



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**



D.B. Civil Miscellaneous Appeal No.5151/2019

Rajasthan Urban Infrastructures Development Project, Through
Officer-In-Charge Sh. V.K. Sharma, executive engineer, RUIDP,
City Improvement Trust, Ajmer (Rajasthan)

----Appellant

Versus

M/s National Builders, Baroda, 81-A, Kunj Society, Ist Floor,
Alkapuri, Vadodara, (Gujrat)

----Respondent

For Appellant(s) : Mr. R. P. Garg with
Mr. Vikram Yadav
For Respondent(s) : Mr. Sunil Nath with
Ms. Shruti Jain

**HON'BLE MR. JUSTICE AVNEESH JHINGAN
HON'BLE MR. JUSTICE BHUWAN GOYAL**

JUDGMENT

RESERVED ON :: :: :: 25/04/2025

PRONOUNCED ON :: :: :: 01/05/2025

AVNEESH JHINGAN, J:-

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') is filed aggrieved of dismissal of application under section 34 of the Act.

2. The appellant (respondent before the Arbitrator, hereinafter referred to as 'appellant') issued work order in favour of the claimant (hereinafter referred to as 'respondent') and the parties entered into contract on 03.02.2003. The scope of the work was widening and strengthening of National Highway Beawar Road, Ajmer from Ramganj to Transport Nagar and to erect ramp on one side. The work starting w.e.f. 03.02.2003 was to be completed on



02.02.2004 but was actually completed on 10.05.2005. The disputes arising between the parties during performance of the contract was referred to the arbitrator. The arbitrator passed an award dated 30.08.2010 directing the appellant to pay to the respondent sum of Rs.41,54,511/- and Rs.1,01,500/- towards arbitration cost. Interest was granted under section 31(7)(a) of the Act amounting to Rs.15,87,957/- and @18% p.a. under section 31(7)(b), on the awarded amount from the date of award till payment. The application under section 34 was dismissed by the Commercial Court on 11.07.2019, hence, the present appeal.

3. The appellant has raised following issues:-

- (i) interest charged to the tune of Rs.1,37,400/- for delay in getting the mobilization advance adjusted was wrongly set aside by the arbitrator;
- (ii) the recovery of excise duty was in consonance with clause 14.5 of the contract;
- (iii) the recovery made for non-submission of video cassette and the documents was justified;
- (iv) the arbitrator went beyond the clauses of the contract and contrary to the clause 41 in awarding escalated price; and
- (v) lastly, that liquidated damages were rightly imposed while extending the time for completion of execution of the work.

3.1. The reliance is placed upon the decisions of Supreme Court in **Rajasthan State Mines and Minerals Ltd. versus Eastern Engineering Enterprises & Anr.** reported in **AIR 1999 SC 3627** and **State of Odisha vs. Sudhakar Das (Dead) by LR's**, reported in **AIR (2000) SC 1294** to contend that the arbitrator has to adjudicate as per the agreement and cannot award claim



for escalation charges in absence of the clause. The argument is that the award is unsustainable and suffers from patent error.

4. As per contra, there was no clause in the contract for charging interest on mobilization advance. The adjustment was to be made within ten months from the date the work was to be started. The respondent had made a request that 90% of the mobilization advance be adjusted against bill of November 2003 and the 10% against the bill of December 2003.

4.1. The submission is that the exemption of Light Diesel Oil (LDO) was availed as per the law. The excise department had neither objected nor initiated proceedings against exemption claimed, yet the appellant recovered the excise duty on LDO.

4.2. The recovery for non-submission of documents and video cassette is refuted by stating that the compliance was made as obligated under the terms of the contract.

4.3. It is argued that the claim for escalation price is objected to relying upon clause 41 of the contract which was deleted as a whole. The contention is that clause 38 provided for payment of escalated prices. Reliance is placed upon the report of Higher Powered Committee wherein out of 463 days delay, 458 days were attributed to the appellant.

4.4. The argument is that the delay in completion of work was assigned to the appellant hence, the extension of time subject to liquidation damages is unjust.

5. Heard learned counsel for the parties, perused the paper book and relevant record with their able assistance.

6. In the case in hand, the findings recorded by the arbitrator and the commercial court while dismissing the application under



section 34 are concurrent. The interference under section 37 cannot be beyond the grounds available under section 34 of the act. The court has to be very careful before disturbing the concurrent findings. Sub-section 2A in Section 34 of the Act, was inserted wherein the ground of patent illegality on the face of award was added as a ground for interference in the award. But the proviso thereto stipulates that erroneous application of law or on re-appreciation of evidence the award cannot be set-aside.

7. It will be fruitful to quote paragraphs from **MMTC Limited**

vs. Vedanta Limited reported in **(2019) 4 SCC 163**:-

"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 reappraisal 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.”

8. The Supreme Court in **Punjab State Civil Supplies Corporation Limited & Anr. vs. M/s Sanman Rice Mills & Ors.** reported in **(2024) INSC 742** held:-

“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.”



9. As per clause 44 of the contract, the appellant paid interest free mobilization advances to the respondent. The repayment of the advance was to be within ten months from the date to proceed with the work and by deduction from the interim payments.

10. Analysing the clause of the contract the arbitrator held that the appellant was free to make deductions from interim bills and yet failed to do so. On the other hand, the respondent vide letter dated 03.12.2003 requested for deduction of 90% of advances in November 2003 and 10% recovery to be effected in December 2003. The finding of fact is recorded that 8th running bill was submitted on 29.11.2003. The first contention of the learned counsel for the appellant lacks merit and is rejected.

11. The appellant made recovery to the tune of Rs.2,09,760 of the excise benefit claimed by the respondents for use of LDO. It would be relevant to quote clause 14.5 of the contract.

"14.5. With reference to sub-clause 14.3 the Employer will assist the contractor to obtain any lawful exemptions from payment of Excise Duty or Import Duty of Sales Tax or Income Tax or any other admissible exemption from any kind of Tax or Duty on plant and Works and materials which are to be incorporated as a part of the permanent works by issue of an "Essentiality Certificate" in the format indicated in Section-VIII, which certifies the estimated quantities of materials that are to be incorporated into the works. The responsibility for obtaining any such exemption from Competent Authority will remain with contractor and the RUIDP shall not in any way be responsible for admissibility of the claims or eligibility of the contractor."



12. The issue as to whether the exemption could be claimed by the respondent is to be decided by the excise department. The respondent submitted letter dated 17.04.2004 to the Assistant Commissioner of Central Excise Department for exemption on LDO to be used. Nothing was produced either before the arbitrator or now that the excise department had ever objected to the exemption claimed by the respondent on LDO. No case is made out for interference wherein the recovered excise duty has been ordered to be refunded.

13. An amount of Rs.1,00,000/- was recovered from the respondent for violation of clause 85 as the video cassette of the site before the commencement of the work and of all important activities of the work was not submitted. The clause 85 was deleted by the clause 126 and the contractor had to only supply colour photographs in compliance of the provisions of clause 85, which were submitted. The factual finding recorded calls for no interference.

14. The claim of the respondent on account of escalation of price is opposed by relying upon clause 41 contending that claim for escalation of price cannot be made if the completion period in the contract is of less than twelve months.

15. It is an admitted case that clause 41 was deleted as a whole and clause 38 provided for price adjustment if the event for compensation occurs. It was considered by the arbitrator that the appellants had themselves made partial payments for escalation in prices. Another aspect is that as per the report of the Higher Powered Committee, the delay of 458 days in completion of the work was attributed to the appellant and negligible delay of five



days was on the part of the contractor for which also there were factors like adverse sub-soil water conditions, congested working areas in the main city. It cannot be ignored that the delay in completion of work was one of the factor for escalation of prices.

16. The reliance on the decision of supreme court cases of MMTTC Limited vs. Vedanta Limited (Supra) and Punjab State Civil Supplies Corporation Limited & Anr. vs. M/s Sanman Rice Mills & Ors.(Supra) is of no avail. The decisions are relied upon to buttress the argument that arbitrator awarded the claim for escalation of price inspite of there being no clause in the contract to this effect and the award is patently illegal, the contention is factually wrong. Even after deletion of clause 41 the claim for price adjustment could be made under clause 38. Moreover, the appellant itself had allowed the partial claim for price escalation. The claim awarded by arbitrator is upheld.

17. Lastly, the appellant recovered liquidated damages imposed while granting extension to complete the work. As noted above, out of 463 days delay in completion of the work, the delay of 458 days was imputed to the appellant. In such circumstances, the extension of time subject to liquidation damages was rightly set aside.

18. In view of the above discussion, the appeal is dismissed.

(BHUWAN GOYAL),J

(AVNEESH JHINGAN),J

Chandan/reserved

Whether Reportable: **Yes**