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

% *Date of Decision: 17.05.2023*

\+ **FAO (COMM) 52/2023 and CM Nos. 9523/2023 & 9524/2023**

M/S JOP INTERNATIONAL LIMITED ..... Appellant

Through: Mr Rajesh Yadav, Senior Advocate.

versus

M/S MULTIFOLD GROUP CONTRACTOR AND ENGINEERS ..... Respondent

Through: Mr Abhimanyu Singla, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.(*ORAL*)

1. The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning a judgement dated 18.11.2022 (hereafter '**the impugned judgement**') passed by the learned Commercial Court in an application preferred by the respondent under Section 34 of the A&C Act.

2. The respondent had filed the said application seeking setting aside of the arbitral award dated 01.09.2018 (hereafter '**the impugned award**'). The impugned award was rendered in the context of the disputes that had arisen between the parties in connection with their agreement dated 22.03.2014 (hereafter '**the Agreement**'). In terms of

the Agreement, the respondent had agreed to carry out construction and development of works in a project named 'JOP Palms', located at Sector 28, Rohtak, Haryana (hereafter '**the project**').

3. The disputes were referred to an arbitral tribunal comprising of a sole arbitrator (hereafter '**the Arbitral Tribunal**'). The respondent had, *inter alia*, claimed a sum of ₹17,04,755/- (Claim no.1). The said amount comprised of a sum of ₹1,09,879/- due against the Running Account Bills and an amount of ₹15,94,876/- on account of refundable security deposit. The Arbitral Tribunal awarded a sum of ₹15,81,705/- being the security deposit that was retained by the appellant. Insofar as claim for payment due under the 39th Running Bill is concerned, the Arbitral Tribunal rejected the same on the ground that the respondent (claimant in the impugned award) had failed to prove the acknowledgement of the said bill. The balance claims (Claim nos.2 to 6), relating to miscellaneous civil work, were disallowed. Claim nos.7 and 8, relating to interest, were partly allowed to the extent of the amount awarded under Claim no.1.

4. Claim nos.2 to 6, as summarized in the impugned judgement, are set out below:

> "**Claim No.2**
> Payment for Miscellaneous civil work
> 3BHK: Covered Area 98400 Sq.ft. @ Rs. 8/- Rs. 7,87,200/-
> Balcony Area 15346 Sq.ft. @ 4/- Rs. 61,387/-
> Total
> Rs. 8,48,587/-

Claim No.3
Loss due to delay in casting of slab at 2BHK Casted on 20.03.2016 Rs. 2,00,000/-.

Claim No.4
Casting of columns at 2BHK & 3 BHK Manually /Hand mixing Rs. 10,22,230/-.

Claim No.5
2BHK pending column quantity at basement Rs. 2,38,122/-.

Claim No.6
Extra payment made to rigger for setting of pipeline from the concrete pump to the point of casting Rs. 1,38,000/-."

5. The Arbitral Tribunal had rejected the said claims, principally, on the ground that the claimant (respondent) had failed to establish the same. The Arbitral Tribunal held that the respondent had failed to show any specific order or any specific bill in respect of the amounts claimed under Claim nos.2 to 6. The Arbitral Tribunal also rejected the emails relied upon by the respondent on the ground that such electronic evidence could not be relied upon in the absence of a necessary affidavit under Section 65B of the Indian Evidence Act, 1872. The relevant extract of the impugned award is set out below:

> "while claim no 2 to 6 which are concerned with the payment for misc civil work carried out at the site, Loss due to delay in casting of slab and column at 2 BHK, pending column quantity at basement and extra payment made to rigger by the claimant, the claimant has explained the same in a detailed manner in his claim and also explained the same during the course of argument and succeed in proving the calculation so

> made by him for the purpose of the claim that the said work has been carried out by him at the site however the conducting of the said work is duly admitted by the respondent, but on the pretext that the same was a part of the work order and without these work the project cannot be consider as completed, even otherwise the claimant has failed to show any specific work order or any specific bill so raised by him in respect to the said alleged misc works etc as mentioned in claim 2 to 6, however it is a settled principal of commercial transaction and explained by the apex courts in his various judgments that in case of commercial transactions the payment has to be made only against the demand for payment so raised by way of bills and in the present case the claimant has fails to prove any specific work order or bill so raised against the alleged work carried out by him however in this regard the claimant is purely relying upon the e mails among the parties which are a part of the electronic evidence and cannot be relied with procedure so mentioned in section 65 B of evidence act which is regarding the admissibility of electronic records and both the parties has failed to comply with the same, however to prove the same onus is on the claimant and in the absence of any such bill no such claim completely or in partial can be granted in faovur of the claimant. Even otherwise the claimant has failed to mention in his claim or during the course of arguments the source of emails. While in case of claim 7 and 8 which is regard the interest on the claim part as well as the damage and mental agony, no direct/indirect question has been put to any of the witness by the claimant however the onus to prove the same is upon the claimant and the claimant has failed to prove the same."

6. Aggrieved by the denial of its claims, the respondent preferred the application under Section 34 of the A&C Act [being

OMP(COMM) No.1 of 2018], before the learned Commercial Court, assailing the impugned award. The learned Commercial Court examined the impugned award and concluded that the material and evidence placed by the respondent were sufficient to allow the claims; accordingly, the impugned award, inasmuch as it rejected Claims nos. 2 to 6, was patently illegal and not sustainable in law.

7. Having concluded the same, the learned Commercial Court proceeded further to allow the said claims. The relevant extract of the impugned judgement, dispositive of the respondent's application under Section 34 of the A&C Act, to set aside the impugned award, is set out below:

> "27. In view of the foregoing discussions, it can be held the impugned award passed by the arbitrator thereby dismissing the claims no. 2 to 6 made by the petitioner are patently illegal and is not sustainable in law. Therefore, the impugned award dismissing the claims no. 2 to 6 made by the petitioner is set aside. The claim no.7 and the issue no.3 relate to the interest which may be granted in case, the petitioner succeeds in proving the claims no. 2 to 6. The subject transaction was the commercial in nature. Hence, the petitioner is held entitled to Rs. 24,46,939.00 along with interest @ 12% pa from the date of award i.e. 01.09.2018 till realization."

8. The appellant is aggrieved to the extent that the respondent's claims have been allowed by the learned Commercial Court.

9. Mr Yadav, the learned senior counsel appearing for the appellant, contended that the impugned judgement is liable to be set

aside as the learned Commercial Court did not have the jurisdiction to modify the impugned award. He relied upon the decision of the Supreme Court in ***Project Director, National Highways No.45 E and 220 National Highways Authority of India v. M. Hakeem & Anr***[1] in support of his contention.

10. Mr Singla, the learned counsel appearing for the respondent, countered the aforesaid submissions. He submitted that the learned Commercial Court cannot be faulted for allowing the respondent's claim. He contended that it is implicit that the powers available with the Court under Section 34 of the A&C Act would extend to allowing the claims, if it is found that the same were erroneously rejected.

11. He referred to the decision of the Supreme Court in ***Alpine Housing Development Corporation Pvt. Ltd. v. Ashok S. Dhariwal & Ors***[2], and on the strength of the said decision, submitted that the Supreme Court had clarified that it was open for the Court to examine evidence in proceedings under Section 34 of the A&C Act, prior to its amendment by the Arbitration and Conciliation (Amendment) Act, 2019.

12. He reasoned that if the court was empowered to accept affidavits and in given cases also permitted cross-examination in proceedings under Section 34 of the A&C Act, it would necessarily follow that the court would also have the jurisdiction to pass consequential orders relating to the disputes. Thus, in cases where the

[1] (2021) 9 SCC 1
[2] 2023 SCC OnLine SC 55

court is of the view that the claims made are liable to be allowed, the court could pass appropriate orders in applications filed under Section 34 of the A&C Act. He also submitted that the decision in the case of ***Project Director, National Highways No.45 E and 220 National Highways Authority of India v. M. Hakeem & Anr.***[1] is not applicable in the facts of the present case as, in the said case, the Supreme Court had agreed with the conclusion of the arbitral tribunal and had enhanced the amounts awarded. He submitted that, in the given facts, the same amounted to modifying the impugned award, which the Supreme Court held was impermissible. He submitted that the said decision would have no application where the court does not agree with the decision of the arbitral tribunal. In that case, passing consequential orders would not amount to modification of the award.

13. The question whether a court can exercise an award in an application filed under Section 34 of the A&C Act is no longer *res integra*. The Allahabad High Court, in the case of ***Managing Director v. Asha Talwar***[3], held that the Court did not have the power to grant the original relief prayed for before the arbitrator. Referring to the said decision, a learned Single Judge of this Court in ***Cybernetics Network Pvt. Ltd. & Ors. v. Bisquare Technologies Pvt. Ltd.***[4] declined to decide the claims that were wrongly rejected by the learned arbitrator. A similar view was also expressed by this Court in

[3] 2009 SCC OnLine All 624
[4] 2012 SCC OnLine Del 1155

Bharti Cellular Limited v. Department of Telecommunications[5].

14. In ***Central Warehousing Corporation v. A.S.A. Transport***[6], the Division Bench of the Madras High Court had considered an appeal arising from a decision of the learned Single Judge setting aside the arbitral award and further directing the appellant to appoint an arbitrator for conducting arbitration. Although the Division Bench of the Madras High Court concurred with the view that the arbitral award impugned in that case was rightly set aside, it did not agree to a further direction for appointment of an arbitrator. The Division Bench referred to the decision of the Supreme Court in ***McDermott International Inc. v. Burn Standard Co. Ltd. & Ors.***[7] and held that in an application under Section 34 of the A&C Act, the Court could set aside the award leaving the parties free to commence arbitration again, if desired.

15. In ***Puri Construction P. Ltd. & Ors. v. Larsen and Toubro Ltd. & Anr.***[8], the Division Bench of this Court concurred with the decision in ***Managing Director v. Asha Talwar***[3]***; Cybernetics Network Pvt. Ltd. v. Bisquare Technologies Pvt. Ltd & Ors.***[4]***; Bharti Cellular Limited v. Department of Telecommunications***[5]*; and* ***Central Warehousing Corporation v. A.S.A. Transport***[6]. The Court also referred to the following passage from the decision of the Supreme Court in ***McDermott International Inc. v. Burn Standard Co. Ltd. &***

[5] 2012 SCC OnLine Del 4846
[6] 2007 SCC OnLine Mad 972
[7] (2006) 11 SCC 181
[8] 2015 SCC OnLine Del 9126

Ors.[7] as laying down the guiding principles on the issue:

> "The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

16. The Court accepted that the above observations in ***McDermott International Inc. v. Burn Standard Co. Ltd. & Ors.***[7] were not in the context of the specific issue but held that "*...it is determinative of the Court's approach in an enquiry under Section 34 of the Act*". The Court further observed that "*...a Court, while modifying or varying the award would be doing nothing else but "correct[ing] the errors of the arbitrators"*.

17. The decision in the case of ***Puri Construction P. Ltd. & Ors. v. Larsen and Toubro Ltd. & Anr.***[8] was referred with approval by the Supreme Court in the case of ***M. Hakeem & Anr.***[1]. In its decision, the Supreme Court referred to the language of Section 34 of the A&C Act and explained as under:

> "16. What is important to note is that, far from Section 34 being in the nature of an appellate provision, it provides only for setting aside awards on very limited

> grounds, such grounds being contained in sub-sections (2) and (3) of Section 34. Secondly, as the marginal note of Section 34 indicates, "recourse" to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-sections (2) and (3). "Recourse" is defined by P. Ramanatha Aiyar's *Advanced Law Lexicon (3rd Edn.)* as the enforcement or method of enforcing a right. Where the right is itself truncated, enforcement of such truncated right can also be only limited in nature. What is clear from a reading of the said provisions is that, given the limited grounds of challenge under sub-sections (2) and (3), an application can only be made to set aside an award. This becomes even clearer when we see sub-section (4) under which, on receipt of an application under sub-section (1) of Section 34, the court may adjourn the Section 34 proceedings and give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or take such action as will eliminate the grounds for setting aside the arbitral ward. Here again, it is important to note that it is the opinion of the Arbitral Tribunal which counts in order to eliminate the grounds for setting aside the award, which may be indicated by the court hearing the Section 34 application"

18. In ***M. Hakeem & Anr.***[1] the Supreme Court also rejected the contention that the rule of purposive construction could be extended to read in the power to modify an award under Section 34 of the A&C Act. The relevant extract of the said decision reads as under:

> "47. Purposive construction" of statutes, relevant in the present context, is referred to in a recent concurring judgment by Nariman, J. in *Eera v. State (NCT of Delhi)* (2017) 15 SCC 133, as the theory of "creative interpretation". However, even "creative interpretation" has its limits, which have been laid down in the aforesaid judgment as follows:

> "139. A reading of the Act as a whole in the light of the Statement of Objects and Reasons thus makes it clear that the intention of the legislator was to focus on children, as commonly understood i.e. persons who are physically under the age of 18 years. The golden rule in determining whether the judiciary has crossed the *Lakshman Rekha* in the guise of interpreting a statute is really whether a Judge has only ironed out the creases that he found in a statute in the light of its object, or whether he has altered the material of which the Act is woven. In short, the difference is the well-known philosophical difference between "is" and "ought". Does the Judge put himself in the place of the legislator and ask himself whether the legislator intended a certain result, or does he state that this must have been the intent of the legislator and infuse what he thinks should have been done had he been the legislator. If the latter, it is clear that the Judge then would add something more than what there is in the statute by way of a supposed intention of the legislator and would go beyond creative interpretation of legislation to legislating itself. It is at this point that the Judge crosses the Lakshman Rekha and becomes a legislator, stating what the law ought to be instead of what the law is."
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> (emphasis in original)

48. Quite obviously if one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what, according to the justice of a case, ought to be done. In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament very clearly intended that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996. It is only for Parliament to amend

> the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over."

19. Clearly, in the facts of the present case, the learned Commercial Court has modified the award and in our opinion, has erred in doing so.

20. The proceedings under Section 34 of the A&C Act are limited to setting aside the arbitral award, if any of the grounds as set out under Section 34(2) and 34(3) of the A&C Act are established. Thus, having concluded that the impugned award is patently illegal, the learned Commercial Court could have set aside the said impugned award but it was impermissible for it to proceed further and allow the claims. It is not within the jurisdiction of the Court to modify an arbitral award or correct the errors of the arbitral tribunal. In an application under section 34 of the A&C Act, the court does not act as a court hearing a first appeal from the decision of the arbitral tribunal; its jurisdiction is confined to examining whether the arbitral award is required to be set aside.

21. The foundation of arbitration is the consent between the parties. The disputes between the parties are required to be decided by the forum of their choice – the arbitral tribunal. Any party aggrieved by an arbitral award is entitled to make an application under Section 34 of the A&C Act for setting aside the arbitral award *albeit* on the limited grounds as set out in Section 34 of the A&C Act. The provisions of the A&C Act do not empower the court to re-adjudicate the said disputes, the same would necessarily have to be adjudicated in

arbitration.

22. In the event the parties succeed in establishing that the rejection of its claims by the arbitral tribunal is patently illegal, the said award may be set aside, but the claims cannot be allowed in favour of the claimant by the court as that would amount to rewriting the award, which is impermissible. In such cases, the said disputes would necessarily have to be referred to arbitration and it would be open for any party to take necessary steps in this regard.

23. Mr Singla's reliance on the decision in the case of ***Alpine Housing Development Corporation Pvt. Ltd. v. Ashok S. Dhariwal & Ors.***[2] is misplaced. The reasoning that since a court could examine the evidence under Section 34 of the A&C Act would also necessarily include the power to modify the award, is erroneous. As noted above, the power of a court under Section 34 of the A&C Act is limited to setting aside the award if the grounds set out under Section 34 of the A&C Act are established. The decision in the case of ***Alpine Housing Development Corporation Pvt. Ltd. v. Ashok S. Dhariwal & Ors.***[2] relates to the scope of examination for determining whether the award is liable to be set aside. The observations in the said decision, relied upon by Mr Singla read as under:

> "24. …..Therefore, in an exceptional case being made out and if it is brought to the court on the matters not containing the record of the arbitrator that certain things are relevant to the determination of the issues arising under section 34(2)(a), then the party who has assailed the award on the grounds set out in section 34(2)(a) can be permitted to file affidavit in the form of

> evidence. However, the same shall be allowed ***unless absolutely necessary***."

24. It is clear from the above passage that the observations made in regard to power of the court to consider material and evidence that was not before the arbitrator, is in the context of determination of issues arising under Section 34(2) of the A&C Act. The opening sentence of Sub-section (2) of Section 34 of the A&C Act reads as "*An arbitral award may be set aside by the Court only if* .....". Thus the examination is confined for determining whether any of the grounds under Section 34(2) of the A&C Act are established. It follows that consideration of additional material or evidence can only be for the purpose of determining whether the arbitral award is required to be set aside. The power of the court under Section 34 of the A&C Act cannot be read to mean that the Supreme Court had accepted that the jurisdiction of the Court would extend to modifying or remitting the award.

25. In view of the above, the impugned order, to the extent that it allows the claims of the respondent, is set aside.

26. The appeal is disposed of in the aforesaid terms. All pending applications are also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

MAY 17, 2023
RK/GSR