, the learned AGP is justified in contending that this Court may consider accepting the dissenting opinion in the arbitral award.

11. At the same time, this Court cannot be oblivious of the position of law repeatedly clarified by the Supreme Court, concerning the limited scope of interference available to the Court while exercising jurisdiction under Section 34 of the said Act to consider the correctness or otherwise of an arbitral award.

12. In the case of ***McDermott International Inc. v/s. Burn Standard Co. Ltd. and others*** (*supra*), this Court expounded the various aspects of jurisdiction to be exercised by the Court under Section 34 of the said Act. It is clearly laid down in the said judgment that the supervisory role of the

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Court under Section 34 of the said Act is clearly distinguishable from the jurisdiction to be exercised by an appellate Court and that such a supervisory role is to be kept at the minimum. It has been held that interference, even on the ground of 'patent illegality', is permissible only if it goes to the root of the matter and violation of public policy should be demonstrated to be so unfair and unreasonable that it shocks the conscience of the Court. It is also clarified that what would constitute 'public policy' would be a matter depending upon the nature of transaction between the parties.

13. In the case of **Associate Builders v/s. Delhi Development Authority** (*supra*), the Supreme Court reiterated the aforesaid position and further elaborated that the arbitrator is the sole Judge of the quantity and quality of evidence before him and that if a possible view on facts is taken by the arbitrator, the Court ought not to interfere, while exercising jurisdiction under Section 34 of the said Act. The said position of law has been reiterated in the case of *Madhya Pradesh Power Generation Company Limited and another v/s. Ansaldo Energia SPA and another*, [**(2018) 16 SCC 661**). The scope and ambit of jurisdiction under Section 34 of the aforesaid Act is further explained and it is emphasized that the Court, while exercising jurisdiction, ought not to re-appreciate the evidence because the Court is not exercising appellate jurisdiction while considering the correctness or otherwise, of an arbitral award.

14. Applying the aforesaid position of law to the facts of the present case, it needs to be examined as to whether the majority opinion of the arbitral tribunal can be said to be of such a nature that it gives rise to grounds under Section 34 of the aforesaid Act for interference.

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15. This Court has perused the majority opinion in the arbitral award concerning claim No.2, which pertained to compensation for losses incurred due to delay in completion of work. The majority opinion took into consideration the entire facts discernible from the material placed on record by the rival parties. Upon appreciating such material, the majority opinion in the arbitral award found that the petitioners, at no point in time, placed any blame on the respondent for delay in completion of the work and despite contractual provision for penal action, the petitioners never imposed any fine on the respondent. Instead, they granted extensions from time to time. On this basis, it was found that delay in completion of the project was not attributable to the respondent and therefore, the respondent was justified in raising the claim in that regard. The majority opinion in the arbitral award found, as matter of fact, that the respondent had led evidence of one of its former partners as regards the rate analysis for overheads that were suffered due to delay in completion of work. The said witness was cross-examined on behalf of the petitioners, but there was no cross-examination either on the averments made in the affidavit of evidence or in respect of the rate analysis regarding overheads.

16. The majority opinion in the arbitral award then took into consideration guidelines and recommendations concerning overheads prepared by the Ministry of Irrigation and Power, upon survey of various projects in the country and found that a particular formula could be applied. After taking into consideration the material available on record, the majority opinion in the arbitral award found that the losses in connection with claim No.2 would be certainly more than 10%, amounting to at least 15%. Thereupon, the majority opinion in the arbitral award referred to Hudson's formula and even quoted from a book authored by Gajaria as to the manner

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in which compensation towards such losses could be calculated. It was then held that after disallowing certain periods and reducing certain others, the respondent could be compensated for loss on overheads at 15%, although the respondent was insisting for payment at 18% towards loss of overheads. It is, thereafter, that the aforesaid formula was applied and the figure was arrived at, for partly allowing claim No.2 in favour of the respondent.

17. As opposed to this, the minority opinion rejected the claim, primarily on the ground that the respondent had failed to lead detailed evidence as to the actual loss suffered while claiming compensation under claim No.2.

18. This Court has considered the majority as well as minority opinion in the arbitral award and it is found that the majority opinion is based on a reasonable appreciation of the material available on record and upon application of a formula, which is indeed applicable for calculation of compensation in such circumstances.

19. It is significant that in the aforesaid judgment of ***McDermott International Inc. v/s. Burn Standard Co. Ltd. and others*** (*supra*), the Supreme Court did refer to the Hudson's formula, observing that it was widely accepted in construction contracts for computing increased overheads and losses. This Court is of the opinion that the majority opinion in the arbitral award applied the said formula, which was reasonable in the facts and circumstances of the present case and hence, it cannot be said that the petitioners have made out a case for exercising jurisdiction in the limited scope available under Section 34 of the aforesaid Act. The manner in which the evidence and material on record has been appreciated by the majority opinion in arbitral award, cannot be said to be unreasonable and applying

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the position of law that the arbitrator is the sole Judge of the quantity and quality of evidence before him, no interference is warranted in the impugned award. The present case is not a case of absence of evidence or of perversity, to justify interference with the impugned award.

20. Even on the question of interest, the minority award wrongly proceeded on the basis that the contract between the parties did not stipulate a specific rate of interest, while the contract did specify such rate. The observation in the minority opinion in the award was thus, in the teeth of the terms of the contract. Hence, on this aspect also the majority opinion in the award cannot be found fault with.

21. Applying the settled position of law as regards limited scope available to this Court to interfere with the arbitral award under Section 34 of the said Act, it is found that the petitioners have not been able to make out a case in their favour. Consequently, it is found that there is no merit in the petition.

22. Hence, the petition is dismissed. All pending applications stand disposed of.

23. No order as to costs.

(MANISH PITALE, J)

Priya Kambli

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