IN THE HIGH COURT OF MADHYA PRADESH

AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SUSHRUT ARVIND DHARMADHIKARI

ON THE 9th OF DECEMBER, 2022

ARBITRATION APPEAL No. 11 of 2017

BETWEEN:-

STATE OF MADHYA PRADESH THROUGH

1. **THE SECRETARY, PUBLIC WORKS DEPARTMENT, VALLABH BHAWAN, BHOPAL (MADHYA PRADESH)**

2. **THE EXECUTIVE ENGINEER PUBLIC WORKS DEPARTMENT (B&R) DIVISION DAMOH (MADHYA PRADESH)**

.....APPLICANTS

(BY SHRI ASHISH ANAND BERNARD – ADDITIONAL ADVOCATE GENERAL WITH SHRI RITWIK PARASHAR – GOVERNMENT ADVOCATE)

AND

NATHURAM YADAV (DEAD) S/O SHRI PAIJ SINGH YADAV VILLAGE KOVARPURA, POST DHILLA, TEHSIL PRITHVIPUR, DISTRICT TIKAMGARH (M.P.) (DEAD) THROUGH HIS LEGAL HEIR SHAILENDRA SINGH YADAV S/O LATE SHRI NATHURAM YADAV R/O VILLAGE KUNWARPURA, POST AND TEHSIL PRITHVIPUR DISTRICT TIKAMGARH (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI SIDDHARTH KUMAR JAIN - ADVOCATE)

Reserved on : 01.09.2022

Pronounced on : 09.12.2022

This appeal having been heard and reserved for hearing, coming on for pronouncement this day, the court pronounced the following:

JUDGMENT

The instant appeal under Section 37 of Arbitration and Conciliation Act, 1996 (hereinafter shall be referred to as '**the Act of 1996**') has been preferred by the State of Madhya Pradesh being aggrieved by the award dated 03.07.2015 passed by the sole Arbitrator, whereby the claim of the respondent has been allowed in part as also the order dated 11.11.2016 passed in MJC (Arbitration Case) No.116/2015 by the Commercial Court, Bhopal, by which the order of the sole Arbitrator has been affirmed.

2. The respondent/claimant Nathuram Yadav is 'A-5' class contractor registered with the Public Works Department, Government of Madhya Pradesh. In response to the notice inviting tender dated 10.11.2005 issued by the appellants, the respondent submitted its proposal for the work of improvement of Abhana Tendukheda Patan road between KM 41 to 91 under C.R.F. Scheme for the estimated cost of Rs.11.00 crores (eleven crores). The respondent participated in the bid process and the bid of the respondent was found to be appropriate. The respondent's proposal was quoted @ 13.52% below the schedule of rates which was accepted by the respondent and work order dated 04.04.2005 was issued. As per schedule for completion of work, the work was to be completed on 03.11.2006. As per schedule of items,

appended with the contract, the respondent was required to remove existing damaged surface of marked patches and after filling with earth, the crust was to be laid with G.S.B. & W.B.M. and the same was to be covered with bituminous macadam and semi dense bituminous concrete. As per the contract, the liability of the respondent was to remedy the notified defects for a period of 36 months which was to commence from the date of completion of work. The payment to the contractor was to be made as per the agreement on monthly intervals, for the work done during the period.

3. That on 23.04.2007 extension was granted by way of last opportunity to the respondent. However, the work was not completed by the respondent. Thereafter, the dispute arose and the contract was terminated by the appellants without issuing any show cause notice and the respondent was proceeded according to clause 3 of the agreement. Pursuant to the permission of Chief Engineer, the Executive Engineer passed an order on 20.07.2007 whereby contract awarded to the respondent was terminated and he was directed to remain present for measurement of the work executed by him up to 30.07.2007 so that the balance work, if any, may be executed at the risk and cost of the respondent.

4. Being aggrieved, the respondent approached the Arbitral Tribunal at Bhopal for resolution of dispute. However, the learned Tribunal directed the respondent to approach the High Court for appointment of an Arbitrator. The Hon'ble Court vide order dated 03.02.2012 appointed Hon'ble Justice Shri V.K. Agrawal (Retired) an an Arbitrator to adjudicate the claim which is in existence between the parties. The learned Arbitrator adjudicated the claim

of the respondent and passed an award on 03.07.2015 and awarded a sum of Rs.1,85,01,091/- (one crore eighty five lakhs one thousand ninety one only) to the respondent herein alongwith interest @ 6% per annum on the aforementioned amount from the date of the proceedings i.e. from 24.05.2012 till the date of making of the award. Being dissatisfied with the award of the Arbitral Tribunal dated 03.07.2015, the appellant filed an application under Section 34 of the Act of 1996. The learned trial Court rejected the application on the ground that the case of the appellants does not fall within the purview of Section 34(2)(b)(ii) of the Act of 1996. Being dissatisfied with the order, the present appeal has been filed by the appellants before this Court.

5. Shri Ashish Bernard, learned Additional Advocate General appearing for the appellants contended that arbitral award dated 03.07.2015 has been passed without there being jurisdiction and the same is indirect contravention to the public policy of India, therefore, the same deserves to be set aside. Even the order dated 11.11.2016 passed by the Commercial Court, Bhopal is not in consonance with law, therefore, the same deserves to be set aside. The impugned award dated 03.07.2015 is not only exercised arbitrarily but is illegal since the same was induced and affected by fraud inasmuch as forged and fabricated letter dated 30.06.2007 and so-called certificate dated 13.03.2007 have formed the basis of the arbitral award which persuaded the arbitral Tribunal to allow the claim of the respondent. Even the Clause 3 of the Contract Agreement has been misinterpreted. The finding of the Tribunal with regard to getting the balance executed through another agency at the risk and cost of the respondent is also perverse and

contrary to the provisions under clause 3 of the GCC. The learned Tribunal as well as the Court below failed to consider the fact that the contract work awarded to the respondent was a 'works contract' as defined under Section 2(i) of the Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter shall be referred to as '**Act of 1983**') and the appellants being a public undertaking as defined under Section 2(g) of the Act of 1983, any dispute arising out of 'works contract' in question was essentially referable to the Tribunal constituted under the Act of 1983. Section 7 of the Act, 1983 has an overriding effect, therefore, the claim of the respondent ought to have been rejected on this ground alone.

6. Per contra, learned counsel for the respondent vehemently opposed the contentions of the appellants and submitted that the instant appeal has been filed by the appellants just to escape from their responsibility of making payment to the respondent. The appellants had lost the case on two occasions. Furthermore, they have complied with the directions of the award dated 03.07.2015 which clearly manifests the *mala fide* intention of the appellants and also reflect that they have not approached this Court with clean hands. The appellants herein hopelessly failed to fulfill the requirements of Sections 34 and 37 of the Act of 1996. The appellants have been constantly changing their grounds at every stage of litigation. The appellants never challenged the jurisdiction of the arbitral Tribunal at any point of time, to the contrary they have accepted the jurisdiction of the arbitral Tribunal in para no.36 of the written statement. That apart, in the prayer clause as well, the appellants have prayed for allowing the counterclaim, meaning thereby, the appellants are not challenging the

jurisdiction of the Tribunal in respect of the counterclaim. Learned counsel for the respondent has relied on the following judgments:

(i) Madhya Pradesh Rural Road Development Authority Vs. L.G. Chaudhary Engineers and Contractors reported in **(2018) 10 SCC 826.** Relevant paragraph No.17 is reproduced below:-

> *"We do not express any opinion on the applicability of the State Act where award has already been made. In such case if no objection to the jurisdiction of the arbitration was taken at relevant stage, the award may not be annulled only on that ground."*

(ii) State of Jharkhand & Other Vs. HSS Integrated SDN & Another reported in **(2019) 9 SCC 798**. Relevant paragraph is 8-

> *"Once the finding recorded by the learned Arbitral Tribunal that the termination of the contract was illegal is upheld and the claims made by the claimants have allowed or partly allowed, in that case, the counterclaim submitted by the petitioners was liable to be rejected and the same is rightly rejected. No interference of this Court is called for."*

(iii) MMTC Limited Vs. Vedanta Limited reported in **(2019) 4 SCC 163**. Relevant paragraphs are 11 & 14-

> *"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 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.

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."

(iv) Chintels India Limited Vs. Bhayana Builders Private Ltd. reported in **(2021) 4 SCC 602**. Relevant paragraph is 12-

"12. We now come to section 37(1)(c). It is important to note that the expression "setting aside or refusing to set aside an arbitral award" does not stand by itself. The expression has to be read with the expression that follows - "under section 34". Section 34 is not limited to grounds being made out under section 34(2). Obviously, therefore, a literal reading of the provision would show that a refusal to set aside an arbitral award as delay has not been condoned under sub-section (3) of Section 34 would certainly fall within section 37(1)(c). The aforesaid reasoning is strengthened by the fact that under section 37(2)(a), an appeal lies when a plea referred to in sub-section (2) or (3) of Section 16 is accepted. This would show that the Legislature, when it wished to refer to part of a section, as opposed to the entire section, did so. Contrasted with the language of Section 37(1)(c), where the expression "under Section 34" refers to the entire section and not to section 34(2) only, the fact that an arbitral award can be refused to be set aside for refusal to

condone delay under Section 34(3) gets further strengthened."

(v) Haryana Tourism Limited Vs. Kandhari Beverages Limited reported in **(2022) 3 SCC 237**. Relevant paragraph no. 9-

"9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to : (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) Justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial Court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable."

7. I have heard learned counsel for the parties and perused the record as also the pleadings made by the parties before the Tribunal as well as before this Court.

8. That, few important questions which are relevant for the purpose of determination of the dispute in the present appeal are as under:

(i) Whether award of the arbitral tribunal is without jurisdiction as contemplated by the appellant before this Court or not?

(ii) Whether return of the dispute in terms of Clause 29 of the agreement by the 'arbitral Tribunal' is just and proper or not?

(iii) Whether the issue of jurisdiction is/was ever raised by the appellant before the Arbitrator at the first instance or not?

(iv) Whether the order of 'arbitral Tribunal' dated 03.07.2015 was challenged before any forum in respect of issue of jurisdictional as raised by the present appellants in the present appeal or not?

9. In order to deal with the aforesaid questions, this Court would first consider the dispute which came into existence and also the order dated 03.07.2015 passed by the Madhyastam Adhikaran. After termination of contract, dispute arose between the parties and the respondent invoked Clause 29 of the agreement which prescribed the procedure for settlement of the dispute and file the dispute before the arbitral Tribunal from where the case of the respondent was registered as Reference No.55/2009.

10. That the said dispute came up for hearing before the arbitral Tribunal on 03.05.2015. The Tribunal in the light of Apex Court judgment **Va Tech Escher Wyass Flovel Limited Vs. M.P.S.E. Board & Another** reported in **2010 Arb.W.L.J. 116 (SC)** held that the Act of 1996 shall apply only where there is an arbitration clause but it would not be applicable where there is no arbitration clause and apart from this, Act of 1996 covers all kinds of dispute

including the dispute relating to the 'works contract'. It was further observed by the Tribunal that the Apex Court in the above referred case held that the Act of 1983 and 1966 can be harmonized by holding that Act of 1983 only applies where there is an arbitration clause. The Tribunal has further observed that when there is an arbitration clause, the jurisdiction in the cases where special arbitration clause exists in the agreement, therefore, looking to this peculiar aspect of the arbitration clause, the dispute has been returned by the arbitral Tribunal to invoke the arbitration clause.

11. On perusal of the record, it is seen that the order dated 03.07.2015 was never challenged by the appellants/State before any forum. Neither the validity of this order nor the issue of jurisdiction was ever raised before the High Court by the appellants. Thus, the principle of merger would be applicable in the present case and the order of the tribunal would be treated to have been accepted, therefore, it is not open to challenge at the appellate stage.

12. From perusal of the record and particularly the pleadings of the arbitral Tribunal, it transpires that the issue of jurisdiction was never raised by the appellants before the Arbitrator, therefore, it can be safely presumed that the issue of jurisdiction was never raised and the same has been raised for the first time in the present proceedings under Section 37 of the Act of 1996. In answer to question nos.1 and 2, it can be safely held that the award of the arbitral Tribunal is well within the jurisdiction as per clause 29 of the agreement.

13. So far as other questions are concerned, the core issue raised by the appellants in the present appeal is that the award of the arbitral Tribunal is without jurisdiction. To summarise this issue, it would be appropriate for this Court to deal with the issue of jurisdiction which is the only issue in the appeal and only on the basis of this issue, the present appeal may be decided and during course of arguments both the parties have confined their argument on this issue of jurisdiction, therefore, on this issue, the appeal is being decided.

14. From perusal of the pleadings, it appears that the appellants participated in the proceedings without filing an application before the arbitral Tribunal to the effect that the Tribunal has been incorrectly constituted or the Tribunal is having no jurisdiction to try the dispute existing between the appellant and the respondent. Not only this, the order of the High Court in relation to appointment of an arbitrator was duly accepted by the appellants and the said order was never challenged before any higher forum, therefore, jurisdiction was very well accepted by the appellants. The appellants cannot raise the issue of jurisdiction for the first time in the present appeal, therefore, the award of the Tribunal cannot be treated as without jurisdiction.

15. The appellants have relied upon the judgment rendered by the Full Bench of this Court in the case of **Viva Highways limited Vs. M.P. Road Development Corporation** reported in **2017 Vol. 2 MPLJ 681** in support of their contention. The relevant paragraphs is reproduced below:-

> "64. The appellants also relied on ***2016 (9) SCC 720, Union of India vs. Indusind Bank Ltd.*** and another to bolster their

submission that amendment in the definition cannot have any retrospective effect. The said judgment is of no help to the applicants . In the said case, it was held (34) that the amendment was remedial in nature and not clarificatory or declaratory of the law. Certain agreements covered by unamended provision were made void for the first time. It was found that rights and liabilities that have already accrued between the parties are sought to be taken away. In this backdrop, it was held that amended section will not apply retrospectively. In the present case, no legal statutory, vested or constitutional right of the applicants is taken away or altered by the amendment in the definition nor any fresh liability has been created.

65. This is trite law that right of preferring appeal or avail legal remedy is a substantive right whereas right relating to forum is procedural in nature. It is equally well settled that in contrast to Statutes dealing with the substantive rights, Statutes dealing with merely matters of procedure are presumed to be retrospective unless such a construction is textually inadmissible. See ***AIR 1927 P.C. 242 (Delhi Cloth and General Mills Ltd. vs. CIT Delhi)***, ***AIR 1975 SC 1843 (Gurbachan Singh vs. Satpal Singh)***, ***AIR 1990 SC 209 (Hitendra Vishnu Thakur vs. State of Maharashtra), AIR 1994 SC 2623***. ***Lord Denning, in Blyth vs. Blyth, 1966 (1) ALL ER 524*** opined that the rule that an act of Parliament is not to be given retrospective effect applies only to Statute which affect vested rights. It does not apply to Statute which only alter the form of procedure or admissibility of evidence, or the effect which the court gives to evidence. The said principle is followed by this court in the case reported in ***2016 (1) MPLJ 48, [Mescot Hospital & Research Centre vs. State of M.P.]***.

66. In view of foregoing analysis,we are constrained to hold that the amendment by Act No.7 of 2017 is clarificatory in nature and is applicable to pending and future contracts.

67. We are not oblivious of the fact that this order may create inconvenience in certain cases where parties may be required to resolve their dispute before a forum constituted under 1983 Adhiniyam. However, inconvenience etc. cannot be a ground to interpret a definition or to provide a redressal forum which is otherwise not available as per law [see **AIR 1965 SC 1449** (***Raja Soap Factory and others vs. S.P. Shantharaj and others***) **Para 9**]. In view of ***1999 (9) SCC 559, State of H.P. vs. Nurpur Private Bus Operator Union***, the doctrine of prospective overruling cannot be utilised by the High Court. In ***2001 (1) SCC 534, Raymonds Ltd. vs. MPEB***, it was again held that doctrine of prospective overruling can be invoked only in matters arising under the constitution and that it can be applied by the Supreme Court of India.

68. Shri Nagrath urged that in the concession agreement it was made clear that the present dispute will be decided by the arbitration proceedings as per the Act of 1996 and Regulatory Body etc. may deal with future disputes. Suffice it to say that no clause of agreement can prevail over the statutory provisions of the Adhiniyam of 1983. If a dispute falls within the ambit of Section 2(i)(d) & (i) as per Section 7 of the Adhiniyam, the Tribunal constituted under the 1983 Adhiniyam alone will have jurisdiction."

16. The appellants have also raised an issue that this being a 'works contract' the dispute can only be adjudicated by the M.P. Madhyastam

Adhikaran to adjudicate the claim. So far as the case of **Viva Highways (supra)** is concerned, would be of no help to the appellants in the facts and circumstances of the case and therefore it cannot be made applicable retrospectively. The amended definition in Section 2(1)(d) of the Act of 1996 was introduced on 27.02.2017 and the dispute was returned by the Tribunal in the year 2015 and the application under Section 34 of the Act of 1996 has been decided on 11.11.2016 which is much prior to introduction of the amended definition. Thus, in this backdrop, it is clear that the proceedings were completed much prior to the amendment. As per Section 4 of the Act of 1996, the jurisdiction was accepted by the appellants, therefore, it cannot be raised at the appellate stage. Moreover the amended definition came into effect from 2017 i.e. much prior to the original proceedings, therefore, the said submissions of the learned counsel for the appellants has no legs to stand.

17. That so far as issue in respect of legality and applicability is concerned, as already held in the preceding paragraphs that the award of the sole Arbitrator is well within the jurisdiction and the same was accepted by the appellants and never challenged before any forum. Even the order passed by the High Court under Section 11(5)(vi) was never challenged by the appellants, thus, the issue of jurisdiction attains finality and it cannot be raised at this stage of appeal. This Court is of the view that the award of the sole Arbitrator is within the conformity of clause 29 of the agreement and the same is within jurisdiction. As already indicated hereinabove, the only question to be considered by this Court was of jurisdiction and when the present appeal is based only on the ground of jurisdiction, the present award

of Arbitrator is within jurisdiction as also the orders passed under Section 34 of the Act is also within the realm of jurisdiction; therefore, there is no reason to interfere with the award passed by the sole Arbitrator as well as order passed by the learned trial Court. In view of the aforesaid analysis and the discussions made hereinabove, the appeal filed by the appellants fails and is hereby **dismissed**.

No order as to costs.

(S. A. DHARMADHIKARI)
JUDGE

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