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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 31st August, 2021

\+ **FAO(OS) (COMM) 96/2020 & CM.APPL. 18980/2020**

UNION OF INDIA AND ANR ..... Appellants
Through: Ms. Geetanjali Mohan, Advocate.

versus

M/S ANNAVARAM CONCRETE PVT LTD ..... Respondent
Through: Mr. R.K. Sanghi, Senior Advocate with Mr. Satjendar Kumar, Advocate and Mr. Ishan Sanghi, Advocate.

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

The present appeal under section 13 of the Commercial Courts Act 2015 read with section 10 the Delhi High Court Act 1966 and section 37 of the Arbitration & Conciliation Act 1996 ('A&C Act') has been filed by the Union of India, Ministry of Railways and North Eastern Railways ('**Railways**') impugning judgment dated 27.02.2020 rendered by the learned single Judge of this court in O.M.P. (COMM) No. 112/2020 **('impugned judgment'),** whereby the learned single

Judge has upheld arbitral award dated 08.02.2011 ('**arbitral award**') made by the learned Sole Arbitrator in arbitral proceedings between the Railways and M/s Annavaram Concrete Pvt Ltd., Hyderabad ('**Annavaram**').

2. The Railways had filed a petition under section 34 of the A&C Act challenging arbitral award dated 08.02.2011; in which award the learned Sole Arbitrator had directed the Railways to refund to Annavaram the sum of Rs. 1,22,38,125/-, which had been deducted/withheld by the Railways as 'liquidated damages' imposed upon Annavaram for alleged breach of the terms and conditions of a tender bearing No. CS 160/2007, pursuant to which a Letter of Acceptance dated 15.09.2008 ('1st LoA') was issued by the Railways to Annavaram for supply of 10000 Pre-Stressed Concrete Sleepers ('**sleepers**') by 14.01.2009.

3. By the impugned judgment, the learned single Judge has upheld the arbitral award and has also awarded interest for the delay in payment of the awarded sum.

4. Briefly, disputes arose between the Railways and Annavaram in relation to alleged non-performance and non-compliance by Annavaram with the terms of the 1st LoA. As per the record, after issuance of the 1st LoA, *vidé* its letter dated 22.12.2008 Annavaram requested the Railways for an additional order, representing that their capacity was to manufacture 25000 sleepers per month; whereupon *vidé* a Second Letter of Acceptance dated 27.01.2009 ('2nd LoA') the Railways ordered an increased quantity of 150000 (one lac fifty

thousand) sleepers to be supplied by Annavaram by 14.07.2009, which order was accepted by Annavaram. It is the Railways' contention that Annavaram failed to supply even a single sleeper within the stipulated time; nor did they obtain any extension of time for making such supply; whereupon, the contract comprised in the 1st LoA and 2nd LoA lapsed by efflux of time on 14.07.2009. Consequently, it is the contention of the Railways, that as per IRS Condition 0702, the Railways imposed liquidated damages to the tune of Rs. 1,22,38,125/- (Rupees One Crore Twenty-two Lacs Thirty-eight Thousand One Hundred and Twenty-five Only) upon Annavaram on 27.05.2009. It is further contended that on grounds of non-performance, on 08.04.2010 the Railways also terminated the contract with Annavaram.

5. Disputes having arisen between the parties, on 21.06.2010 the learned Sole Arbitrator came to be appointed and entered upon reference. Subsequently he rendered the arbitral award awarding Rs. 1,22,38,125/- (Rupees One Crore Twenty-two Lacs Thirty-eight Thousand One Hundred and Twenty-five Only) in favour of Annavaram and against the Railways, which sum was directed to be refunded within 03 months from the date of the award. For completeness, it may be mentioned that the Railways had also preferred a counter-claim in the sum of Rs. 10,00,000/- (Rupees Ten Lac Only) against Annavaram in the arbitral proceedings.

6. It is the contention of the Railways that the 1st LoA was amended by the 2nd LoA, whereby, apart from increasing the quantity of sleepers

to be supplied by Annavaram, clause 1.0 and clause 1.1 were amended and a new clause 1.2 was inserted in the terms and conditions of the contract. Clauses 1.1 and 1.2 as amended/inserted by way of the 2nd LoA read as under:

* * * * *

> *"1.1 The supply against this order shall be completed by 14.07.2009.*
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> *1.2 On finalisation of the new tender, the ordered quantity in CS-160/2007 shall be reduced to the number of sleepers manufactured till the date of issue of LoA for the new contract. If the rate accepted in the new tender is higher than the updated rate of CS-160/2007 on the date of issue of LoA and the manufactured quantity is less than the pro-rata quantity then the supplier will have to recoup the short-fall in the quantity on the same rate terms & conditions. This updated rate will be frozen on the date of issue of LoA for the shortfall quantity."*
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> (emphasis supplied)

7. Ms. Geetanjali Mohan, learned counsel appearing on behalf of the Railways, submits that the learned single Judge has erred in failing to appreciate that under clause 1.1 aforesaid, Annavaram was obligated to complete the supply of the originally ordered 10000 sleepers by 14.07.2009; which it failed to do; and thereby, the Railways were entitled to impose liquidated damages in accordance with the contractual terms. Accordingly, it is counsel's contention, that the impugned judgment as also the arbitral award require to be set-aside.

8. On the other hand, Mr. R. K. Sanghi, learned senior counsel appearing for Annavaram contends that by inserting clause 1.2, a new condition came into effect whereby the parties agreed that the quantity of sleepers ordered under the original tender stood " ... *reduced to the number of sleepers manufactured till the date of issue of LoA for the new contract ...*"; and it is contended, that as a result there was no *obligation* on Annavaram to supply 10000 sleepers by 14.07.2009. Consequently, it is argued, the Railways were not justified in imposing any liquidated damages upon Annavaram.

9. A perusal of the arbitral award indicates, that though the award may have other infirmities, insofar as the merits of the factual controversies between the parties are concerned, what has weighed with the learned Sole Arbitrator is the following essential premise, as set-out in para 12 of the arbitral award:

> *"Hence, as per the acceptance letter, pre-condition 1.2, respondent has to cancel/reduce remaining quantity of the tender CS 160. In this case the respondent has closed the tender as it where is basis (sic, as-is-where-is) in place of terminating the contract."*

10. Upon a meaningful reading of the arbitral award, based upon his understanding of the feasibility of performance of the contract and on the basis of the amendments carried-out by the 2nd LoA to the terms and conditions of the 1st LoA, the learned Sole Arbitrator concludes as follows:

> *"8... This is very important condition of letter of acceptance. The period of acceptance was extended from 14.01.2009 to 14.7.2009*

i.e. approximately for 06 months. It should be noted that completion period for 10,000 sleepers was given 4 months and for the remaining 1,40,000 sleepers, the completion period was given 6 months which is against the principle of natural justice.

* * * * *

"11.... Production details, number of sleepers per month produced by factory in CS-156, submitted by the claimant and respondent was also examined and it was found that average 5,000 Nos. sleepers per month can only be produced and maximum 9976 Nos. sleepers per month was produced in August'2006 by the old plant. There is no difference between the claimant and respondent regarding the old lay out and new lay out plan submitted.

* * * * *

"17. I carefully examined the claim of both the parties and not convinced with the arguments of the respondents that they have rightly and legally imposed the LD of Rs. 1,22,38,125/- as above stated. Counter claim submitted by respondents is not genuine. In counter claim, salary of ten officers/staff involved in defending the arbitration & other expenses etc. has been mentioned to the tune of Rs. 10, 00,000 (ten lakh).

* * * * *

"19. Award :- In view of the fact narrated above Rs. 1,22,38,125/- will be refunded to the claimant. The contract has to be closed as it where as basis (sic, as-is-where-is basis), so other claim of the claimant is also not to be considered. The above amount will be refunded to the claimant within three months of publication of the award."

11. The aforementioned factual inferences and conclusions drawn, and the interpretation given to contractual clauses, by the learned Sole Arbitrator have been accepted by the learned single Judge. In his assessment of the arbitral award, the learned single Judge has opined as under:

> *"13. Ms. Mohan is right in submitting that the reasoning offered by the arbitrator in the impugned award is somewhat sketchy. However, it is* ***in my view adequate to discern the basis upon which the arbitrator has arrived at his conclusion****. The operative portion of the award refers to the contract being closed on 'as is where is basis', which is essentially the arbitrator's interpretation of clause 1.2 of the contract [CS-160/2007] read with clause 1.2.1 of CS-162/2008 [the relevant portions of which have been extracted above].* ***On a point of interpretation of the contract, the arbitrator's decision will be amenable to interference under Section 34 of the Act only if it is manifestly arbitrary or perverse****. The limited nature of the inquiry to be made under Section 34 is well settled. .....*
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> *14. The arbitrator has applied clause 1.2 of the contract to the factual situation and come to the conclusion that upon the letter of acceptance being issued for CS-162/2008, the scope of CS-160/2007 stood reduced to the number of sleepers actually manufactured until that date. Ms. Mohan's argument is that the said clause could not have been applied after the lapse by efflux of time of the original contract. However, the incorporation of clause 1.2.1 in the subsequent contract, which in essence mirrors clause 1.2 of CS-160/2007, negates this argument. Consequently,* ***the arbitrator's interpretation of the contract cannot be said to be absurd or perverse, justifying interference under Section 34 of the Act****."*
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> (emphasis supplied)

12. Furthermore, considering the delay occasioned by reason of the challenge filed by the Railways to the arbitral award, the learned single Judge has also awarded simple interest at 6% per annum from the time that the amount became refundable, namely 03 (three) months from 08.02.2011 *i.e.,* from 08.05.2011 till the date of refund.

13. Before proceeding further with the matter, we remind ourselves of the limited scope and ambit of a challenge under sections 34 and 37 of the A&C Act, which are pithily set-out *inter alia* in the following recent decision in ***PSA SICAL Terminals Pvt Ltd vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin & Ors.*** [1] in which the Hon'ble Supreme Court reiterates its view in *MMTC Limited v. Vedanta Limited* [2] and holds as follows :

> *"41. It will be relevant to refer to the following observations of this Court in the case of MMTC Limited (supra):*
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> > *"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 K.B. 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.*

[1] 2021 SCC Online SC 508

[2] (2019) 4 SCC 163

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 reappreciation 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."*
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> (emphasis supplied)

14. We are therefore conscious that so long as the view taken by an arbitrator, which in this case has also been upheld by the learned single Judge, is *a possible view based on facts*, it is irrelevant whether this court would or would not have taken the same view on the merits of the matter; and the arbitral award is required to be upheld.

15. In view of the foregoing discussion, and being of the opinion that the view taken by the learned Sole Arbitrator, as upheld by the learned single Judge, is certainly *a possible view based on facts* in relation to the merits of the disputes, we find no ground to interfere in the arbitral award or the impugned judgment.

16. Accordingly, we uphold impugned judgment dated 27.02.2020.

17. Consequently, Annavaram shall be entitled to receive from the Railways the amount directed to be refunded in the arbitral award, namely Rs. 1,22,38,125/- (Rupees One Crore Twenty-two Lacs, Thirty-eight Thousand, One Hundred and Twenty-five Only**)** along

with simple interest at 6% per annum calculated from 08.05.2011 till the date of payment as per the impugned judgment, within 04 weeks of this judgment. The amount deposited in court in these proceedings be paid-over to Annavaram accordingly. The balance due, if any, from the Railways to Annavaram be paid within 04 weeks as aforesaid.

18. Subject to the above directions, the appeal is dismissed

19. Other pending applications, if any, also stand disposed of.

20. There shall be no order as to costs.

SIDDHARTH MRIDUL, J

ANUP JAIRAM BHAMBHANI, J

AUGUST 31, 2021
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