HIGH COURT OF TRIPURA
AGARTALA

Arb. A. 3/2022

Engineering Projects (India) Ltd.,
North Eastern Regional Office, Regional Office at 4th Floor, Hindustan Tower, Jawahar Nagar, N.H.-37, Guwahati- 781022
Having its local office at Agartala-
Engineering Projects(India) Ltd.,
21, Krishna Nagar Road, Bijoy Kumar Chowmuhani, near SBI Regional Office, Agartala- 799001, Tripura, represented by its Deputy General Manager (Tech.), Shri Abhijit Nandi.

----- Appellant(s)

Versus

M/s. M. P. Khaitan, Contractor,
15, Ganesh Chandra Avenue, 7th Floor, Kolkata-700013, West Bengal.

----- Respondent(s)

For Appellant(s)	:	Mr. P. Majumder, Advocate. Ms. S. Debbarma, Advocate.
For Respondent(s)	:	Mr. Somik Deb, Sr. Advocate. Mr. Abir Baran, Advocate. Ms. R. Chakraborty, Advocate. Mr. K. Debnath, Advocate. Mr. S. Majumder, Advocate.
Date of Hearing	:	***13th July, 2022.***
Date of Pronouncement	:	***12th September, 2022.***
Whether fit for reporting	:	YES

_B_E_F_O_R_E_

HON'BLE THE CHIEF JUSTICE MR. INDRAJIT MAHANTY
HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY

JUDGMENT & ORDER

[Per S.G. Chattopadhyay], J

This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (Arbitration Act hereunder) against the judgment

and order dated 25.02.2022 passed by the District Commercial Court, West Tripura, Agartala in Civil Misc. (Arbitration) 03 of 2020.

[2] The factual context of the case is as under:

Appellant, M/s. Engineering Projects (India) Ltd. (EPIL for short) (a Government of India Enterprise) signed an agreement in the form of MOU with the Department of Agriculture, Government of Tripura on 15.11.2007 for construction of the College of Agriculture at Lembucherra. Appellant split up the entire project into 3 packages for suitably executing the work and floated Notice Inviting Tender (NIT for short) for construction of the college building at Lembucherra which was in package-1. The NIT was so published on 06.02.2008. Respondent, M/s. M.P Khaitan, a registered contractor participated in the tender process along with other contractors and submitted its tender. The tender submitted by the claimant-respondent M/s. M.P. Khaitan having stood the lowest, the General Manager, EPIL, Kolkata issued a Letter of Intent (LOI for short) in favour of the claimant on 10.03.2008. An agreement was thereafter executed between the appellant and respondent, M/s. M.P. Khaitan on 25.04.2008. The LOI indicated that date of commencement of the work would be reckoned from the 10th day of issuance of the LOI. The contract between the parties which was valued at Rs.22,79,80,148.70/- was stipulated to be completed within a period of 18 months i.e. by 20.09.2009. The different units which were to be constructed under package-1 were to be as under:

(i) Boys' hostel, (ii) Guest house, (iii) Workshop, (iv) Auditorium, (v) Boys' hostel (PG), (vi) New college building complex with library and canteen, (vii) Local shopping complex, (viii) Mini sports stadium, (ix) Dispensary building and (x) Garage.

[3] Since completion of the work within time depended on the performance of the reciprocal obligations, it was agreed upon between the parties that the appellant would hand over the dispute free worksite, designs and drawings etc. to the claimant-respondent within the stipulated time and the appellant would also make timely payment to the claimant-respondent as per the agreement.

[4] The claimant-respondent started the work in time and applied due diligence for execution of the work in time but due to frequent interruptions by the appellant, the claimant-respondent could not complete the work within the stipulated period of 20.09.2009. By 20.09.2009, the claimant completed only one unit i.e. the PG hostel. Seven other units were completed on 19.07.2011 at 22 months' delay. Even on 19.07.2011, the garage could not be completed due to non-availability of proper site.

[5] However, after delayed completion of the work, claimant-respondent claimed completion certificate from the appellant but the appellant, despite series of communications made by the claimant, did not issue the certificate in his favour which deprived the claimant-respondent of getting higher ranking from NBCC and Government

contracts of higher amount. Aggrieved claimant-respondent moved the Gauhati High Court by filing a writ petition seeking direction to the appellant for issuing completion certificate. Pursuant to the order of the High Court, completion certificate was issued to the claimant-respondent.

[6] Having received the completion certificate from the appellant, claimant raised bill of a sum of Rs.92,74,632/-. Gross value of the work was Rs.22,79,80,148.70/-. After deducting the amount already paid to him during the execution of the work, claimant raised the bill of Rs.92,74,632/- i.e. the balance payable to him.

[7] The appellant disputed the claim by raising various objections. Claimant-respondent invoked the arbitration clause of the agreement for referring the matter to the arbitrator for adjudication. The impugned judgment of the Commercial Court indicates that initially one S. Roy Chowdhury was appointed as sole arbitrator. The respondent filed his claim statement supported by documents before the said arbitrator. The arbitrator having resigned on 30.05.2018, the claimant-respondent approached this High Court by filing Arb. Petition No.7 of 2018 seeking appointment of the arbitrator and the present arbitrator was appointed by this Court by an order dated 20.09.2018.

[8] In the course of arbitration, appellant filed counter claim before the arbitrator. In its counter claim, appellant contended that despite providing all contractual support, claimant-respondent delayed the completion of the work. He took 22 months beyond the scheduled

date of completion to complete the work. While granting extension, the appellant reserved the right to recover damages as per the agreement under Clause 72.1 which provided as under:-

> **"If the contractor fails to maintain the required progress in terms of Clause 72.4 or relevant clause of ACC to complete the work and clear the site on or before the completion date or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to EPI on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below or such other smaller amount as the Engineer in Charge (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/week (as applicable) that the progress remains below that specified in Clause 72.4.1 or the relevant clause in ACC or that the work remains incomplete. This will also apply to items or group of items for which a separate period of completion has been specified."**

[9] Appellant claimed compensation subject to ceiling of 10% of the tendered value of the work i.e. Rs.22,79,80,148.70/-.

[10] In reply to the counter claim, claimant-respondent filed reply. On the basis of the claim statement of the claimant-respondent, counter statement of defence, the counter claim filed by the appellant and replies filed by the claimant-respondent, the following issues were framed by the learned arbitrator:

> **"1. Is the claimant entitled to get balance payment on value of works done amounting to ₹92,74, 663/-?**
>
> **2. Is the claimant entitled to damages on account of escalation of charges due to high price rise in all sectors amounting to ₹91,24,126/-?**
>
> **3. Is the claimant entitled to get damages on account of longer retention of site and overheads amounting to ₹31,13,157/-?**

4. Is the claimant entitled to get damages being the share of head office overheads for the overrun period amount to ₹4,61,998/-?

5. Is the claimant entitled to get damages for longer retention of plants, machineries and equipments in the work site amount to ₹63,03,352/-?

6. Is the claimant entitled to get damages for making payment of electricity charges during the overrun period amounting to ₹5,22,183/-?

7. Is the claimant entitled to get damages for illegally withholding ₹17,12,104/- in 26th R.A. bill by granting interest @ 18% p.a. for the period from 25.08.2011 to 07.02.2013 amounting to ₹4,71,473/-?

8. Is the claimant entitled to get damages for providing facility to EPIL for the extra period from 20.09.2010 to 18.07.12 amounting to ₹8,85,320/-?

9. Is the claimant entitled to get damages for incurring insurance charges on car and WC policy amounting to ₹3,14,341/-?

10. Is the claimant entitled to get damages being the bank commission on performance guarantee for the period from 20.12.2010 to 23.11.2012 amounting to ₹3,14,401/-?

11. Is the claimant entitled to get damages being the bank commission on retention money bank guarantee amounting to ₹2,41,955/-?

12. Is the claimant entitled to get damages for longer retention of Security deposit/Retention money of ₹10.00 lac by granting interest @ 18% p.a. amounting to ₹4,10,940/-?

13. Is the claimant entitled to get damages on account of travelling expenses etc. for the overrun period of 22.133 months @ ₹10,000/- per month amounting to ₹2,21,333/-?

14. Is the claimant entitled to get damages amounting to ₹30,00,000/- for abnormal delay in issuance of completion certificate of work and thereby depriving claimant from participating in the tender process of higher category with NBCC and other departments and causing loss?

15. Is the claimant entitled to the legal charges paid for filing writ petition for getting appropriate justice from the Hon'ble High Court relating to issuance of completion certificate amounting to ₹12,000/-?

16. Is the claimant entitled to get interest @ 18% p.a. on ₹3,37,88,799/- w.e.f. 25.02.2013 till the date of actual payment?

17. Is the claimant entitled to get cost of the arbitration and incidental thereto?"

[11] Issues framed by the learned arbitrator in the counter-claim of the appellant are as under:

"a) Is the respondent entitled to get a compensation of ₹2,27,98,015/- being 10% of the tendered value for the delay of 22 months in completing the work?

b) Is the respondent entitled to get any compensation as penal amount from the respondent for making the claim under issue no.15?

c) Is the respondent entitled to get a compensation of ₹1,13,38,880/- for sustaining additional expenditure of on-site expenses, off-site expenses and loss of profit and over head expenses for prolongation of the completion period?

d) Is the respondent entitled to get the cost of arbitration, litigation and incidental expenses?

e) Is the respondent entitled to get interest @ 18% p.a. on the counter claim if awarded?"

[12] The learned arbitrator by his arbitral award dated 21.11.2019 decided issue No.1, 2, 3, 7, 8, 10, 11, 12, 16 & 17 in the claim in favour of the claimant-respondent and the other issues were decided against him. In the counter claim, all issues were decided against the present appellant.

[13] While deciding issue No.1, the learned arbitrator held that even though there were minor deficiencies in executing the work, it was accepted by the appellant without pointing out to any material irregularity and the appellant continued to have the benefit of the work. It was

therefore, decided that the claimant-respondent shall be entitled to 10% profit in terms of Clause 69.1(iv) of the contract (GCC).

[14] Under issue No.2, it was decided by the learned arbitrator that as the present appellant (respondent before the arbitrator) did not dispute the claim or part on plausible ground, there was no scope of reducing the claim of the respondent of Rs.91,24,126/- for escalation charges.

[15] Under issue No.3, it was held that damages of a sum of Rs.31,13,157/- on account of longer retention of the work site could not be reduced for any reason.

[16] Under issue No.7, respondent-claimant was held entitled to interest @ Rs.10% per annum from 25.08.2011 to 08.08.2013 since the appellant illegally withheld the bill of a sum of Rs.17,12,104/-.

[17] Under issue No.8, claimant-respondent was allowed damages for providing facilities including office accommodation and stationery to the appellant for an extra period from 20.09.2010 to 18.07.2012.

[18] Issue No.10 & 11 were decided together by the learned arbitrator. The claimant-respondent was allowed damages for paying commission on retention of the bank guarantee for extra period due to delay in completing the work for negligence on the part of the present appellant.

[19] Under issue No.12, respondent was allowed damages for longer retention of his security deposit by granting 10% annual interest thereon.

[20] Under issue No.16, claimant-respondent was allowed 10% *pandente lite* interest from 25.02.2013 till the date of award. And under issue No.17, clamant-respondent was allowed the cost of arbitration and other incidental expenses.

[21] Aggrieved by and dissatisfied with the said arbitration award, appellant filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Act for short) before the learned District Judge, West Tripura, Agartala for setting aside the impugned arbitral award dated 21.11.2019. The said application of the appellant was registered as Arbitration Case No.3 of 2020 before the learned District Judge.

[22] The learned District Judge by judgment and order dated 25.02.2022 dismissed the prayer of the appellant for setting aside the arbitral award dated 21.11.2019 passed in ARB/2018(2)/SS by the sole arbitrator. The learned District Judge (District Commercial Court) held as under:

> **"...7. In the light of the principles as referred to above, we may proceed to consider the question that has been raised for and on behalf of the petitioner.**
>
> **As stated earlier; learned advocate for the petitioner has raised the issue that while deciding the issue No.1, the Arbitrator has granted 10% profit but did not specify the amount on which such interest is to be calculated. In this connection when we dwell upon the issue No.1 so framed by the arbitrator on the basis of the claim of**

the respondent, it surfaces that the issue was very specific, inter alia, that if the respondent is entitled to get balance payment on the value of work done amounting to Rs.92,74,663/-. The claim statement of the respondent so laid before the arbitrator as well as the issue so framed by the arbitrator make it abundantly clear that the interest is to be calculated on the value of work done. So the argument so raised by learned advocate for the petitioner stands not sustainable. As regards the point so raised as to issue No.3, it was contended that the petitioner did not get the opportunity to cross-examine the respondent on the documents on the basis of which the relief was granted. In this regard, we are of the considered opinion that such a contention nevertheless brings the matter within the mischief of section 34 of the Arbitration Act. That apart, the petitioner had the opportunity to make request to the arbitrator in view of section 24 of the Arbitration Act, but they omits to do so.

8. Now coming to issue No.9, it is apparent on the claim statement so submitted by the respondent before the arbitrator that the respondent specifically had claimed damages being suffered towards payment of insurance charges for car and WC Policy. It follows, therefore, the argument so placed by the learned advocate for the petitioner, inter alia, that the issue No.9 stands beyond the submission of arbitration cannot be accepted. Moreover, no relief was granted by the arbitrator while deciding the issue No.9 on the reasoning that such claim stands beyond the agreement.

9. Similar to that of the issue No.1 the interest @ 10% per annum so granted by the arbitrator while deciding issue No.16, the issue itself is very much clear as to the amount on which such interest is to be calculated.

10. The scheme and scope of the provisions of Section 34 of Arbitration Act aims at keeping the supervisory roles of the court at minimum level, therefore, we cannot correct the errors, if any, done by the arbitrator by sitting as an Appellate Court and also by re-appreciating the matters on record, it can only be quashed leaving the parties to begin the arbitration again if it is desired. The contentions so raised on behalf of the petitioner do not bring the matter within the mischief of any of the grounds as enumerated in Section 34(2) or 34(2-A) of the Arbitration Act in view of the law as referred to above.

In view of the discussion as we had herein-above I order as follows.

ORDER

11. In the result, the application for setting aside the arbitral award dated 21.11.2019 made in ARB/2018(2)/SS by the sole arbitrator Mr. Subhas Sikdar, Retired District Judge stands rejected……"

[23] As stated appellant has challenged the said judgment dated 25.2.2022 of the District Court by filing this appeal under Section 37 of the Arbitration Act mainly on the following grounds:

(i) The District Commercial Court did not appreciate the fact that the sole arbitrator in his award dated 21.11.2019 did not specify the amount of award for which the District Commercial Court should have set aside the award.

(ii) The sole arbitrator while deciding issue No.16 awarded interest on the award, but it was impossible to ascertain the amount of interest since the amount of award was not specified by the learned Arbitrator.

(iii) The sole arbitrator travelled beyond the terms of the arbitration agreement for which the learned Commercial Court should have dismissed the award of the arbitrator. The arbitrator should have heard the Director of Agriculture for adjudication of the dispute. The learned Commercial Court overlooked this aspect and erroneously dismissed the petition under Section 34 of the Arbitration Act.

[24] Heard Mr. P. Majumder, learned advocate appearing alongwith Ms. S. Debbarma, learned advocate for the appellant. Also heard Mr. Somik Deb, learned senior advocate appearing alongwith Mr. A. Baran, Ms. R. Chakraborty, Mr. K. Debnath, and Mr. S. Majumder, learned advocates for the respondents.

[25] Main contention of the appellant is that no amount of award has been specified in the arbitrator's award and as such, the same should

have been dismissed by the learned District Judge (District Commercial Court).

[26] Mr. Somik Deb, learned senior advocate appearing for the respondent on the other hand, contends that the arbitrator's award is well-founded which does not call for any interference. Counsel contends that by a detailed judgment, the District Commercial Court has rejected appellant's petition under Section 34 of the Arbitration Act and upheld the award made by the sole arbitrator by assigning good reasons. It is contended by Mr. Deb, learned senior counsel that contention of the appellant's counsel that the arbitrator has not specified the amount of award is not acceptable because, the arbitrator has recorded issue-wise findings and specified the amounts as admissible to the claimant-respondent under the various heads. Learned senior counsel, therefore, urges the Court to dismiss the appeal.

[27] We have gone through the entire facts and circumstances of the case and the materials placed on record and considered the submissions of learned counsel representing the parties. The arbitral award dated 21.01.2019 is placed in file as Annexure-A. We have also gone through the arbitral award. As stated, the sole arbitrator framed as many as 17 issues in the claim of the present respondent and framed 5 issues in the counter claim filed by the present appellant and recorded issue-wise findings in the claim as well as in the counter claim. In his award, the sole Arbitrator seems to have specified the amounts awarded

to the claimant-respondent under various heads. The appellant has failed to establish any patent illegality in the arbitral award. Award of the sole arbitrator is based on evidence and the arbitrator appears to have examined each of the issues in detail and assigned sound reasons for deciding those issues.

[28] It is a settled position of law that the Court cannot sit in appeal and examine correctness of the arbitrator's award on merit. Court can interfere only on limited grounds. In this regard, we can profitably refer to the decision of the Hon'ble Supreme Court in the case of **McDermott International INC vs. Burn Standard Co. Ltd. and Others** reported in **(2006) 11 SCC 181** wherein the Hon'ble Apex Court has held as under:

> **"58. In *Renusagar Power Co. Ltd. v. General Electric Co*. this Court laid down that the arbitral award can be set aside if it is contrary to (*a*) fundamental policy of Indian law; (*b*) the interests of India; or (*c*) justice or morality. A narrower meaning to the expression "public policy" was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in *ONGC Ltd. v. Saw Pipes Ltd*. (for short *"ONGC"*). This Court therein referred to an earlier decision of this Court in *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly* wherein the applicability of the expression "public policy" on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or other wise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by section 23 of the Indian Contract Act. In *ONGC* this Court, apart from the three grounds stated in *Renusagar,* added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.**
>
> **59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed**

law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. *(See State of Rajasthan v. Basant Nahata.")"*

[29] The Apex Court in the case of **Associate Builders vs. Delhi Development Authority** reported in **(2015) 3 SCC 49** reiterated that Court can interfere only when the findings recorded by the arbitrator are arbitrary, capricious, perverse and suffer from patent illegality. Observation of the Hon'ble Apex Court is as under:

"33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd.* v. *B.H.H. Securities (P) Ltd.*, this Court held: (SCC pp. 601-02, para 21)

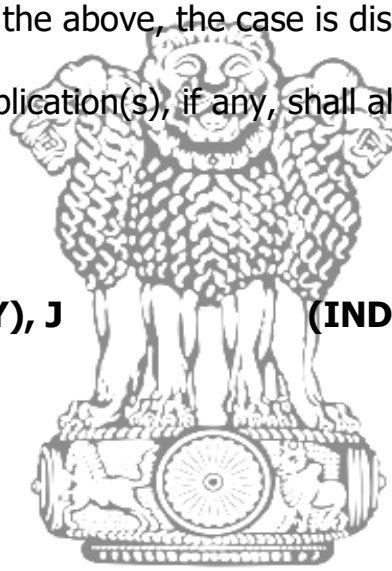
"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any

ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

[30] Having applied the tests laid down by the Hon'ble Apex Court to the case in hand, we are of the considered view that the arbitral award impugned before us, does not call for any interference. The District Commercial Court has rightly rejected appellant's petition for setting aside the arbitral award. Resultantly, the appeal stands dismissed.

In terms of the above, the case is disposed of.

Pending application(s), if any, shall also stand disposed of.



(S.G. CHATTOPADHYAY), J **(INDRAJIT MAHANTY), CJ**

Sabyasachi G.