IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE SANJEEV SACHDEVA,

ACTING CHIEF JUSTICE

&

HON'BLE SHRI JUSTICE RAJENDRA KUMAR VANI

ARBITRATION APPEAL No. 46 of 2024

M/S. BANCO CONSTRUCTION PVT. LTD.

Versus

BRAJESH SHARMA

Appearance:

(SHRI ARUN DUDAWAT – ADVOCATE FOR THE APPELLANT)
(SHRI SANKALP SHARMA – ADVOCATE FOR THE RESPONDENT)

Reserved on : 24.08.2024.
Delivered on : 23.09.2024

JUDGMENT

Per*: *Rajendra Kumar Vani, J.

1. The appellant impugns the order dated 29.02.2024 passed by the Commercial Court and Commercial Appellate Court, Gwalior in MJC AV No.01/2017 under Section 34 of the Arbitration & Conciliation Act,1996 (for brevity 'the Act') affirming the arbitral award dated 05.10.2016 passed by the learned Sole Arbitrator [Hon‘ble Shri Justice R.B. Dixit (Retd.)]; whereby, an award of Rs.55,97,532/- has been passed in favour of the respondent.

2. In brief, the facts of the case are that a work contract of

construction of road was granted to the appellant for construction/up-gradation of rural roads under Pradhan Mantri Gramin Sadak Yojna (PMGSY) in Package No.MP-2149 Khandwa by the M.P. Rural Road Development Authority (MPRRDA) vide agreement No.63-K/2008-09 dated 18.02.2009. As per Clause 7.1 of the said agreement subletting upto 25% was permissible with the approval of the employer in writing.

3. Vide agreement dated 14.09.2009, work of Rs.210 lacs was sublet to the respondent. Thereafter, a dispute arose between the parties, therefore, respondent served two notices dated 18.09.2012 on appellant for payment of dues and appointment of Arbitrator in the matter. Since no action was taken by the appellant for appointment of Arbitrator, respondent approached this Court by filing A.C.No.23/2012 and learned Single Bench of this Court vide order dated 20.08.2014 appointed Hon'ble Shri Justice R.B.Dixit (Retd.) as sole Arbitrator.

4. On the basis of the pleadings of the parties, Sole Arbitrator passed impugned award dated 05.10.2016 awarding an amount of Rs.55,97,532/- to the respondent along with interest @ 9% from the date of notice dated 18.09.2012 till its realization by allowing Claim No.'A'. Other claims of the respondent and counter-claim of the appellant were rejected.

5. Against the arbitral award dated 05.10.2016, appellant preferred an application under Section 34 of the Act before the Commercial Court & Commercial Appellate Court by filing MJC AV/01/2017 which was dismissed vide order dated 29.02.2024. Hence, this appeal under Section 37 of the Act.

6. The submission of learned counsel for the appellant is that agreement dated 14.09.2009 is not properly stamped and the said agreement was a void contract being executed contrary to the Condition No.7 of the agreement entered into between appellant and MPRRDA as according to said agreement subletting to the maximum 25% of the contract amount was permissible and that too after getting prior approval from the principal employer. The objection of the appellant in this regard was rejected by the sole Arbitrator on the ground that objections were already raised by the appellant in application under Section 11 of the Act and that cannot be re-agitated again before the Arbitrator.

7. It is the submission of learned counsel for the appellant that said reasoning of the learned Arbitrator is patently illegal as the order passed by this Court on application under Section 11 of the Act is not a judicial order but an administrative order and an order of administrative nature is not having binding judicial precedential value. The claimant/respondent himself submitted audited balance-sheet wherein in the category of sundry debtors balance has been shown as Rs.19,24,832/-, whereas learned Sole Arbitrator has awarded award of Rs.55,97,532/- against the appellant. Thus, award passed by the learned Arbitrator suffered from patent illegality. On these grounds, it is prayed that impugned award passed by the learned Sole Arbitrator as well as impugned order dated 29.09.2024 passed in MJC AV No.01/2017 be set aside.

8. *Per contra*, it is the submission of learned counsel for the respondent that learned Arbitrator with the consent has adopted the procedure for arbitration and according to the said procedure the parties have submitted documents and affidavits followed by their

admission and denial. The learned Arbitrator found that respondent has executed the work and subsequent agreement dated 25.1.2011 clearly shows that only labour work of Rs.20 lacs was left out of total work allotted to the respondent. The appellant has failed to prove his case through evidence.

9. At the stage of Section 37 of the Act scope of interference is very limited and factual aspects cannot be reconsidered. Cement bills filed by the appellant do not specify that for which work such material was supplied. Moreover, the said bills were not of the period when the respondent had executed the work, rather they were prior or post of time and such bills do not substantiate the case of the appellant. Original agreement dated 14.09.2009 has not been produced by the appellant. Condition No.16 of the said agreement stipulates that the original agreement shall be retained by the appellant and thus, the responsibility of proper stamping also lies with the appellant. So far as the submission of learned counsel for the appellant that dues were limited to Rs.19,83,092/- is concerned, said balance-sheet was of the period 31st March, 2010 and a separate balance-sheet Ex.C/3 is already on record which shows further balance of Rs.39,37,897/- and when both the amounts are taken together, total amount comes to Rs.59,20,989/-. The respondent was not a party to the agreement between the appellant and MPRRDA, therefore, he was not aware of Clause 7.1 of the agreement executed between them. The appellant cannot take benefit of its own mistake. Therefore, dismissal of the appeal is prayed for.

10. Heard learned counsel for the parties and perused the record.

11. At the outset, the scope and jurisdiction to interfere with the award of arbitration under Section 34 and under Section 37 of the Act

is required to be considered.

12. Section 34(2)(b)(ii) of the Act *inter alia* mandates that if the Court finds that the arbitral award is in conflict with the public policy of India, such award may be set aside by the Court. As per the provisions of Section 37(1) of the Act, an appeal shall lie from an order refusing to refer the parties to arbitration under Section 8; granting or refusing to grant any measure under Section 9 and setting aside or refusing to set aside an arbitral award under Section 34.

13. It is settled position of Indian law in this regard that it is the domain of the Arbitrator to adjudicate upon facts and evidence produced before it. Arbitrator is the sole judge of the quantity and quality of the evidence. An award can be set aside only if it shocks the conscience of the court.

14. The scope under Sections 34 and 37 of the Act has been discussed by the Hon'ble Supreme Court in **Konkan Railway Corporation Ltd. vs. Chenab Bridge Project Undertaking, (2023) 9 SCC 85**, relevant paras 18 and 19 of the said judgment are as follows :

> ***"18.*** *At the outset, we may state that the jurisdiction of the court under Section 37 of the Act, as clarified by this Court in MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd.v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , is akin to the jurisdiction of the court under Section 34 of the Act. [Id, SCC p. 167, para 14:"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision."] Scope of interference by a court in an appeal under Section 37 of the Act, in examining an order, setting aside or refusing to set aside an award, is restricted and subject to the same*

grounds as the challenge under Section 34 of the Act.

19.*Therefore, the scope of jurisdiction under Section 34 and Section 37 of the Act is not akin to normal appellate jurisdiction. [UHL Power Co. Ltd. v. State of H.P., (2022) 4 SCC 116, para 15 : (2022) 2 SCC (Civ) 401. See also : Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1, paras 24, 25.] It is well-settled that courts ought not to interfere with the arbitral award in a casual and cavalier manner. The mere possibility of an alternative view on facts or interpretation of the contract does not entitle courts to reverse the findings of the Arbitral Tribunal.* [*Ibid*; *Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213; *Parsa Kente Collieries Ltd.* v. *Rajasthan Rajya Vidyut Utpadan Nigam Ltd.*, (2019) 7 SCC 236, para 11.1 : (2019) 3 SCC (Civ) 552] In *Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.* [*Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1] , this Court held : (*Dyna Technologies case* [*Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1] , SCC p. 12, paras 24-25)

> *"24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.*
>
> *25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of*

> *contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."*

15. The judgment of Hon'ble Apex Court in the case of **Maharashtra State Electricity Distribution Company Ltd. Vs. Datar Switchgear Ltd. and others, (2018) 3 SCC 133** is referable, relevant part of para 51 reads as under :-

> *"51.....The proposition of law that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of evidence on record are not to be scrutinised as if the Court was sitting in appeal now stands settled by a catena of judgments pronounced by this Court without any exception thereto."*

16. The Hon'ble Apex Court in the case of **Associate Builders v. DDA, (2015) 3 SCC 49** has held in para 19 that the arbitral award could be set aside if it is contrary to:

(*a*) fundamental policy of Indian law; or
(*b*) the interest of India; or
(*c*) justice or morality, or
(*d*) in addition, if it is patently illegal.

It is further held that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. The Hon'ble Apex Court in the said judgment while discussing term "perverse", held that a finding can be said to be perverse if it is:

(i) a finding is based on no evidence, or

(*ii*) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(*iii*) ignores vital evidence in arriving at its decision,

In para 32 and 33 of the said judgment, the Hon'ble Apex Court has discussed it in detail, which reads as under :-

> **32.** A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority* v. *Gopi Nath & Sons* [1992 Supp (2) SCC 312] , it was held: (SCC p. 317, para 7)
>
> > "*7.* … It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."
>
> *In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10: 1999 SC*C (L&S) 429] , it was held: (SCC p. 14, para 10)
>
> > "*10.* A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."
>
> ***33.*** *It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score .....*"

17. The Hon'ble Apex Court in the case of **Reliance Infrastructure Ltd. v. State of Goa, (2024) 1 SCC 479** in para 26 held as under :-

"26. *In MMTC [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 this Court took note of various decisions including that in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] and exposited on the limited scope of interference under Section 34 and further narrower scope of appeal under Section 37 of the 1996 Act, particularly when dealing with the concurrent findings (of the arbitrator and then of the Court). This Court, inter alia, held as under :*

> *"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.*
>
> *12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 :*

(2015) 2 SCC (Civ) 204] Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] ; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445] ; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the Court under Section 34 and by the Court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.".

18. Taking note of the aforesaid dictum of Hon'ble Apex Court and applying it to the case in hand, we find that all points which have been

raised by the appellant in this appeal have been properly considered by learned Sole Arbitrator in his award dated 5.10.2016 in proper and lawful manner. So far as the objection as regards improper stamping of document dated 14.09.2009 is concerned, learned Single Judge in A.C.No.23/2012 vide order dated 20.08.2014 has considered the issue and held that the objection is meritless. Otherwise also, the objection is not tenable, as the document was executed by appellant with the respondent and appellant itself kept the custody of original document. The original Stamped Agreement has never been produced by the Appellant to demonstrate as to what was the stamp affixed on the Agreement. Thus an adverse inference is liable to be drawn against the Appellant, that the document was duly stamped. Further, Appellant has also assigned the work to the respondent and also paid certain amounts to the respondent under this agreement, therefore, it cannot take u-turn and and raise objection as regards validity of the document qua insufficient stamping and its mandatory registration.

19. That apart, having gone through the provisions of Section 17 of the Registration Act, 1908, it is found that present agreement is not covered under the documents referred to in Section 17 of the Registration Act, therefore, registration of this document was not mandatory. Similarly, as per sub-clause (g) of clause 5 of Schedule I-A of the Indian Stamp Act, 1899, at the relevant time, stamp duty of Rs.100/- was provided for agreement which is not covered in any of the sub-clauses (a) to (fa) of clause 5. Therefore, apparently the agreement dated 14.09.2009 is properly stamped. The learned counsel for the appellant is unable to point out as to how and in which manner the stamp duty paid on the agreement is insufficient.

20. The learned Sole Arbitrator has also considered the objection as

regards Clause 7.1 of the agreement between appellant and MPRRDA which also seems to be proper as the respondent was not a party to that agreement, and therefore, as against the respondent, such objection is not sustainable.

21. As regards other objections, the learned Sole Arbitrator has discussed and considered the material available on record in appropriate manner and in the light of Annexures F, G, and H Learned Sole Arbitrator has rightly concluded that minor modifications cannot be termed as bad work and that there is no evidence on record showing any defect or slow progress of the work on the part of respondent and that appellant has committed breach of contract by stopping the payment to the claimant/respondent for the work he has already completed.

22. As far as the bills as per Annexure A and receipts are concerned, perusal of these documents and material on record did not suggest that material purchased through these bills was utilized by the claimant/respondent. Moreover, as per Condition No.2 of the agreement dated 14.09.2009 the claimant had to arrange for all resources including labour, material, tools and equipments etc. therefore, the question of supply of such material through various bills and receipts by the appellant to the respondent does not arise. Ergo, by disbelieving these bills, learned Sole Arbitrator did not commit any mistake.

23. So far as agreement dated 25.1.2011, Annexure B, is concerned, it is rightly found by learned Sole Arbitrator that only labour work to the tune of Rs.20 lacs was allotted to third agency. There is no evidence on record to suggest that exactly what sort of work was got done under this contract. Likewise, there is no evidence on record to

establish that by this agreement dated 25.1.2011 appellant has got done the work from third party which was left over by the claimant/respondent.

24. It is also reflected from the material on record that in June 2010 despite receiving payments from the department, appellant failed to release the same in favour of the claimant/respondent. It also reveals that appellant has re-allotted some of the remaining work to another agency as per the averments of the appellant without the written consent of the claimant, which also amounts to violation of the terms of the agreement by the appellant contained in clause 9 of the agreement dated 14.09.2009. There is no evidence on record which suggests that any liquidated damage was imposed upon the appellant for delayed and bad work on the part of claimant/respondent by the department. The appellant never intimated in writing in this regard to the claimant/respondent. Moreso, no documentary proof is available on record that MPRRDA has deducted Rs. 11,39,579/- towards defective or bad work, and consequently, the finding of learned Sole Arbitrator is not found to be perverse or illegal.

25. So far as the counter-claim of the appellant is concerned, it has rightly been dismissed by the learned Sole Arbitrator on the ground that appellant after receiving notice dated 18.09.2012 for appointment of the Arbitrator and even after filing reply before this Court in A.C.No.23/2012 did not raise any counter-claim and even failed to inform the claimant by giving reply of notice as regards the relief sought in counter-claim. Cause of action for such counter-claim definitely arose when claimant/respondent stopped the work in 2010. Since limitation provides period of 3 years for initiation of suit of recovery, therefore, it was *ex-facie* time barred.

26. The evidence on record establishes that appellant has received total Rs. 1,26,87,651/- for work contract out of which Rs.10,22,099/- has been deducted under different heads while the claimant/respondent has only been paid Rs.56,13,291/- by the appellant and the amount withheld by the appellant comes to Rs.55,97,532 and no reasonable excuse for such withholding has been put forth by the appellant. Thus, the claim to the tune of Rs.55,97,532/- in favour of the claimant/respondent has rightly been allowed with interest @ 9% per annum.

27. In the backdrop of aforesaid discussion and taking note of the ratio laid down in the aforesaid cases, it is not found that learned Sole Arbitrator has passed the award in a casual and cavalier manner and that the award is against the public policy of India. It is not found that the arbitral award is patently illegal and it shocks the conscience of the Court or perverse. It is also not found that learned Sole Arbitrator or learned Court dealing with the application under Section 34 of the Act have exceeded their jurisdiction outlined under the Act. Therefore, the impugned order dated 29.2.2024 and award passed by the learned Sole Arbitrator dated 05.10.2016 do not call for any interference.

28. Consequently, this Arbitration Appeal being bereft of merit is hereby dismissed. No order as to costs.

(SANJEEV SACHDEVA)
ACTING CHIEF JUSTICE

(RAJENDRA KUMAR VANI)
JUDGE

ms/-