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

Date of decision: 17th January, 2023

\+ O.M.P. 146/2008

UNION OF INDIA & ANR. ..... Petitioners

Through: Mr. Jitendra Kumar Singh, Advocate with Ms. Anjali Kumari & Mr. Rudresh Tripathi, Advocates.

versus

ALCON BUILDERS AND ENGINEER PVT. LTD..... Respondent

Through: Mr. G.S. Gangwar, Advocate.

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition under section 34 of the Arbitration & Conciliation Act, 1996 ('A&C Act' for short), the petitioners - Union of India (Northern Railways) - impugn arbitral award dated 09.08.2007 ('impugned award') rendered by the learned Sole Arbitrator, thereby deciding the disputes that had arisen between the petitioners and the respondent from a works-contract for *'Indoor Signalling Works i.c.w. Yard Remodelling at GZB*' awarded by the petitioners to the respondent on 07.12.1994. The impugned award variously decides the claims and counter-claims raised by the parties.

2. As recorded in order dated 04.03.2008, the limited challenge raised by the petitioners before this court concerns the award of *pendente-lite* interest and costs by way of the impugned award.

Challenge to Award of *Pendente-Lite* Interest

3. Mr. Jitendra Kumar Singh, learned counsel appearing for the petitioners submits that in awarding *pendente-lite* interest on the principal sum awarded, the learned Arbitrator has acted in breach of the provisions of section 28(3) of the A&C Act (as it stood prior to amendment by way of Amendment Act 3 of 2016 which came into effect from 23.10.2015). To be sure, the award itself pre-dates the amendment, and is therefore governed by the pre-amendment provision.

4. Attention in this behalf is drawn to the pre-amendment sections 28(3) and 31(7)(a) of the A&C Act, which read as under :

> ***"28. Rules applicable to substance of dispute***
> *(1)…*
> *(2)…*
> *(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction"*
>
> * * * * *
>
> ***"31. Form and contents of arbitral award***
> *(1)…*
> *(2)…*
> *(3)…*
> *(4)...*
> *(5)…*
> *(6)…*
> *(7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may*

> *include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made."*
>
> (emphasis supplied)

5. Learned counsel for the petitioners submits that the award of interest by the learned Arbitrator is contrary to the express agreement between the parties, since clause 16(2) of the General Conditions of Contract ('GCCs') governing the parties recites as under :

> *"**Clause 16(2)** - No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon"*
>
> (emphasis supplied)

6. It is submitted that on the one hand, in the impugned arbitral award the learned Arbitrator has acknowledged that under the terms of the contract entered into between the parties, the contractor, *viz* the respondent, was debarred from receiving any interest upon any amount payable under the contract, on the other hand, the learned Arbitrator has proceeded to award interest. It is pointed-out that taking due notice of clause 16(2) of the GCCs, in paras 27 and 28 of the award, the learned Arbitrator expressly observes that the contractor is debarred from receiving any interest upon any amount payable under the contract, saying:

> *"27. In Claim No.9, the claimant has prayed for award Rs.1,12,253/- as interest from July 1999 to February 2001 @ 18% per annum on delayed payment of 7th Running Account Bill. As far as claim of interest is concerned for delay in payment of the amount due, there is a clause in the contract. Clause 16(2) in the contract which clearly debarred the*

contractor from having any interest upon any amount payable to the contractor under the contract.

"28. The learned counsel for the claimant has argued that notices C-27, 31, 34, 37, 43, 45 in the year January 2001 to June 2001 were sent by the claimant demanding the amount due and on failure of payment the intention of the claimant was communicated to claim interest on the due amount. The receipt of all these communications has been denied by the respondent in the statement of defence itself. The claimant had not brought any evidence on the record apart from a bald affidavit of claimant's witness that these communications have been duly served on the respondent. The witness has not given any documentary proof of having served any such communication on the respondent. The arbitrator has no jurisdiction to ignore any contractual provisions and award any amount dehors the contract. Thus, the claim of interest is not admissible in view of said contractual provisions."

(emphasis supplied)

7. Yet, contradicting the above inference, the learned Arbitrator proceeds to award *pendent-lite* interest from the date the cause of action arose till the date of the award, in the following words :

"34. In view of the findings above, the respondent is liable to pay to the claimant a sum of Rs.3,68,630/- on which I allow the interest @ 10% per annum w.e.f. 1st July, 2001 to 31st July, 2007 and amount comes to Rs.2,21,178/-."

8. In support of his objection to awarding of *pendente-lite* interest, learned counsel for the petitioners has drawn attention to the judgment of the Supreme Court in ***Sri Chittaranjan Maity vs. Union of India***[1], the relevant paragraphs of which read as under:

"13. The next question for consideration is whether the Arbitral Tribunal was justified in awarding interest on the delayed payments in favour of the appellant?

[1] (2017) 9 SCC 611

> *"14. The total interest awarded by the Arbitral Tribunal is Rs 12,44,546 which includes interest for the pre-reference period and also pendente lite interest. Section 31(7)(a) of the 1996 Act provides for payment of interest, as under:*
>
> > *"31. (7)(a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the Arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made."*
>
> *In this section, a specific provision has been created, whereby if the agreement prohibits award of interest for the pre-award period (i.e. pre-reference and pendente lite period), the arbitrator cannot award interest for the said period.*
>
> * * * * *
>
> *"18. In Sayeed Ahmed and Co. v. State of U.P. [Sayeed Ahmed and Co. v. State of U.P., (2009) 12 SCC 26 : (2009) 4 SCC (Civ) 629], this Court noted that the 1940 Act did not contain any provision relating to the power of the arbitrator to award interest. However, now a specific provision has been created under Section 31(7)(a) of the 1996 Act. As per this section, if the agreement bars payment of interest, the arbitrator cannot award interest from the date of cause of action till the date of award. The Court has observed that in regard to the provision in the 1996 Act, the difference between pre-reference period and the pendente lite interest has disappeared insofar as award of interest by the arbitrator is concerned. Section 31(7)(a) recognises only two periods i.e. pre-award and post-award period."*
>
> (emphasis supplied)

9. It is submitted on behalf of the petitioners that the foregoing view has been reiterated by the Supreme Court recently in ***Garg Builders vs. Bharat Heavy Electricals Limited***[2], as follows :

[2] 2021 SCC OnLine SC 855

> *"15. In Sri Chittaranjan Maity v. Union of India[6] it was categorically held that if a contract prohibits award of interest for pre-award period, the arbitrator cannot award interest for the said period.*
>
> * * * * *
>
> *"22. Thus, when there is an express statutory permission for the parties to contract out of receiving interest and they have done so without any vitiation of free consent, it is not open for the Arbitrator to grant pendent lite interest. We are of the considered opinion that Clause 17 of the contract is not ultra vires in terms of Section 28 of the Indian Contract Act, 1872."*

10. On the other hand, Mr. G.S. Gangwar, learned counsel appearing for the respondent argues that as per the applicable GCCs of 1989, there is no 'contractual restriction' on the arbitrator granting *pendente-lite* interest, which the arbitrator may therefore do in his discretion. It is argued that the express bar on award of interest on the award was included in clauses 64.5 and 64.6 of the subsequent GCCs of 1999, which prohibition was absent in the GCCs of 1989. Accordingly, the submission is that the learned Arbitrator was within his remit to grant interest. It is further argued that clause 16(2) of the GCCs of 1989 stipulates non-entitlement to interest on earnest money or security deposit or on any "amounts payable to the Contractor", and the words any "amounts payable to the Contractor under the contract" refer only to amounts diverted towards security deposit as clarified in clause 16(1). To make good this submission, the respondent relies upon the decision of the Supreme Court in ***Union of India vs. Pradeep Vinod Construction Company***[3], which *inter-alia* holds as follows :

[3] 2017 SCC OnLine SC 2075

> *"12. Having given our thoughtful consideration to the contractual obligations entered into by the parties through clause 16, we have no reason to doubt, firstly, that the clause related exclusively to earnest money and security deposit. The above Clause did not relate to the other contractual obligations between the parties. A perusal of clause 16(1) further clarifies the position, inasmuch as, even if some payment under the contractual obligation was diverted to make good the security deposit payable, no interest would be payable thereon as well. Therefore, there can be no doubt, that non-payment of interest, contemplated between the parties under clause 16, was exclusively limited to the component of earnest money and the security deposit, which was held by the appellant and nothing else. Even though, there can be no dispute whatsoever, that Clause 16(2) is in parimateria with the clause taken into consideration in Tehri Hydro Development Corpn. Ltd.' case (supra), yet in the case before us, having read the clause in its entirety, we are satisfied, that the parties had agreed, that payment of interest would not be due, only with reference to earnest money and security deposit. Thus viewed, we have no hesitation in concluding, that the determination in the arbitral award, of component of interest, payable by the appellant to the respondent, was in terms of the contractual obligation. Nothing in the contract provided for non-payment of interest on the contractual obligations."*
>
> (emphasis supplied)

11. Reliance is also placed by the respondent on the observations of the Supreme Court in ***Secretary, Irrigation Department, Government of Orissa and Ors. vs. G.C. Roy***[4], where it has been observed thus :

> *"44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf :*
>
> *Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes — or refer the dispute as to interest as such*

[4] (1992) 1 SCC 508

— to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view."

(emphasis supplied)

Challenge to Award of Costs

12. Insofar as the award of costs is concerned, learned counsel for the petitioners submits that the learned Arbitrator has awarded Rs.4 lacs as costs of proceedings, despite the fact that the respondent had claimed only Rs.1 lac towards costs and the petitioners had, in any case, borne their share of the costs of the arbitral proceedings. It is submitted that there is no break-up, quantification, reason or rationale for the amount of costs awarded.

13. It is further submitted on behalf of the petitioners, that the award of costs is also contrary to the provisions of section 31(8) of the A&C Act, as it stood prior to amendment by Amendment Act 3 of 2016 which came into effect from 23.10.2015. The pre-amendment provision read as under :

"(8) Unless otherwise agreed by the parties,—

(a) the costs of an arbitration shall be fixed by the arbitral tribunal;

(b) the arbitral tribunal shall specify—

(i) the party entitled to costs,

(ii) the party who shall pay the costs,

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid.

> *Explanation.—For the purpose of clause (a), "costs" means reasonable costs relating to—*
>
> *(i) the fees and expenses of the arbitrators and witnesses,*
>
> *(ii) legal fees and expenses,*
>
> *(iii) any administration fees of the institution supervising the arbitration, and*
>
> *(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award."*

14. Responding to the challenge to award of costs, learned counsel for the respondent argues that the claim of Rs.1 lac made by the respondent towards costs, was only on tentative basis; whereas, the learned Arbitrator has quantified arbitrator's fee *vide* order dated 22.03.2007 at Rs. 4,40,000/- for 20 hearings and has further directed payment of half-share by each party.

15. Counsel argues that since the petitioners had failed to deposit their share of the arbitrator's fee despite reminders by the Arbitrator, this compelled the learned Arbitrator on 26.05.2007 to direct the petitioners to pay the fee due within 02 weeks, failing which the respondent was directed to pay the same, observing that the same would be treated as part of the costs. However, since the petitioners failed to deposit their share of the arbitrator's fee, the respondent deposited Rs.1,16,000/-, which led to the learned Arbitrator awarding costs in the sum of Rs.4 lacs in the respondent's favour.

16. It is further argued, that there is no bar in GCCs of 1989; nor is there any other provision that the arbitral fee and costs are to be borne in equal share by the parties; nor was there any provision in the contract

that barred the arbitrator from fixing costs of proceedings in his discretion in favour of the successful party.

17. In support of this submission, the respondent places reliance on the decision of this court in ***Union of India vs. Om Vajrakaya Construction Company***[5] where this court held as under :

> *33. Unlike the power of the Arbitral Tribunal to award interest under Section 31(7)(a) of the A&C Act, which is subject to the contract between the parties, there are no such fetters on the discretion of the Arbitral Tribunal to award costs under Section 31A of the A&C Act. The only exception being any agreement between the parties regarding costs which is entered into after the disputes have arisen.*
>
> (emphasis supplied)

On partial setting-aside of an award

18. In the course of hearing the parties, a preliminary query was raised as to whether, in exercise of its jurisdiction under section 34 of the A&C Act, this court can *partly* set-aside an arbitral award. Learned counsel for the parties answered the query in the affirmative, to say that in any case, the challenge was only to the arbitrator's decision on two aspects; and the parties have accepted and acted-upon the rest of the award. That being said however, this court finds it necessary to refer to the decision of the Supreme Court in ***The Project Director, National Highway No. 45 E and 220, National Highways Authority of India*** **vs.** ***M. Hakeem and Another***[6], in which case it was held that the court's power under section 34 of the A&C Act *does not* include the power to 'modify' an award. The question then arises whether partial

[5] 2021 SCC OnLine Del 5434

[6] (2021) 9 SCC 1

setting-aside of an award would amount to 'modification' thereof. It would be beneficial at this point to extract para 42 of *M. Hakeem* which reads as under:

> *"42. It can therefore be said that this question has now been settled finally by at least 3 decisions [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] , [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."*

19. Upon a closer reading of *M. Hakeem* (supra) however, it transpires that the said case concerned a claim for payment of compensation for land acquisition and the District Court**,** in exercise of its powers under section 34 of the A&C Act, had increased the quantum of compensation awarded by the competent authority. *M. Hakeem* (supra) therefore, was not a case where some of several claims made before the arbitral tribunal were set-aside**.**

20. In order to better appreciate and apply *M Hakeem* (supra), and to understand the correct meaning of what amounts to 'modification' of an arbitral award, it is necessary to refer to the following decisions:

20.1. In ***J.G. Engineers Pvt. Ltd. vs. Union of India and Anr.,***[7] which involved multiple claims dealt with and decided by the arbitrator, this is what the Supreme Court had to say :

> *"25. It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. ..."*
>
> (emphasis supplied)

20.2. Then again, in ***R.S. Jiwani (M/S.) Mumbai vs. Ircon International Ltd., Mumbai***[8] a Full Bench of the Bombay High Court has dealt with the concept of severability of the decisions on various claims/counter-claims comprised in an award and has held as follows:

> *"17. The argument raised before us is that sub-clauses (i) to (iii) and (v) of clause (a) of sub-section (2) of section 34 are the grounds where it is mandatory for the Court to set aside the whole award and there is no other choice before the Court. It is only in the class of cases falling under section 34(2)(a)(iv) that with the aid of the proviso to that sub-section, the Court can apply principle of severability. In that case, if the matter submitted to the arbitration can be separated from the one not submitted then the Court may set aside that part of the award alone which is not submitted to arbitration. This argument is founded on the Division Bench judgment of this Court in the case of Mrs. Pushpa P. Mulchandani v. Admiral Radhakrishin Tahiliani, 2008(7) LJ Soft, 161, and which was relied upon by the respondents for inviting the decision against the Appellant. Thus, we have to examine the provision of section 34 of the 1996 Act to find whether it permit of any other interpretation than the one put forward by the respondents. Sub-clauses (i), (ii), (iii)*

[7] (2011) 5 SCC 758

[8] 2009 SCC OnLine Bom 2021

and (v) of clause (a) of sub-section (2) of section 34 deal with certain situations which may require the Court to set aside an award of the arbitral tribunal. These may be the cases where the party was under incapacity, the agreement is not valid under the law in force, where proper notice was not given to the party or otherwise enable to present his case, and the composition of arbitral tribunal or procedure was not in accordance with the agreement between the parties and lastly the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Explanation to section 34(2) which is in the nature of a declaration further explains that when an award is in conflict with the public policy of India when the award was induced or affected by (i) fraud or (ii) by corruption; or (iii) was in violation of section 75 or 81 of the Act. It is difficult for this Court to hold that under all these categories it would be inevitable for the Court to set aside the entire award. It may not be very true that even under these categories, it would be absolutely essential for the Court to set aside an award. It is true that where a party was under incapacity or was not served with the notice at all and the arbitration agreement itself was not valid that an award may have to be set aside in its entirety. But even within these clauses, there is possibility of a situation where it may not be necessary for the Court to set aside the entire award. Let us take an example that where a party is given a notice has participated in the proceedings before the arbitral tribunal but was unable to lead evidence or present himself or submit his counter claim. Would it be fair for the Court to set aside an award of the arbitral tribunal in its entirety in this situation? A party who participated in the arbitral proceeding even led evidence and cross-examined the witnesses of the claimants in relation to the claims but for any reason was not able to place his evidence on record in relation to the counter claims or he was not granted sufficient opportunity to present his case or for some reason was unable to present his case before the arbitral tribunal, would it not be just, fair, equitable and in line with the object of the Act of 1996 to consider setting aside award only regarding counter claim. Is such a party which has succeeded in the claims made by it, which are otherwise lawful and not hit by any of the stated circumstances, should be

awarded his reliefs while either rejecting or even altering the award with regard to the counter claim filed by the aggrieved party before the Arbitrator. Situation may be different where arbitration agreement is not valid. ...

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"18. In the event the arbitration agreement between the parties is not valid means where it is unlawful or void, the whole award will have to be set aside as the very root of the matter suffers from a defect of law and is not valid under the law for the time being in force. Severability is an established concept. It is largely applicable to various branches of civil jurisprudence. Where it is possible to sever the bad part from the good part, the good part of the contract can always be enforced and partial relief can be granted. Doctrine of severability has been applied to law of Contract since time immemorial of course, it could be said that substantial severability and not textual divisibility is the principle controlling this concept. ...

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"20. The cases would be different where it is not possible or permissible to sever the award. In other words, where the bad part of the award was intermingled and interdependent upon the good parts of the award there it is practically not possible to sever the award as the illegality may affect the award as a whole. In such cases, it may not be possible to set aside the award partially. ***However, there appears to be no bar in law in applying the doctrine of severability to the awards which are severable****. In the case of Messrs. Basant Lal Banarsi Lal v. Bansi Lal Dagdulal, AIR 1961 SC 823, though the Supreme Court was dealing with an application for setting aside an award passed by the Bombay City Civil Court, contending that forward contract in groundnuts were illegal as making of such contracts was prohibited by Oil Seeds (Forward Contract Prohibition) Order, 1943 and hence arbitration clause contained in the forward contracts in groundnuts between the parties was null and void, where it was found as a matter of fact that it was not possible to*

segregate the dispute under the various contracts as there was direct link between them. The Supreme Court held as under:

> *"It would follow that the arbitration clause contained in that contract was of no effect. It has therefore to be held that the award made under that arbitration clause is a nullity and has been rightly set aside. The award, it will have been noticed, was however in respect of disputes under several contracts one of which we have found to be void. But as the award was one and is not severable in respect of the different disputes covered by it, some of which may have been legally and validly referred, the whole award was rightly set aside."*

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"30. If the principles of severability can be applied to a contract on one hand and even to a statute on the other hand, we fail to see any reason why it cannot be applied to a judgment or an award containing resolution of the disputes of the parties providing them such relief as they may be entitled to in the facts of the case. It will be more so, when there is no statutory prohibition to apply principle of severability. We are unable to contribute to the view that the power vested in the Court under section 34(1) and (2) should be construed rigidly and restrictedly so that the Court would have no power to set aside an award partially. The word "set aside" cannot be construed as to 'only to set aside an award wholly', as it will neither be permissible nor proper for the Court to add these words to the language of section which had vested discretion in the Court. Absence of a specific language further supported by the fact that the very purpose and object of the Act is expeditious disposal of the arbitration cases by not delaying the proceedings before the Court would support our view otherwise the object of Arbitration Act would stand defeated and frustrated.

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"38. For the reasons afore-recorded, we are of the considered view that the dictum of law stated by the Division Bench in the case of Ms. Pushpa Mulchandani (supra) is not the correct exposition of law. We would predicate the contrary view expressed by different Benches of this Court for the reasons stated in those judgments in addition to what we have held hereinabove. It is difficult to prescribe legal panacea which, with regard to the applicability of the principle of severability can be applied uniformally to all cases. We find that the principle of law enunciated by us hereinabove is more in comity

to object of the Act, legislative intent, UNCITRAL Model Law and will serve the ends of justice better. Thus, we proceed to record our answers to the questions framed as follows:

1. The judicial discretion vested in the Court in terms of the provisions of section 34 of the Arbitration and Conciliation Act, 1996 takes within its ambit power to set aside an award partly or wholly depending on the facts and circumstances of the given case. In our view, the provisions of section 34 read as a whole and in particular section 34(2) do not admit of interpretation which will divest the Court of competent jurisdiction to apply the principle of severability to the award of the Arbitral Tribunal, legality of which is questioned before the Court. The Legislature has vested wide discretion in the Court to set aside an award wholly or partly, of course, within the strict limitations stated in the said provisions. The scheme of the Act, the language of the provisions and the legislative intent does not support the view that judicial discretion of the Court is intended to be whittled down by these provisions.

2. The proviso to section 34(2)(a)(iv) has to be read ejusdem generis to the main section, as in cases falling in that category, there would be an absolute duty on the Court to invoke the principle of severability where the matter submitted to arbitration can clearly be separated from the matters not referred to arbitration and decision thereupon by the Arbitral Tribunal."

(emphasis supplied)

20.3. The judgment in *R.S. Jiwani* (supra) has been relied upon recently in a judgment of the Bombay High Court in ***National Highways Authority of India Through its Project Director and Another vs. Additional Commissioner and Others***[9]**.**

20.4. A similar view emerges in a decision of a Division Bench of the Kerala High Court in ***Navayuga Engineering Company Limited vs. Union of India Represented by the Chief***

[9] 2022 SCC OnLine Bom 1688

Engineer[10], where the Division Bench, while distinguishing *M Hakeem* (supra) observes as follows:

> *"12. According to us the dictum in Hakeem's case (supra) can be distinguished on facts. As stated earlier, the District Court in the proceedings under Section 34 found that the amount of compensation granted to the land owners under the National Highway Act by the authorities under the Act was abysmally low and therefore enhanced the compensation to Rs. 645/- per sq.mtr. in the place of Rs. 46.55/- to Rs. 83.15/- per sq.mtr. This is the modification that has been interdicted by the Apex Court. However, the situation in the case on hand is different. A total of 31 claims amounting to Rs. 16,04,07,582/- was made by the appellant/claimant before the Arbitrator. An award of Rs. 3,93,24,065/- with interest was granted by the Arbitrator. The court below in the proceeding under Section 34 initiated by the respondent/UoI, confirmed the award on some claims and set aside the award on certain other claims. The claims are independent and separate. This is not a case in which the award of compensation under any particular head was revised/changed or altered, but a case in which the portion of the award relating to certain independent claims were set aside.*
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> *****
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> *14. As in the aforesaid decision, in the case on hand also, the award has dealt with and decided several claims separately and distinctly. Therefore, if the court finds the award with regard to some claims to be bad, the court can segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. If such an interpretation is not given, it would result in gross injustice and absurd results because the court would have to set aside that portion of the award also which suffers from no infirmity. This certainly cannot be what was contemplated by the Legislature.* ***No reference has been made to J.G. Engineers Pvt. Ltd. (supra) in Hakeem's case nor has it been distinguished or overruled.*** *The decision in J.G. Engineers Pvt. Ltd. is apparently not under Article 142 of the Constitution also. That being the*

[10] 2021 SCC OnLine Ker 5197

position, we find that the doctrine of severability can be applied to proceedings under Section 34 also because as held in R.S. Jiwani (supra), if a person can challenge an award in part, certainly the court can also set aside an award in part. That being the position, we negative the argument advanced on behalf of the appellant that the impugned order is liable to be set aside on the said preliminary ground alone."

(emphasis supplied)

20.5. To be sure, it is also necessary for this court to point-out that the *apparently* contrary view taken by a Division Bench of this court in ***MBL Infrastructures Ltd. vs. Telecommunication Consultants of India*** [11] **,** is distinguishable on facts, inasmuch as while holding that an arbitral award can only be set-aside as a whole, the court was dealing with a case where the learned single Judge had proceeded to correct errors and thereby modify the arbitral award, which the Division Bench held was beyond the scope of the powers of the court under section 34 of the A&C Act. In that case**,** the Division Bench found fault with the learned single Judge having modified and corrected the amounts awarded under individual heads of claims and counter-claims, which, there is no dispute, the court cannot do in exercise of powers under section 34. However, the Division Bench was not seized of and did not express any opinion on the question of what the correct course of action would be if one or more claims in their entirety are *set-aside - but not*

[11] 2022 SCC OnLine Del 4613

modified - by the court in exercise of its jurisdiction under section 34 of the A&C Act**.**

21. It is important to appreciate that the A&C Act does not define an 'award', except to say in section 2(1)(c) that '*arbitral award*' includes an interim award. But typically, an arbitral award includes decisions on multiple claims and counter-claims raised by the disputing parties; and thus the award commonly comprises a bouquet of decisions of the arbitrator on separate claims and counter-claims.

22. Furthermore, in line with what is mandated in section 5 of the A&C Act, the settled position of law is that judicial intervention in arbitral proceedings and in an arbitral award is to be 'minimal'. What sense would it then make, to say that if an arbitral award is challenged under section 34, it is the bounden duty of the court to either uphold the arbitrator's decisions 'wholesale' on all claims/counter claims; or set them aside 'wholesale' on all claims/counter-claims ? What if an arbitral award is challenged only in relation to decisions on certain claims/counter-claims (as is the case in the present matter); or, upon a consideration of the challenge made, the court finds no fallacy in the decision of the arbitrator on some of the claims/counter-claims; and is of the view that the decision on other claims /counter-claims requires to be set-aside ? In such circumstances, would the court necessarily have to wield the axe even on decisions with which it does not find any fault ?

23. Upon a combined and meaningful reading of the provisions of the A&C Act and the aforesaid judicial precedents, in the opinion of this court, the following position emerges:

23.1 A court exercising power under section 34 of the A&C Act cannot '*modify*' an arbitral award;

23.2 The arbitrator's decision on each claim and counter-claim, *taken individually*, is final. 'Modification' means to *substitute* the court's own decision for the decision made by the arbitrator on any given claim or counter-claim; which the court cannot do;

23.3 If objections are filed under section 34, impugning the arbitrator's decision *only on some* of the claims or counter-claims, it is *not necessary* for the court to set-aside the *entire* arbitral award *viz.* the decision on all claims and counter-claims. This follows from the limited ambit of the court's powers under section 34. Besides, the decision on a section 34 petition cannot go beyond the scope of the challenge itself;

23.4 When the arbitrator's decisions on multiple claims and counter-claims are *severable and not inter-dependent*, the court is empowered under section 34 to set-aside or uphold the arbitrator's decisions on *individual and severable* claims or counter-claims; without having to set-aside the entire arbitral award. That would *not* amount to *modification* of the arbitral award;

23.5 The above is also in-line with the overarching principle that the scope of interference by the court under the A&C Act in arbitral proceedings and arbitral awards, is to be minimal. The statute does not command the court to go for the overkill. To adapt a phrase famously used by Justice Felix Frankfurter, while

exercising power under section 34, *it is not necessary to burn the house to roast the pig!*

Conclusions

24. In the opinion of this court, there is merit in the challenge made by the petitioners to the arbitral award on both counts, *viz.* as regards the award of *pendente-lite* interest as also the award of the costs in favour of the respondent.

25. Insofar as the award of *pendente-lite* interest is concerned, upon a plain reading of section 28(3) as it stood before it was amended w.e.f. 23.10.2015, it is apparent that the mandate of the law was that " ... *the arbitral tribunal shall decide* (the disputes) *in accordance with the terms of the contract ...",* meaning thereby that in the present case, the learned Arbitrator had *mandatorily* to go by the provisions of clause 16(2) of the GCCs of 1989 which governed the contractual relationship between the parties. This clause specifically provided that no interest was to be payable to the respondent, *not only* upon the earnest money or the security deposit but also on *"amounts payable to the Contractor under the contract"*. In fact, the learned Arbitrator has acknowledged the applicability of this clause in his own award, but has yet proceeded, to award interest *pendente-lite* for the period from July 2001 to July 2007**,** which was impermissible under clause 16(2). The learned Arbitrator himself observes that he had no jurisdiction to "*...ignore any contractual provision and award amounts dehors the contract"* and that the "*... claim of interest is not admissible in view of said contractual provision"*; but then goes-on to award interest for an even longer period though at a lesser rate, against the terms of the contract. This, the learned Arbitrator could not have done.

26. The argument made on behalf of the respondent that clause 16(2) only applies to earnest money, security deposit or amounts diverted from such earnest money or security deposit holds no water, inasmuch as the clause, in so many words, applies to *"... amounts payable to the Contractor under the contract"*. The amounts awarded by the learned Arbitrator after adjudicating the disputes between the parties were obviously amounts claimed by the respondent/contractor to be due from the petitioners *under the contract*. If under the contractual terms, the contractor was not entitled to interest on such payments, that position would not change merely because amounts were awarded after adjudication by the learned Arbitrator.

27. In interpreting clause 16(2) of the GCCs, this court is also guided by the decision of the Supreme Court in ***Union of India vs. Manraj Enterprises***[12], wherein the Supreme Court has interpreted an in *pari-materia* clause as under :

> *"12. The further submission made on behalf of the respondent is that Clause 16 has to be read as a whole and on doing so, it can be said that Clause 16 pertains specifically to earnest money and security deposit and that the same can in no way be read in a manner to imply a bar on pendente lite interest.*
>
> > *12.1. It is required to be noted that Clause 16(1) is with respect to earnest money/security deposit. However, Clause 16(2) is specifically with respect to interest payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract. The words used in Clause 16(2) is "or". Therefore, the expression "amounts payable to the contractor under the contract" cannot be read in conjunction with "earnest money deposit" or "security deposit" by applying the principle of ejusdem generis. The expression "amounts payable to*

[12] (2022) 2 SCC 331

> *the contractor under the contract" has to be read* ***independently*** *and* ***disjunctively*** *to earnest money deposit and security deposit as the word used is "or" and not "and" between "earnest money deposit", "security deposit" and "amounts payable to the contractor under the contract". Therefore, the principle of ejusdem generis is not applicable in the present case."*
>
> (emphasis supplied)

28. Insofar as the award of arbitral costs is concerned, apart from the fact that the respondent had claimed costs only of Rs.1 lac, the fact that the learned Arbitrator offers no break-up, quantification, reason or rationale for award of costs of Rs.4 lacs against the petitioners cannot be ignored. It is clear from a bare reading of pre-amendment section 31(8) of the A&C Act, that even under that provision, costs are meant to be 'reasonable costs' relating to fee and expenses of arbitrator and witnesses; legal fee and expenses; administration fee of institution supervising the arbitration and any other expenses incurred in connection with the arbitration proceedings and the arbitral award. Absent any heads under which costs have been quantified or awarded, and absent any reasoning therefor, the award of costs of Rs.4 lacs must be held to be arbitrary. It may be observed here that the mandate contained in section 31(3), *that an arbitral award shall state the reasons* on which it is based, *must pervade all and every aspect of the award*, including award of costs. Awarding costs by a stroke of the pen, without stating reasons therefor, would fly in the face of section 31(3), apart from being opposed to well accepted canons of fairness and justice.

29. On this point, the argument made on behalf of respondent, that the learned Arbitrator has awarded costs based on the number of hearings;

or that the petitioners' default in depositing its share of Rs.1,16,000/- of the arbitrator's fee impelled the learned Arbitrator to award costs, also does not address the complete lack of quantification of costs awarded against the petitioners.

30. Accordingly, in the opinion of this court, the award of costs in the sum of Rs.4 lacs is arbitrary, unreasoned and therefore untenable in law.

31. In this view of the matter, the court is persuaded to accept the present limited challenge to arbitral award dated 09.08.2007.

32. Accordingly, the impugned arbitral award is set-aside *limited* to the award of *pendente-lite* interest and costs.

33. The petition is disposed-of in the above terms.

34. Pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J.

January 17, 2023
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