

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

**BEFORE
SHRI JUSTICE SUJOY PAUL
&
SHRI JUSTICE PRAKASH CHANDRA GUPTA
ON THE 15th OF SEPTEMBER, 2022**

ARBITRATION APPEAL No.47 OF 2022

Between :-

**THE STATE OF MADHYA
PRADESH THROUGH
PROJECT DIRECTOR,
PROJECT IMPLEMENTATION
COORDINATION UNIT (PICU),
WATER RESOURCES
DEPARTMENT (WRD),
GOVERNMENT OF MADHYA
PRADESH, BHOPAL.**

...APPELLANT

***(BY SHRI AMIT SETH - DEPUTY ADVOCATE GENERAL WITH SHRI
ANKIT AGRAWAL – GOVERNMENT ADVOCATE)***

AND

**M/S SMEC INTERNATIONAL
PVT. LTD THROUGH
MANAGER, 220 SHARP STEET
(PO BOX 356) COMMA, 2630
AUSTRALIA ALSO AT- LEVEL 5
TOWER-C BUILDING NO. 8
DLF CYBER CITY PHASE-II,
GURGAON- 122002, INDIA**

.....RESPONDENT

***(BY SHRI K. K. SHARMA, SENIOR ADVOCATE WITH SHRI JAI
SHUKLA - ADVOCATE)***

ARBITRATION APPEAL No.46 OF 2022**Between :-**

**THE STATE OF MADHYA
 PRADESH THROUGH
 PROJECT DIRECTOR
 PROJECT IMPLEMENTATION
 COORDINATION UNIT (PICU),
 WATER RESOURCES
 DEPARTMENT (WRD)
 GOVERNMENT OF MADHYA
 PRADESH, BHOPAL M.P.**

...APPELLANT

***(BY SHRI AMIT SETH - DEPUTY ADVOCATE GENERAL WITH SHRI
 ANKIT AGRAWAL – GOVERNMENT ADVOCATE)***

AND

**M/S SMEC INDIA PVT. LTD.
 THROUGH MANAGER, LEVEL
 5, TOWER C, BUILDING NO. 8,
 DLF CYBER CITY, PHASE-II,
 GURGAON 122002 INDIA.**

....RESPONDENT

***(BY SHRI K. K. SHARMA, SENIOR ADVOCATE WITH SHRI JAI
 SHUKLA - ADVOCATE)***

*These arbitration appeals coming on for hearing this day, Justice
 Sujoy Paul, passed the following :*

J U D G E M E N T

In these appeals, the appellants have called in question the legality, validity and propriety of the similar impugned orders dated 20.04.2022 whereby, the applications filed by the appellant under Section 34 of the

Arbitration Act 1996 (Arbitration Act) were dismissed by the Commercial Court.

A.A. No.46 of 2022

2. This appeal filed under Section 37 of the Arbitration Act assails the order dated 20.04.2022 whereby the application of appellant under Section 34 of the Arbitration Act was dismissed merely by giving two reasons. *Firstly*, application filed under Section 34 is barred by limitation. *Secondly*, the grounds taken in the application filed under Section 34 are not sufficient to disturb the award of the learned Arbitrator.

Appellant's contentions :-

3. Shri Amit Seth, learned Deputy Advocate General submits that so far question of limitation is concerned, the learned Commercial Court has passed the order without considering its own finding wherein while rejecting an application under Section 34(3) of Arbitration Act of the respondent, the Commercial Court itself recorded that the application under Section 34 was filed within time. Reliance is placed on order of Court below dated 03.07.2019 whereby the application preferred by the respondent under Section 34(3) was rejected by the Court below.

4. Learned counsel for the appellant by taking this Court to the grounds taken in the application preferred under Section 34 of the Arbitration Act, urged that appellant had raised various grounds which fall within the ambit and scope of Section 34 of the said Act. The learned Commercial Court considered and reproduced the contentions of the parties up to para 5 of the impugned order.

5. Thereafter, the Court framed a question and the Court recorded its finding from para 7 to 8 relating to limitation. The Court then reproduced

the judgments cited by the parties and referred the relevant statutory provisions.

6. For the reasons stated above and as per previous order of Court below dated 03.07.2019, para-9 is pregnant with an erroneous finding that the application filed under Section 34 was barred by limitation. Thereafter, again upto paragraph 15, the tribunal either reproduced the statutory provisions or mentioned the judgments cited by the parties.

7. In para 16 of the impugned order, the tribunal directly reached to a conclusion that the grounds taken by the appellant assailing the award do not fall within the ambit of Section 34 (2)(b)(ii) of the Arbitration Act.

8. It is further recorded that award is against 'public policy' could not be established by the appellant and therefore the application is dismissed.

9. Shri Amit Seth, learned Deputy Advocate General submits that the Court below has not assigned any reason as to why the grounds taken by the appellant were not found to be trustworthy. There is no iota of discussion by considering each ground taken by the State and by assigning reason as to why the said grounds do not fall within the ambit of Section 34 of the said Act. The Court below directly jumped to the 'conclusion' without assigning any 'reason'. Reliance is placed on a Division Bench judgment of this Court in **A.A. No.01/2012 (General Manager BSNL Vs. Anil Kumar Tripathi)** decided on 22.04.2016 (Gwalior Bench). It is urged that for this reason alone, impugned order is liable to set aside and matter may be remitted back to the Court below to pass a reasoned order in accordance with law.

10. Learned counsel for the appellant/State further submits that Section 34(2)(iv) makes it clear that when arbitral award is passed on a point not

contemplated or not falling within the terms of submission to arbitration or it contains decision on matters beyond the scope of submission to arbitration, interference can be made. The Court below although mentioned the grounds and factual backdrop raised by appellant in sufficient detail in para 3 of impugned order, did not deal with them in specific. Thus, order suffers from procedural impropriety and perversity.

11. The next contention is that the contract/agreement although termed as ‘consultation agreement’, it falls within the ambit of ‘works contract’ as per the **Madhyastham Adhikaran Adhiniyam, 1983** (Adhiniyam). Once it is a works contract, in view of Full Bench judgment of this Court reported in **2017 (2) MPLJ 681(Viva Highways Ltd. Vs. Madhya Pradesh Road Development Corporation Ltd.)** appropriate remedy for claimant/respondent is to approach the Madhyastham Tribunal and not the arbitrator appointed under the provisions of the Arbitration Act.

12. The question of patent lack of jurisdiction is a question which can be raised at any stage. The relevant contract/agreement was on record. The application contains relevant grounds questioning the jurisdiction of the arbitrator. Apart from this, in view of this judgment of Supreme Court reported in **(2018) 16 SCC 758 (Lion Engineering Consultants Vs. State of Madhya Pradesh & Ors.)**, whether or not such a ground was taken, it is open to the appellant to take that ground and the Apex Court in a similar situation remitted the matter back before the Court below to decide said ground and permitted the parties to take their rival stand.

13. Shri Amit Seth, learned counsel for the appellant also placed reliance on Section 34(2-A) of the Arbitration Act and urged that the domestic award can be called in question if there exists a ‘patent illegality’ on the face of the record. There exists patent illegality on the

face of the same and this aspect of availability patent illegality has not been gone into by the commercial Court. The commercial Court only considered the question of 'Public Policy' and did not deal with the aspect of 'patent illegality'.

14. During the course of hearing, reliance is placed on **(2022) 2 MPLJ 425(Gayatri Project Ltd. Vs. Madhya Pradesh Road Development Cooperation Ltd.)** wherein this Court opined that the expression used in the statute namely '*the court finds*' makes it obligatory for the Court to examine whether there exists any ingredient on the strength of which Court itself can interfere. Thus, as held in **(2009) 17 SCC 796 (Fiza Developers and inter-trade private Ltd. Vs. AMC (India) private Ltd. & Another)** which is followed by Division Bench of this Court, it was obligatory on the part of the Commercial Court to examine the aforesaid aspect.

15. For the same purpose, next reliance is on a recent judgment of Supreme Court reported in **(2022) 2 SCC 275(State of Chhattisgarh and Anr. vs. Sal Udyog Private Limited)** wherein it was held that the expression "the Court finds that" is wide enough to enable the Court to act on its own in deciding a petition under Section 34 of Arbitration Act for setting aside an award.

Respondent's contentions :-

16. *Per-contra*, Shri K.K. Sharma, learned Senior Counsel assisted by Shri Jai Shukla, learned counsel for the respondent opposed the contentions. He submits that pursuant to orders passed in W.P. No.7781/2013 and W.P. No.7783/2013 decided on 06.05.2015, Hon'ble Justice V.K. Agrawal (retired) and Hon'ble Justice N.K. Jain (retired)

respectively were appointed as Arbitrators in both the matters. The said orders make it clear that the said appointments were based on a prayer jointly made by the parties. In this view of the matter, it cannot be said that appointment of the Arbitrators was impermissible.

17. So far objection relating to “works contract” under the Adhinyam is concerned, learned Senior Counsel placed reliance on an order of Chhattisgarh High Court passed in **ARBR No.23/2018 (SMEC International Private Limited)** (present respondent) vs. **State of Chhattisgarh** decided on 13.05.2019. It is argued that after considering the definition of the ‘works contract’, the Chhattisgarh High Court came to hold that a Former Judge of the Chhattisgarh High Court can be appointed in exercise of power under Section 11(6) of the Arbitration Act. The State of Chhattisgarh unsuccessfully assailed the said order in SLP(C) No.21120/2019 which was dismissed in *limine* on 11.09.2019. Thus, question of applicability of Adhinyam does not arise.

18. Learned Senior Counsel for the respondent then placed reliance on **2006 (2) Arb. LR 498(SC) (MCDERMOTT International INC vs. Burn Standard Co. Ltd. and Ors.)** and urged that if question of jurisdiction is not taken before the Arbitrator, it cannot be taken at later point of time in any other proceeding. The supervisory role of Court is confined to ensure fairness. The interference can be made in case of fraud or bias by the Arbitrator or for violation of principles of natural justice etc. He also placed reliance on **(2015) 3 SCC 49 (Associate Builders vs. Delhi Development Authority)** to bolster the submission that the Commercial Court under Section 34 of the Act is not required to correct the errors of fact. A possible view taken by Arbitrator cannot be disturbed. The ‘patent illegality’ aspect can be gone into only in the event of

existence of fraud or corruption. The next judgment is **(2018) 3 SCC 133 (Maharashtra State Electricity Distribution Company Limited vs. Datar Switchgear Limited and Ors.)** wherein it is laid down that the Arbitral Tribunal is master of evidence and the finding of fact which are arrived at by the Arbitrator on the basis of evidence which cannot be brushed aside and scrutinized by the Court.

19. (2019) 15 SCC 131 (Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India (NHAI)) is relied upon to contend that “public policy of India” has a definite meaning and judicial review in a case of this nature is confined to the principles laid down from Para 34 -39 of this judgment. Learned Senior Counsel placed reliance on **(2019) 4 SCC 163 (MMTC Limited vs. Vedanta Limited)** and urged that the Court cannot sit in appeal over the arbitral award and court can interfere on merits on limited grounds provided under Section 34 (2) (b)(ii) of the said Act. Thus, scope of judicial review is very limited and court below has not committed any error of law while declining interference.

Rejoinder Submission :-

20. In rejoinder submissions, Shri Amit Seth, learned Deputy Advocate General submits that in **Viva Highways (Supra)** the Full Bench of this Court has candidly held that jurisdiction cannot be assumed and created by consent of parties. He also placed reliance on **AIR 1988 SC 1531 A.R. Antulay vs. R.S.Nayak and another** to bolster his submissions that the Court can assume jurisdiction only on the basis of relevant enabling statutory provision. In this view of the matter, even if parties reached to a consensus before this Court for the purpose of appointment of Arbitrator as per the Arbitration Act, that consent will not be binding on the parties.

In any case, this aspect was required to be addressed and gone into by the Court below for which no attempts have been made.

21. Addressing the objection relating to ‘Works contract’ Shri Amit Seth submits that in the State of Chhattisgarh, the definition of ‘Works contract’ is different. In Madhya Pradesh, the definition has undergone an amendment which was considered by the Full Bench in **Viva Highways** (supra). The M. P. amendment is wide enough to include the consultancy agreement/contract. This aspect was also required to be gone into by the Court below.

22. No other point is pressed by the learned counsel for the parties.

23. We have heard the parties at length and perused the record.

FINDINGS :-

24. During the course of hearing, learned senior counsel for the respondent did not dispute that on the question of limitation, the Court below already gave its finding on 03/07/2019 held that application is within limitation and dismissed the application of respondent filed under Section 34(3) of the Arbitration Act. We find substance in the argument of learned counsel for the appellant that the final order of Court below on the question of limitation runs contrary to its previous order. After having dismissed the application under Section 34(3) of Arbitration Act filed by the respondent, it was no more open to the Court below to take a different view. Thus, the finding of Court below to the extent of limitation is certainly perverse and cannot sustain judicial scrutiny.

25. Learned counsel for the respondent placed reliance on a Division Bench’s Judgment of Supreme Court in the case of **Burn Standard Co. Ltd. (supra)**, wherein the Apex Court opined that the question of

jurisdiction must be raised before the Arbitrator itself. As against this, a three judges Bench of Supreme Court in the case of **Lion Engineering Consultants (supra)** considered a similar situation, where the stand of the State of Madhya Pradesh was that the contract in question is a ‘Works Contract’ under the M. P. Adhiniyam. The Apex Court while over-ruling its observation mentioned in paras-16 & 17 of previous judgment reported in **MSP Infrastructure Ltd. v. M.P. Road Development Corporation Limited (2015) 13 SCC 713** opined that the view taken in the said previous judgment cannot be said to be correct law. The Apex Court expressed its inability to agree with the observation that the public policy of India does not refer to State Law and refers only to an All India Law. The relevant paras of **Lion Engineering (supra)** read thus :-

“4. We find merit in the contentions raised on behalf of the State. We proceed on the footing that the amendment being beyond limitation is not to be allowed as the amendment is not pressed. We do not see any bar to plea of jurisdiction being raised by way of an objection under Section 34 of the Act even if no such objection was raised under Section 16.

6. Both stages are independent. Observations in paras 16 and 17 in *MSP Infrastructure Ltd. [MSP Infrastructure Ltd. v. M.P. Road Development Corpn. Ltd., (2015) 13 SCC 713 : (2016) 1 SCC (Civ) 810]* do not, in our view, lay down correct law. We also do not agree with the observation that the public policy of India does not refer to a State law and refers only to an all-India law.

7. In our considered view, the public policy of India refers to law in force in India whether State law or Central law. Accordingly, we overrule the observations to the contrary in paras 16 and 17 of the judgment in *MSP Infrastructure Ltd. [MSP Infrastructure Ltd. v. M.P. Road Development Corpn. Ltd., (2015) 13 SCC 713 : (2016) 1 SCC (Civ) 810]*

8. Since amendment application is not pressed, the appeal is rendered infructuous. The impugned order is set aside.

9. The matter may now be taken up by the trial court for consideration of objections under Section 34 of the Central Act. **It will be open for the respondents to argue that its objection that the Act stands excluded by the M.P. Madhyastham Adhikaran Adhiniyam, 1983 could be raised even without a formal pleading,** being purely a legal plea. It will also be open to the appellant to argue to the contrary. We leave the question to be gone into by the court concerned.”

[Emphasis supplied]

26. A plain reading of these paras makes it clear that State was permitted to argue on its objection regarding the ‘works contract’ before the appropriate Court. The Apex Court opined that even without a formal pleading, being purely a legal plea, this aspect can be raised by the State. Both the parties were given liberty to argue as per their respective stand before the appropriate Court. In this view of the matter, in our opinion, the matter deserves to be remitted back to the Court below with the direction to decide rival points by passing a reasoned order.

27. If definition of “works contract” mentioned in the Adhiniyam of Chhattisgarh is examined in juxtaposition to the definition contained in the Adhiniyam of Madhya Pradesh, we find force in the argument of appellant counsel that the definition of “work contract” in Madhya Pradesh has undergone a change pursuant to amendment w.e.f. 17.01.2017. It is apt to quote both in tabular form for ready reference.

Definition of “work contract” in Chhattisgarh	Amended definition of “work contract” in Madhya Pradesh
“works-contract” means an agreement in writing for the	“2(1)(i) “Works-contract” means an agreement in writing <u>or a letter</u>

execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal reservoir, tank, lake, road, well, bridge, culvert, factory, work-shop, powerhouse, transformers or such other works of the State Government may, by notification, specify in this behalf at any of its stages, entered into by the State Government or by an official of the State Government or Public Undertaking or its official for and on behalf of such Public Undertaking and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the said works.

of intent or work order issued for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, work-shop, powerhouse, transformer or such other works of the State Government or public undertakings or of the Corporations of the State as the State Government may, by notification, specify in this behalf at any of its stages, entered into by the State Government or by any official of the State Government or by public undertakings or Corporation or by any official of the State Government for and on behalf of such Corporation or public undertakings and includes an agreement for supply of goods or material and all other matters relating to execution of any of the said works and also includes the services so hired for carrying out the aforesaid works and also include all concession agreement, so entered into by the State Government or public undertakings or Corporation, wherein a State support is involved or not,”.

(The underlined portion was inserted in Madhya Pradesh Adhiniyam by way of said amendment).

Since, definition of “works contract” in Madhya Pradesh is not exactly same if compared with the definition in Chhattisgarh Adhiniyam,

the question whether judgment of Chhattisgarh High Court in ARBR No.23 of 2018 will hold the field or not also needs to be determined by the Court below.

28. The impugned order shows that the learned Commercial Court has simply reproduced the factual backdrop of the matter, rival contentions of the parties and also reproduced the citation and governing statutory provisions. Thereafter in para-16 of the impugned order, the learned Court below opined that the grounds raised by the appellant do not fall within the four corners of Section 34(2)(b)(ii) of the Act. The award cannot be said to be against ‘public policy’ and on the basis of these ‘conclusions’, the application of State is dismissed.

29. A Division Bench of this Court in **Anil Kumar Tripathi (supra)** held as under :-

“4. Being aggrieved, the appellant filed the objections to the aforesaid award inter alia on the following grounds :-

(i) That, the Arbitrator while passing the award has travelled beyond the terms and conditions of the agreement dated 24.1.2003.

(ii) The Arbitrator has failed to take into account the documentary evidence on record.

(iii) The statement of claim was not filed by the competent person, namely, respondent but his power of Attorney, namely, Girish Chandra Dubey.

(iv) The Arbitrator while passing the award has failed to appreciate that the appellant was not under an obligation to pay any damages to the respondent under the agreement.

(v) That the Arbitrator even after extending the period of contract after 31.5.2003 did not complete the work awarded to him. However, even the

aforesaid objection of the matter has not been appreciated by the trial Court.

5. From perusal of the impugned order passed by the trial Court dated 30.11.2011, we find that the award only contains the conclusion and no reasons have been assigned by the trial Court for rejecting the objection preferred by the appellant. The trial Court has merely held that the obligation to obtain permission from the authorities was on the appellant and the contractor cannot be held responsible for the same and none of the parties had stated before the Arbitrator that they want to lead evidence. Besides that, in paragraph 19 of the order, the trial Court has reproduced Section 34 of the Act and has held that no ground for interfering with the award in exercise of powers under Section 34 of the Act is made out.

6. From careful scrutiny of the impugned award, it is evident that the grounds raised by the appellant which have been referred by the trial Court in paragraphs 3 and 4 of its order have neither been adverted to nor have been adjudicated while passing the impugned award. The impugned award suffers from non-application of mind and has been passed on cryptic and cavalier manner. It is well settled in law that the reason is heart and soul of the order. In the instant case, the trial Court has merely recorded the conclusion without assigning reasons.

7. In view of the preceding analysis, we quash the order dated 30.11.2011 passed by the trial Court and remit the matter to the trial Court for adjudication of the objections afresh preferred by the appellant in the application under Section 34 of the Act by a speaking order. Let the aforesaid exercise be carried out by the trial Court within a period of six months from today.”

30. We find substantial force in the argument of learned counsel for the appellant that it was the minimum expectation from the Court below that it will assign adequate reasons as to why grounds so taken by the

applicant did not suit it. The Court below, in our opinion, directly reached to a 'conclusion' without assigning any 'reason' therefor.

31. No doubt, the order of Arbitrator can be called in question on limited grounds mentioned in various clauses of Section 34 of the Arbitration Act. Whether grounds so taken in the application filed under Section 34 do fulfill those conditions or not should have been considered by assigning justifiable reasons by the Court below. Para-16 of impugned order, in our opinion is too cryptic, too bald, too shallow and too sketchy. It is not expected from a judicial forum to reject the application without assigning any 'reason' and directly reach to a 'conclusion'. Reasons are held to be the heartbeat of conclusion. [See : **M/s. Kranti Associates Pvt. Ltd. & Anr. Vs. Masood Ahmed Khan & Ors. (2010) 9 SCC 496**]

32. At the cost of repetition, consistent with the view taken by the Supreme Court in the case of **Fiza Developers** (supra) which is quoted with profit by the Division Bench of this Court in **Gayatri Project Ltd** and also as held in **Lion Engineering Consultants** (supra), in our judgment, the appellant is entitled to raise the ground of jurisdiction even if it is not taken under Section 34 of the 1996 Act before the Court below. If the Court below finds that award is in respect of subject matter incapable of arbitration by operation of law, the Court is duty bound to set aside the Award under Section 34 of the Act. Similarly in **Lion Engineering Consultants** (supra) while dealing with the question whether contract is a 'works contract', the Apex Court relegated the parties before the Court below with liberty to raise their rival contentions on the said aspect. We deem it proper to follow the same course.

33. In view of foregoing analysis, in our opinion, it will not be proper to deal with the merits of the case and rival contentions raised before us.

34. Since in the impugned order, an incorrect finding is given that application was barred by limitation, it cannot sustain judicial scrutiny. Similarly, in the impugned order, the learned Court below has not dealt with the rival contentions of the parties by assigning minimum justifiable reasons. It is apt to remember eloquent expression of Shri Y. V. Chandrachud, J. in **State of U.P. v. Jageshwar, (1983) 2 SCC 305** “*Care and brevity are not strange bed-fellows and both can combine in a judgment, with some beauty for a change.*” For these cumulative reasons, we deem it proper to set-aside the order dated 20.04.2022 and remit the matter back before the learned Commercial Court to rehear the parties and decide the matter afresh in accordance with law. It is made clear that this Court has not expressed any opinion on the merits of the case. We order accordingly.

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35. Learned counsel appearing before us have fairly submitted that the order impugned in this appeal is similar to the order which has been interfered with by this Court in A.A.No.46/2022. However, stand of learned counsel for the respondent is that this matter is arising out of an International Commercial Arbitration, whereas, learned counsel for the State has taken a diametrically opposite stand.

36. Shri Seth, Deputy Advocate General submits that since award is a domestic award, it cannot be said to be arising out of an International Commercial Arbitration. Suffice it to say that Court below has not given any finding on this aspect. Thus, this question will also remain open to be

raised by the parties and decided by the Court below in accordance with law. For the reasons stated in the order passed in A.A.No.46/2022, the impugned order dated 20.04.2022 in the instant case is also set aside. The matter is remitted back before the Commercial Court to hear the parties afresh and decide it in accordance with law.

37. We have no doubt that learned Commercial Court will make endeavour to decide both the matters afresh expeditiously. Both the appeals are **disposed off**.

(SUJOY PAUL)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE