

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Arb. Appeal No.21 of 2024
Reserved on: 18.12.2024
Pronounced on: 30.12.2024

The Executive Engineer, I & PH Division, BilaspurApplicant/Appellant
Versus	
Ramesh Khaneja	...Respondent

Coram

Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge
Hon'ble Mr. Justice Satyen Vaidya, Judge

Whether approved for reporting?¹ No.

For the Applicant/ : Appellant	Mr. Anup Rattan, Advocate General with Mr. Rakesh Dhaulta, Mr. Pranay Pratap Singh, Addl. Advocate Generals and Ms. Priyanka Chauhan, Deputy Advocate General.
For the Respondent :	Mr. Sumeet Raj Sharma, Advocate.

Justice Tarlok Singh Chauhan

OMP(M) No.16 of 2024

1. By medium of this application, the applicant-appellant has sought condonation of 194 days' delay that has crept up in filing of the appeal. A perusal of the application discloses sufficient cause which prevented the applicant from filing the appeal within the prescribed

¹ *Whether the reporters of Local Papers may be allowed to see the judgment?*

period of limitation. Accordingly, the aforesaid delay is condoned. The application stands disposed of. Appeal be registered.

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2. The present appeal has been preferred by the appellant under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (in short the “Act”), assailing the order passed by the learned Single Judge on 06.07.2023 in Arbitration Case No.69 of 2016, vide which, the learned Single Judge rejected the appellant’s challenge to the arbitral award dated 05.04.2016 passed by the Arbitrator by way of petition under Section 34 of the Act.

3. The brief factual matrix, as emerging from the record, shows that the respondent was awarded work of construction of LWSS “*Shri Naina Devi Ji*”, including execution and supply of material vide award dated 30.07.2009. The work was required to be completed within one year, i.e. upto 13.08.2010.

4. As regards non-execution of the work, the appellant intended to forfeit the performance bond of the petitioner, restraining the respondent to approach this Court, leading to the appointment of an Arbitrator.

5. The respondent put-forth his claim on six counts:

- (i) Escalation
- (ii) General
- (iii) 15th Final Bill
- (iv) Prolongation
- (v) Performance Bond
- (vi) Litigation Expenses.

6. Upon conclusion of the arbitration proceedings, the Arbitrator awarded a sum of Rs.57,45,832/- under Claim No.1 for Escalation, whereas, he rejected the other claims put-forth by the respondent.

7. It was contended by the respondent before the learned Single Judge that even in the absence of Clause in Contract for Escalation, the Hon'ble Supreme Court in case titled as *K.N. Sathyapalan (Dead) by LRs. vs. State of Kerala and Another, reported in (2007) 13 SCC 43*, has held that in case of delay not attributable to the contractor, escalation is payable to the contractor, whereas, his case stands on a better footing, where Clause 60 in the contract clearly provides for claim for variation of price and, therefore, the respondent is entitled to the claim under the Head of Escalation.

8. The learned Single Judge noted that the nature of the award was more or less, based on consent, wherein the facts have been admitted with respect to late handing over the complete site to the respondent/contractor, thereby leading to non-completion of work by him within the stipulated period and it was further admitted that the work was to be completed within one year of handing over the complete site to the contractor.

9. We have heard learned counsel for the parties and have gone through the material placed on record.

10. At the outset, it needs to be noted that the scope of interference under Section 37 of the Act is extremely limited. Interference is called for only:-

- (i) when it is absolutely necessary or
- (ii) when it shocks the conscience of the Court or
- (iii) where it is found that the arbitral award is in contravention of any prevailing law and/or provisions of the Act and/or in terms of the contract. The Court may also interfere where the award is found to be patently illegal or in conflict with the Public Policy of India.

11. Bearing in mind the aforesaid exposition of law, it needs to be noted that it was during the proceedings before the Arbitrator that the appellant acceded to the claim of the respondent that site was not made available to him till 14.02.2011 and the site was made available to him partially on 15.02.2011 and clear complete site was made available only on 20.11.2011, whereafter, the respondent completed the work on 30.06.2012. These facts were also not disputed before the learned Single Judge.

12. The Arbitrator had also recorded the admission and assent of the appellant with respect to the claim of escalation, which was not disputed before the learned Single Judge, who reproduced the relevant portion of the award recorded by the Arbitrator, Para 6 whereof reads as under:-

“6. It is undisputed that during proceedings before the Arbitrator, department had acceded to the claim of the respondent that site was not made available to him till 14.02.2011 and only partial site was made available on 15.02.2011 and clear complete site was made available on 20.11.2011, whereafter he had completed work on 30.06.2012. The Arbitrator had recorded the admission and assent of the department with respect to claim of escalation, which has not been disputed in the present petition. The relevant portion recorded by the Arbitrator reads as under:-

“vi) From the series of events narrated in para (v) above and para (ii) & (iii) it clear that the contractor could not execute any work till 22.1.2011 because of non clearance of forest land. The delay happened on the part of respondent/EE in fulfilling his fundamental contractual obligation of handing over the site which he did in peace meal manner in extended period of execution of work. During the proceedings of 12th hearing held on dated 20.02.2016, it is apparently admitted by both the parties that the contractor could not do any work till 14.02.2011 and only partial site pertaining to civil structures including raw water tank was handed over to him on 15.2.2011, and further the site for clear water tank at Naina Devi Ji i.e. full site was made available to him on 20.11.2011. More so, even the respondent/EE admitted that the reasons of delay incurred cannot be attributed to the contractor because no penalty was levied upon him under clause 64 by then Executive Engineer.

vii) The defence of the respondent/EE that this claim is not payable because the variation in process incurred

of labour, material etc. stood already covered within 10% under clause 60 of the agreement was found incorrect, because later on this claim when checked by him and submitted in 7th hearing on 19-5-2014 came out to be 57,45,832/-.

viii) From the paras above it I clear that the work was got executed from the contractor in the extended period without his defaults. From the aforesaid facts,

surrounding circumstances and conduct of the contractor during execution of work at the relevant time, it can be construed that the contractor did not lack in deploying his resources as and when the site was made available to him and finally he completed the work on 30.06.2012.

- ix) *During the 6th hearing dated 21.4.2014, the respondent/EE agreed to the amount of this claim if preferred & adjudicated under clause 60 of the agreement. Accordingly in the 7th hearing the respondent/EE submitted the price escalation claim clerically checked for Rs.57,45,832/-. The claimant/contractor also agreed to this amount.*

In the light of discussion & reasons recorded above in para (i) to (ix), I am of the considered opinion that the contractor holds his entitlement for this claim. Therefore, this claim as checked by the respondent/EE is hereby allowed. As such the sum of Rs.57,45,832/- is awarded in favour of claimant/contractor against this claim.”

13. We need not multiply the decisions rendered by the Hon’ble Supreme Court qua the interpretation of Sections 34 and 37 of the Act.

14. Suffice it to refer to one of the latest judgments of the Hon’ble Supreme Court in ***Punjab State Civil Supplies Corporation Limited & Anr. vs. M/s Sanman Rice Mills & Ors., (2024) 11 Scale 368***, wherein, it has been held in paras 8 to 21 as under:-

“POINT OF DETERMINATION:

[8] The short question on the submission of the parties, which arises for our consideration is about the scope of powers of the Appellate Court under Section 37 of the Act and whether the Appellate Court was justified in setting aside the award dated 08.11.2012 which had already been confirmed under Section 34 of the Act.

LEGAL POSITION:

[9] The object of the Act is to provide for a speedy and inexpensive alternative mode of settlement of dispute with the minimum of intervention of the courts. Section 5 of the Act is implicit in this regard and prohibits interference by the judicial authority with the arbitration proceedings except where so provided in Part-I of the Act. The judicial interference, if any, is provided inter-alia only by means of Sections 34 and 37 of the Act respectively.

[10] Section 34 of the Act provides for getting an arbitral award set aside by moving an application in accordance with sub-Section (2) and sub-Section (3) of Section 34 of the Act which inter-alia provide for the grounds on which an arbitral award is liable to be set aside. One of the main grounds for interference or setting aside an award is where the arbitral award is in conflict with the public policy of India i.e. if the award is induced or affected by fraud or corruption or is in contravention with the fundamental policy of Indian law or it is in conflict with most basic notions of morality and justice. A plain reading of Section 34 reveals that the scope of interference by the court with the arbitral award under Section 34 is very limited and the court is not supposed to travel beyond the aforesaid scope to find out if the award is good or bad.

[11] Section 37 of the Act provides for a forum of appeal inter-alia against the order setting aside or refusing to set aside an arbitral award under Section 34 of the Act. The scope of appeal is naturally akin to and limited to the grounds enumerated under Section 34 of the Act.

[12] It is pertinent to note that an arbitral award is not liable to be interfered with only on the ground that the award is illegal or is erroneous in law that too upon reappraisal of the evidence adduced before the arbitral trial. Even an award which may not

be reasonable or is non-speaking to some extent cannot ordinarily be interfered with by the courts. It is also well settled that even if two views are possible there is no scope for the court to reappraise the evidence and to take the different view other than that has been taken by the arbitrator. The view taken by the arbitrator is normally acceptable and ought to be allowed to prevail.

*[13] In paragraph 11 of **Bharat Coking Coal Ltd. v. L.K.Ahuja**, (2001) 4 SCC 86, it has been observed as under:*

"11. There are limitations upon the scope of interference in awards passed by an arbitrator. When the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the court to reappraise the matter as if this were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. So long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for. However, in cases where an arbitrator exceeds the terms of the agreement or passes an award in the absence of any evidence, which is apparent on the face of the award, the same could be set aside."

[14] It is equally well settled that the appellate power under Section 37 of the Act is not akin to the normal appellate jurisdiction vested in the civil courts for the reason that the scope of interference of the courts with arbitral proceedings or award is very limited, confined to the ambit of Section 34 of the Act only and even that power cannot be exercised in a casual and a cavalier manner.

*[15] In **Dyna Technology Private Limited v. Crompton Greaves Limited**, (2019) 20 SCC 1, the court observed as under:*

"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."

[16] It is seen that the scope of interference in an appeal under Section 37 of the Act is restricted and subject to the same grounds on which an award can be challenged under Section 34 of the Act. In other words, the powers under Section 37 vested in the court of appeal are not beyond the scope of interference provided under Section 34 of the Act.

*[17] In paragraph 14 of **MMTC Limited v. Vedanta Limited**, (2019) 4 SCC 163, it has been held as under:*

"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] Recently a three-Judge Bench in *Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking*, (2023) 9 SCC 85, referring to *MMTC Limited (supra)* held that the scope of jurisdiction under Section 34 and Section 37 of the Act is not like a normal appellate jurisdiction and the courts should not interfere with the arbitral award lightly in a casual and a cavalier manner. The mere possibility of an alternative view on facts or interpretation of the contract does not entitle the courts to reverse the findings of the arbitral tribunal.

[19] In *Bombay Slum Redevelopment Corporation Private Limited v. Samir Narain Bhojwani*, (2022) 4 SCC 116, a Division Bench of this Court followed and reiterated the principle laid down in the case of *MMTC Limited (supra)* and *UHL Power Company Limited v. State of Himachal Pradesh*, (2022) 4 SCC 116. It quoted and highlighted paragraph 16 of the latter judgment which extensively relies upon *MMTC Limited (supra)*. It reads as under:

"16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In *MMTC Ltd. v. Vedanta Ltd.*, *MMTC Ltd. v. Vedanta Ltd.*, (2019) 4 SCC 163: (2019) 2 SCC 293, (Civ) the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words: (SCC pp. 166- 67, para 11)

"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 Ltd. 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."*

CONCLUSION:

[20] In view of the above position in law on the subject, the scope of the intervention of the court in arbitral matters is virtually prohibited, if not absolutely barred and that the interference is confined only to the extent envisaged under Section 34 of the Act. The appellate power of Section 37 of the Act is limited within the domain of Section 34 of the Act. It is exercisable only to find out if the court, exercising power under Section 34 of the Act, has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the power so conferred. The Appellate Court has no authority of law to consider the matter in dispute before the arbitral tribunal on merits so as to find out as to whether the decision of the arbitral tribunal is right or wrong upon reappraisal of evidence as if it is sitting in an ordinary court of appeal. It is only where the court exercising power under Section 34 has failed to exercise its jurisdiction vested in it by Section 34 or has travelled beyond its jurisdiction that the appellate court can step in and set aside the order passed under Section 34 of the Act. Its power is more akin to that superintendence as is vested in civil courts while exercising revisionary powers. The arbitral award is not liable to be interfered unless a case for interference as set out in the earlier part of the decision, is made out. It cannot be disturbed only for the reason that instead of the view taken by the arbitral tribunal, the other view which is also a possible view is a better view according to the appellate court.

[21] It must also be remembered that proceedings under Section 34 of the Act are summary in nature and are not like a full-fledged regular civil suit. Therefore, the scope of Section 37 of the Act is much more summary in nature and not like an ordinary civil appeal. The award as such cannot be touched

unless it is contrary to the substantive provision of law; any provision of the Act or the terms of the agreement.”

15. Once, practically, there was no dispute whatsoever regarding the factual matrix, either before the arbitrator or before the learned Single Judge, then where was there an occasion for the State to even have filed an appeal, after all it was not a case, where interference is called for being absolutely necessary, or where it shocks the conscience of the Court or where the arbitral award is in contravention of any prevailing law and/or the provisions of the Act or in violation of the terms of the contract. The award being primarily based on consent cannot also be held to be patently illegal or in conflict with the public policy of India. Consequently, we find no merit in this appeal and the same is accordingly dismissed, so also, any pending miscellaneous application.

(Tarlok Singh Chauhan)
Judge

(Satyen Vaidya)
Judge

December 30, 2024
(Yashwant)