THE HONOURABLE SMT. JUSTICE M.G.PRIYADARSINI

CIVIL MISCELLANEOUS APPEAL No.345 OF 2011

J U D G M E N T:

Aggrieved by the Order dated 23.12.2010 in A.O.P.No.674 of 2006 passed by the learned II Additional District Judge, Rangareddy District, wherein the application filed by the appellant/petitioner to set aside the Award dated 12.05.2006 passed by the Sole Arbitrator-respondent No.1, was dismissed.

02. For the sake of convenience, hereinafter, the parties will be referred as per their array before the learned Arbitrator.

03. The contentions of the claimant before the learned Arbitrator are as follows:

Respondent No.2 placed an order No.LP-04-2-029/PV/TPC-1 dated 11.06.2004 for supply of Lead Antimony Alloy Wire Pb.Sb.2 (With Antimony 1.8 to 2.2%); 6.15mm-6.22 mm dia (0.242" to 0.245") in coiled form weighing of 4/85 and No.2 of 8/87 for quantity of 141207 kgs for a total sum of Rs.82,55,257/- with the petitioner.

Accordingly, the petitioner supplied the matenal of 141207 kgs of wire (2992 coils) during August, 2004 and September 2004 along with the pre-inspection reports. The petitioner raised bills bearing Letter No.NILE/DFK/2004-05/2158, dated 04.09.2004 and NILE/DFK/2004-05/2328, dated 17.09.2004 on respondent No.2. Even after receiving bills, the amount was not paid. On that, the petitioner sent a reminder dated 08.10.2004, for which respondent No.2 sent a fax message on 03.11.2004 stating that the material sent by the petitioner was not found suitable for 'end use' since feeding of wire gets interrupted/stopped in the automatic processing machine as the wire gets bent, resulting in wastage of material, manpower and time, and in view of this discrepancy, total consignment of 141207 kgs is not acceptable and stands rejected. The petitioner gave a reply fax message dated 04.11.2004 to respondent No.2 appraising the material was sent as per the specifications in the supply order and requested to release the payment. The rejection is not valid. Later respondent No.2 addressed letter dated 08.10.2004 asking the petitioner to collect the

rejected material from the stores. The petitioner was forced to lift the same. The material was supplied as per the specifications mentioned in the work order. Thus, the rejection of the material by respondent No.2 is wrongful. As per the terms of the Agreement, the petitioner has initiated the Arbitration proceedings for realization of claim of Rs.19,26,868/-.

04. Sole Arbitrator-respondent No.1 after conducting Arbitration proceedings, passed Award dated 12.05.2006 allowing part of the claim of the petitioner to the tune of Rs.2,48,289/- pertaining to the material used by respondent No.2. But, rejected the balance amount of Rs.16,78,599/- on the grounds that the petitioner collected back the rejected material as per the general terms and conditions of the supply order, so it is up to the petitioner to dispose off the material and the petitioner cannot claim from respondent No.2 the cost/loss including loss of interest due to quantity rejected and returned by respondent No.2.

05. Respondent No.2 filed counter contending the application itself is not maintainable. It is manufacturing the explosive weapons for Armed forces and having its own testing laboratory and quality control department. Respondent No.2 had placed an Order with petitioner vide supply No. LP-04-2-029/PV/TPC-1, dated 11.06.2004 for supply of lead antimony alloy wire PbSb 2 (with 1.8 to 2.2% Antimony) 6.15mm to 6.22mm Dia (0.242" To 245") in coiled form weighing 45 to 50 kgs. To specn. JSS-9530-21-1981 (PbSb-2) Amendment No.1 of 4/85 and No.2 of 8/87 with a note that 1.Quality tolerance +/-5% is acceptable. 2.Firm should enclose test certificate from Government approved/Certified Laboratory with the item code 0899100006 @ Rs.47.500 per Kg.(unit) and the quantity ordered is 141207 Kg. and total cost is Rs.8232932.938 and it is specifically mentioned that the General Manager reserves the right to increase the quantity by another 35362 Kgs., during the currency of the contract with the same rate and terms and conditions which are mentioned in Annexure-a. It is further contended that it is false to allege that the total amount comes to Rs.82,55,257/- for

the quantity of 141207.000 Kgs. As per the acceptance of Tender dated 11.06.2004 which is mentioned as total cost of Rs.8232932.938. The petitioner had supplied the material of 141207.0000 Kgs of wire during August, 2004 and September, 2004 after internal inspection. The said material was received by respondent No.2 along with three inspection reports of the petitioner company except the test certificate from the Government approved/certified Laboratory as per the supply order company.

06. Sole Arbitrator-respondent No.1 has entered reference and conducted the arbitration proceedings on various dates and passed Award on 12.05.2006 after considering the rival contentions of the petitioner and defendant. The learned Arbitrator awarded an amount of Rs.2,78,083.68/-.

07. The following reasons assigned by the learned Arbitrator before passing the above Award:

i. Defendant OFK has rejected the total quantity 1,41,207 Kgs of material supplied by M/s NILE LTD, as the material was not found suitable during productionisation.

The problems faced during practical trials were also shown to firm's representative Shri Yugendra during his visit at OFK in the 2nd week of Octorber, 2004.

ii. The Defendant OFK mentioned in their counter-claim that the firm M/s NILE LTD, has collected the rejected store quantity 1,40,825 Kgs. Also the Defendant OFK vide letter No.6469/Arbitration/Nile/PV dated 27.02.2006 intimated to Sole Arbitrator that OFK has returned 1,40,825 Kgs of material as per the details of nominal vouchers mentioned in the above letter However after verifying the records, it is observed by the Sole Arbitrator that the quantity 1,40,845 Kgs is the gross weight as collected by the firm M/s NILE LTD.

iii. M/s NILE LTD also confirmed that they have collected the material 1,40,825 Kgs as gross weight vide their letter No.NILE/NFD/OFK/2005-06 dated 10th March 2006 in response to Sole Arbitrator letter No. VFJ/JGM/TA/Arbitrator/06 dated 01.03.2006.

(A) M/s NILE LTD, supplied material of quantity 1,41,207 Kgs to OFK. But the Defendant OFK could return back rejected material of quantity 1,36,960 Kgs only to the

firm M/s NILE LTD. Thus OFK has not returned back 4,247 Kgs of material to the firm. Therefore the Defendant OFK is liable to make payment for the quantity 4,247 Kgs of material which has not been returned to the firm M/s NILE LTD.

(B) Since the Defendant OFK has not paid the payment of material which has not been returned to the firm, the Defendant OFK is also liable to pay interest on the amount of the material cost.

iv. The Sole Arbitrator had discussions with the SBI Bank and the Local Accounts Office for payment of interest rate. As per SBI Ranjhi Branch, Jabalpur Letter No.112 dated 10.12.2005, the interest @ 5.5% per annum is paid and after consulting the Local Accounts Office penal rate @ 2.5% per annum may be paid to the firm.

v. Therefore the Defendant OFK is liable to pay the interest at the rate of 8% per annum.

08. Reasons for not admitting/accepting the claim of claimant M/s.Nile Ltd., are:

i. Claim of claimant M/s.Nile Ltd., of Rs.15,77,766.00 being the cost/loss due to quantity rejected has not been admitted/accepted as the material has been rejected by OFK and the firm has also collected back the rejected material as per the general terms and conditions of the supply order, so it is up to the firm M/s NILE LTD, to dispose of the material. The Claimant cannot claim from the Defendant OFK, the cost/loss including loss of interest due to quantity rejected and returned back by OFK. So the claim of Rs.15,77,766.00 is not admitted/accepted.

(ii) The claim of Claimant, in the form of interest of Rs.1,00,813.00 has not been admitted/accepted as the same has been calculated @ 13.25% per annum by the firm M/s NILE LTD on Rs.2,48,289.00 the amount of the cost of material not returned by OFK plus Rs.15,77,766.00 the amount of cost/loss due to quantity rejected and returned back to the firm M/s.NILE LTD, by OFK. Since the firm has collected back the rejected material from OFK, so the interest cannot be paid to the firm for the material which has already been collected back by the firm.

(iii) Further the Claimant M/s NILE LTD has not submitted any documentary evidence showing that they have paid interest of Rs.1,00,813.00 @ 13.25 per annum to the Bank.

(iv) So the claim of Rs.1,00,813.00 as interest @ 13.25% is not admitted/accepted.

09. Aggrieved by the same, the petitioner/appellant filed Arbitration Original Petition before the II Additional District Judge, Rangareddy District vide A.O.P.No.674 of 2006, however, the same was dismissed. Aggrieved by the same, the petitioner/appellant has filed the present Civil Miscellaneous Appeal to set aside the impugned Order dated 23.12.2010 in A.O.P.No.674 of 2006 passed by the learned II Additional District Judge, Rangareddy District.

10. Heard learned counsel for the appellant and perused the record available before this Court. Even after service of notice, there is no representation on behalf of respondent No.2. Therefore, the submissions of respondent No.2 are treated as 'heard'. Notice sent to Sole Arbitrator-respondent No.1 returned unserved.

11. Learned counsel for the appellant submitted that the Court below and Sole Arbitrator failed to consider the claim of the appellant on proper perspective and that the Sole Arbitrator ought to have granted entire amount as claimed by the appellant and prayed this Court to allow this Civil Miscellaneous Appeal.

12. As seen from the entire record, the material supplied by the petitioner to respondent No.2 is for preparation of war material and the said material must be to the specifications as required by respondent No.2 and any small deviation in the standard of material sent, cannot be ignored. The quality of the material sent by the petitioner cannot be inspected by the third parties. The material was inspected by the authorities and made practical trial in the presence of representative of the petitioner, and the defects in the material was exposed. The said defective material was rejected by respondent No.2.

13. The scope of interfering with the arbitration award is very limited until and unless there is error

apparent on the face of the record and there is perversity in the award. The expression public policy was of wider amplitude and hence, where award passed by the arbitral tribunal was against the terms of the contract or against the law of land for the time bearing in force, such an award is against the public policy of India and is liable to be set aside under Section 34 of the Act.

14. The Honourable Supreme Court in **NTPC Limited v. Deconar Services Private Limited**[1]**,** held as under:

> *"12. Further, it is also a settled proposition that where the arbitrator has taken a possible view, although a different view may be possible on the same evidence, the Court would not interfere with the award. This Court in Arosan Enterprises Ltd.v. Union of India, (1999) 9 SCC 449 held as follows:*
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> > *'36. Be it noted that by reason of a long catena of cases, it is now a well – settled principle of law that reappraisal of evidence by the Court to re-appraise the evidence is known to proceedings under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. IN the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is*

[1] 2021 SCC OnLine SC 498...

> *based on a wrong proposition of law. IN the event however two views are possible on a question of law as well, the Court would not be justified in interfering with the award.*
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> *37. The common phraseology "error apparent on the face of the record" does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The Court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined…'*

> *From the above pronouncements, and from a catena of other judgments of this Court, it is clear that for the objector/appellant in order to succeed in their challenge against an arbitral award, they must show that the award of the arbitrator suffered from perversity or an error of law or that the arbitrator has otherwise misconducted himself. Merely showing that there is another reasonable interpretation or possible view on the basis of the material on the record is insufficient to allow for the interference by the Court."*

15. Even in the case on hand, there is no material to show that there is an error apparent on the face of the record or that there is perversity in award. Moreover, when two views are possible on a question of law as well, the Court would not be justified in interfering with the award. In the case on hand, there is no question of law involved in this case. In fact, all the grounds raised by the learned counsel for the appellant are based on questions of fact

and they are not based on question of law. Furthermore, even for the sake of arguments, if any questions of law are involved in the case on hand, as held above, when two views are possible, there is no justification on the part of the Court to interfere with the award.

16. It is apt to mention here that in **Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited[2],** the Honourable Supreme Court held as under:

> *"23. For a better understanding of the role ascribed to Courts in reviewing arbitral awards while considering the application under Section 34 of the 1996 Act, it would be relevant to refer to a judgment of this Court in Ssangyong Engineering and Construction Co. Limited v. National Highways Authority of India (NHAI) MANU/SC/0705/2019: (2019) 15 SCC 131 where R.F. Nariman, J. has in clear terms delineated the limited area for judicial interference, taking into account the amendments brought about by the 2015 Amendment Act. The relevant passages of the judgment in Ssangyong (supra) are noted as under;*
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> > *"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] ,as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 :*

[2] 2022 Live Law (SC) 452

(2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2) (a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204], or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted

to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

24. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by courts while examining the validity of the arbitral awards. The limited grounds available to courts for annulment of arbitral awards are well known to

legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the courts. There is a disturbing tendency of courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

25. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression 'patent illegality'. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression 'patent illegality'. What is prohibited is for courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression 'patent illegality'.

26. Section 34 (2) (b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression 'public policy of India' and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice."

17. In the above said authority, it was elaborately discussed with regard to patent illegality and public policy. It was held that the contravention of a statute not linked to public policy or public interest, which cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

18. It was also made clear that re-appreciation of evidence cannot be permitted under the ground of patent illegality appearing on the face of the award. The expression 'public policy of India' and its connotations for the purposes of reviewing arbitral awards were made clear in the 2015 Amendment Act, from which it can be culled out that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice. But in the instant case on hand, the respondent has not brought to the notice of this Court about any fraud or corrupt practice adopted by the

claimant during the course of transaction between the parties in violation of Section 75 or Section 81 of the 1996 Act.

19. Even the appellant failed to bring to the notice of this Court that there is any patent illegality on the face of the record or that the learned Arbitrator has committed illegality or irregularity while passing the impugned arbitral award. In such circumstances, this Court is of the considered view that the learned Arbitrator after adjudicating all the aspects has rightly passed the impugned award and the interference of this Court in the impugned award is unwarranted, more particularly, when the scope of interference in the arbitral awards passed under Sections 34 and 37 of the Arbitration and Conciliation Act, is very minimum. Moreover, the learned Arbitrator has assigned his reasons in detail, for granting an amount of Rs.2,48,289/- and rejecting the balance claim of Rs.16,78,599/-.

20. The learned II Additional District & Sessions Judge, Rangareddy District at LB Nagar in the impugned

order observed that the record placed before the Court including Award passed by respondent No.1 makes out that the material sent by the petitioner is not according to the standard and not according to the required quality. Thus it is established by respondent No.2 that the rejection of remaining part of the consignment of material is just and valid.

21. In view of the above facts and circumstances, viewed from any angle, this Court is of the opinion that the learned Arbitrator after considering all the aspects has passed the impugned Award, which was confirmed by the learned II Additional District & Sessions Judge, Rangareddy District at LB Nagar. The appellant failed to make out any of the grounds to set aside the impugned Award, which was confirmed by the learned II Additional District & Sessions Judge, Rangareddy District at LB Nagar. There are no merits in the Civil Miscellaneous Appeal and accordingly, the same is liable to be dismissed.

22. Accordingly, the Civil Miscellaneous Appeal is dismissed. There shall be no order as to costs.

As a sequel, pending Miscellaneous applications, if any, shall stand closed.

JUSTICE M.G.PRIYADARSINI

Date: 25-JAN-2024
KHRM