Reserved on 13.03.2023

Delivered on 24.03.2023

(1) Case :- FIRST APPEAL FROM ORDER No. - 1033 of 2021
Appellant :- Agra Development Authority Agra
Respondent :- M/S Baba Construction Pvt Ltd
Counsel for Appellant :- Krishna Agarawal,Anand Prakash Paul,Sr. Advocate
Counsel for Respondent :- S.P.K. Tripathi,Abhinav Gaur

Connected With

(2) Case :- FIRST APPEAL FROM ORDER No. - 1867 of 2021
Appellant :- Agra Development Authority Agra
Respondent :- M/S Baba Construction Pvt Ltd
Counsel for Appellant :- Krishna Agarawal,Anand Prakash Paul
Counsel for Respondent :- S.P.K. Tripathi

Connected With

(3) Case :- FIRST APPEAL FROM ORDER No. - 1868 of 2021
Appellant :- Agra Development Authority Agra
Respondent :- M/S Baba Construction Pvt. Ltd.
Counsel for Appellant :- Krishna Agarawal,Anand Prakash Paul
Counsel for Respondent :- S.P.K. Tripathi

AND

(4) Case :- FIRST APPEAL FROM ORDER No. - 1869 of 2021
Appellant :- Agra Development Authority Agra
Respondent :- M/S Baba Construction Pvt Ltd
Counsel for Appellant :- Krishna Agarawal,Anand Prakash Paul
Counsel for Respondent :- S.P.K. Tripathi

Hon'ble Manoj Kumar Gupta,J.
Hon'ble Prashant Kumar,J.

(Delivered by Hon’ble Prashant Kumar, J.)

Heard Sri Atul Dayal, learned Senior Counsel assisted by Sri Krishna Agarwal, learned counsel for the appellant and learned counsel for the respondent.

The appellant herein (Agra Development Authority) came out with a tender, for construction of 52 Mutli Storey Super Delux Type Flats in Phase-II, Taj Nagri, Agra. After opening of the bid, the bid of M/S Baba Construction Pvt. Ltd. was found to be the most suitable and was accepted on 15.05.2008. Thereafter, an agreement was executed between the parties. According to the

agreement, the date of commencement of work was 25.05.2008 and the project was to be completed on 24.11.2009.

The relevant clauses of the agreement are enumerated below for reference:-

> ***"CLAUSE 32: PROTEST/DISPUTES AND ARBITRATION***
>
> *(a) If the Contractor considers any work demanded of him to be outside the requirements of contract or considers any record or ruling of the Engineer-in-Charge or of his subordinates to be unfair, he shall immediately upon such work being demanded or such record or ruling being made ask in writing for written instructions or decisions where upon he shall proceed without delay to perform the work or confirm to the procedure or ruling and within twenty days after date of receipt of the written instructions or decision he shall file a written protest with the Engineer-in-Charge stating clearly in detail the basis of his objections. Except for such protest or objections as are made on record in the manner herein specified and within the time limit stated the recorded rulings instructions of decisions of the Engineer-in-Charge shall be final and conclusive instructions or decisions of Engineer-in-Charge contained in letters transmitting drawing to the Contractor shall be considered as written instructions or decisions subject to protest or objection as wherein provided.*
>
> *(b) If the Contractor is dissatisfied with the final decision of Engineer-in-Charge in pursuance of Clause 32(a) the Contractor may within twenty-eight days after receiving notice of such decision give notice in writing requiring that the matter be submitted to arbitration and furnishing detailed particulars of:- the dispute or difference specifying clearly the point at the issue. If the Contractor fails to give such notice within the period of twenty days is stipulated above the decision of Engineer-in-Charge/ADA shall be conclusive and binding on the Contractor.*
>
> ***CLAUSE 33: ARBITRATOR***
>
> *Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and to the quality of workmanship or materials used on the work or as to any other question claim right or rates for extra items sanctioned and decided or not by the competent authority under the conditions of the contact, designs, drawings specifications estimates instructions or order on these conditions or otherwise concerning the work or the executive or failure to execute the same whether anything during the progress of the work or after the person or person appointed by the Vice-Chairman, ADA. It will be no objection to any such appointment that the matter to which contract relates and that in the course of his duties as ADA servant he had expressed views on all or any of the matters or dispute or differences. The arbitrator to whom the matter is originally or subsequently referred being incapacitated to act the Vice-Chairman of the ADA shall appoint another person to act as arbitrator in accordance with the term of contract. It is also a term of his contract that no person other than a person appointed by the Vice-*

Chairman of the ADA as aforesaid/shall act as arbitrator and if for any reason that is not possible, the matter is not to be referred to the arbitration at all. The arbitrator(s) may from time to time with consent of the parties enlarge the time for making and publishing the award.
Subject as aforesaid the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereafter and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

54. Tendered rates are inclusive of all taxes and levies payable under the respective statutes. However pursuant to the constitution (Forty Sixth Amendment) Act 1982 if any further tax or levy is imposed by Statutes, after the date of receipt of tenders and the Contractors thereupon necessarily and properly pays such taxes/levies, the Contractor shall be reimbursed the amount so paid provided such payment, if any, is not in the opinion of Engineer-in-Charge (whose decision shall be final and binding) attributable to delay in executing of work within the control of the Contractor:-
(i) The Contractor shall keep necessary books of accounts and other documents for the purpose of this condition as may be necessary and shall allows inspection of the same by a duly authorized representative of Government and further shall furnish such other information/documents as the Engineer-in-Charge may require."

The case of the respondent is that the work was prolonged because of appellant Agra Development Authority delayed in handing over possession of the construction site, supplying plans, drawings & designs, supply instructions to carry out execution of construction work, supply materials of the use of the work, permit the contractor to carry out whole of the work and make timely payments.

It was further alleged, that the appellant failed to take timely decisions and approval of, directions to execute the work in accordance with required pace, and failed to pay price escalations for the prolongated period in terms of the contract bond. Further, the appellant has failed to release payment of service tax and as such invited penalty from the tax department.

That the respondents herein *vide* letter dated 18.03.2010 raised a bill and also asked to pay the service tax which was to be paid by the appellant as per the agreement. Since it was not paid, so a dispute was raised. The Vice-Chairman, Agra Development Authority *vide* order dated 23.12.2010 appointed Shri Sudhanshu Saroha as an arbitrator. Thereafter, Secretary, Agra Development Authority sent a letter to the arbitrator on 13.01.2011

informing him that he has been appointed as an arbitrator. In this letter, there was not a single word depicting that the appointment is only for the adjudication of the service tax dispute.

The arbitrator entered upon the reference and *vide* letter dated 23rd January, 2021 and called upon the parties to submit the statement of claim and the Statement of Defence/written statement.

The respondents herein had preferred the statement of claim on 23.03.2011. The arbitrator granted many opportunities for the appellant to file the written statements and denial of documents viz. dated 10.03.2011, 20.04.2011, 18.05.2011, 15.06.2011, 15.09.2011, 21.10.2011, 15.11.2011 and 25.12.2011.

The appellant on 10.06.2011 raised a preliminary objection and submitted that the appointment of the arbitrator was confined only with respect to the disputes pertaining to service tax matters and not for any other dispute. The claimant filed a reply to the objections raised by the Development Authority and also filed an application for interim measures under Section 17 of the Act. Thereafter, the arbitrator heard both the parties on preliminary objection as well as claimant's application under Section 17 of the Arbitration Act and an order was passed on 20th August, 2011, whereby Section 17 filed by the claimant was rejected, and the preliminary objection has been ordered to be disposed of after submission of written statement of the appellant herein, and evidence by both the parties to reference.

But for the reasons best known to the Appellant (Agra Development Authority), they chose not to file any written statement/Statement of Defence against the statement of claim filed by the claimant in spite of several opportunities.

The claimant opposed the preliminary objection about the change in the scope of arbitration once the appointment of the arbitrator had been made and the arbitration had commenced. Specially when the sole arbitrator was appointed by the appellant to adjudicate the disputes between the parties and it was not open for the authority to modify the terms of reference after the arbitrator has been appointed, and has acted upon, and the arbitration proceedings has been initiated.

The appointment letter of the arbitrator stated that sole arbitrator has been appointed by the appointing authority to adjudicate disputes between the contractor and the authority and it mention the contract number in it.

After hearing the parties and after perusing the documents on record, the arbitrator was pleased to pass an Award on 05.01.2012.

That while passing the award, the arbitrator held that the preliminary objection raised by the Development Authority was not sustainable. As per provision of Section 16 of the Arbitration Act, the arbitrator was to adjudicate upon the dispute between the claimant and the authority and hence, it had the jurisdiction to entertain and dispose of the claims made by the claimant. The arbitrator clearly mentions that in spite of giving several opportunities, the appellant chose not to file the Statement of Defence/written statement and also failed to submit any documents in his defence. Hence, he proceeded as per the provisions of the Section 25(b) of the Arbitration Act.

The arbitrator passed a balanced award and all the claims claimed by the claimant were not admitted. Only these claims, which were substantiated by the documentary evidence were awarded. The award was as follows :-

Sl. No.	**Particulars**	**Claimed Amount**	**Awarded Amount**
Claim-1	For payment of Service Tax being liability of the Respondent	63,27,360/-	63,27,360/-
Claim-2	For Reimbursement of extra expenditure incurred for procurement of Steel	18,42,500/-	09,21,250/-
Claim-3	For refund of interest recovered on mobilisation advance	10,06,566/-	Nil
Claim-4	For reimbursement of extra expenditure incurred by the claimant on monthly over heads which could not be fully utilized	1,72,92,600/-	10,00,000/-
Claim-5	For compensation for loss of profit	1,71,86,000/-	42,96,500/-

	suffered on account of prolongation of contract period		
Claim-6	For payment of compensation due to idle machinery	23,69,790/-	Nil
Claim-7	For payment of compensation due to idle labour	24,11,450/-	Nil
Claim-8	For payment of escalation on amount of work executed during extended period	53,34,500/-	13,33,625/-
Claim-9	For payment of interest as per Section-31, 7(a) & 7(b) of Arbitration & Conciliation Act, 1996	@ 18% per annum	10% per annum simple interest over the awarded amount
Claim-10	Cost of Reference to Arbitration	3,00,000/-	50,000/-

Aggrieved by the Award, the appellant-Agra Development Authority filed a petition under Section 34 of the Arbitration and Conciliation Act in the concerned Court of Agra. The challenge was primarily on the ground that the award was beyond the reference. The learned Commercial Court, Agra *vide* its judgement dated 02.04.2021 was pleased to dismiss the Section 34 appeal filed by the appellant.

Aggrieved against which, the appellant has preferred the instant appeal under Section 13(1-A) of the Commercial Courts Act, 2015 which in fact are the appeals enumerated under Section 37 of the Arbitration and Conciliation Act, 1996.

The counsel for the appellant urged that the learned Arbitrator has acted beyond his jurisdiction by deciding other issues apart from service tax as his

mandate was only to decide the issue of service tax. The counsel for the appellant argued that the Arbitrator was appointed under Clause 33 of the agreement only for the dispute pertaining to the service tax. Counsel for the appellant further submits that the preliminary objection filed before the Arbitrator ought to have been decided at the outset instead of it being decided at the time of final hearing in passing of the award. The arbitrator ought not to have passed an award before deciding the preliminary objection.

The counsel for the appellant in the argument and the synopsis filed by them submitted that the award was *ex parte* and no sufficient opportunity was given to them. The appellant further submitted that the arbitrator has assigned no reason as to how the amount claimed has been arrived at in the award.

Counsel for the respondent submitted that the scope of reference was wide and inclusive of all disputes arising out of the agreement dated 25.05.2008 as have been provided in Clause 33 of the said agreement.

The arbitration clause was not limited to the issue of service tax only rather the same was of wide amplitude encompassing all the disputes arising out of the contract in question.

It is not the case of the appellant that the issues decided by the learned Arbitrator were beyond the scope of arbitration as per the arbitration clause in the agreement. Rather the appellant has solely averred that the scope of reference of the arbitrator was only limited to the issue of service tax, which averment is contrary to the documents available on record and also the letters dated 23.12.2010 and 13.01.2011 by which the arbitrator was appointed.

A bare perusal of the letters dated 23.12.2010 and 13.01.2011 by which a sole arbitrator was appointed by the appellant, shows that there is not even a whisper on the scope of reference, to be limited only to the service tax, on the contrary, these letters have wide amplitude to take within its ambit all the disputes raised by the parties as per the arbitration clause of the agreement. The claims made by the claimant was pertaining to the disputes which has

continuously been raised by the claimant prior to the appointment of the arbitrator.

Heard both the parties and perused the documents on record.

The arguments raised by the appellant that the arbitrator was appointed only to adjudicate issue that the service tax cannot be sustained, as the letters dated 23.12.2010 and 13.01.2011 written by the appellant (who themselves had appointed an arbitrator), did not mention at the time of appointment of the Arbitrator that the reference was limited only to the issues of service tax.

A plain reading of Clause 32 of the agreement shows that any dispute can be raised to the arbitrator, here the claimant had raised various disputes vide letter dated 27.07.2008, 17.07.2008, 22.09.2008 and 21.11.2008 even prior to the appointment of the arbitrator and the claimant have made these disputed claims through the Statement of Claim before the Arbitrator. The appellant, however, chose not to file Statement of Defence/Written Statement against the claim of claimant, they only made a feeble preliminary objection, that the jurisdiction of the arbitrator was only confined to the service tax. This objection was on the basis of some letters written to the Arbitrator much after the arbitration proceedings were initiated. It is not open for the parties to change the goal post once an arbitration proceedings has been initiated on the basis of the agreement between them.

Further, the counsel for the appellant in the argument and in the synopsis filed by them, has submitted that the award was *ex parte* and no sufficient opportunity was give to them. This argument is not correct as it is evident from the award that various opportunities have been granted to the appellant to file the statement of defence but they chose not to do so.

The appellant had submitted that the Arbitrator has assigned no reason as to how the Award has been arrived at. This again is not correct as the award was a speaking award and each claim has been considered separately and on the basis of the evidence on record and on merits.

The counsel further states that the interest awarded by the arbitrator is on higher side and excessive. This argument is not sustainable, as a simple interest of 10% per annum have been awarded.

Surprisingly, even after granting so many opportunities, the appellant chose not to file any defence and hence, it is not open for them to raise any dispute on merits in their appeal. Thereafter, in a petition filed under Section 13(1-A) of the Commercial Courts Act read with Section 37 of the Arbitration and Conciliation Act, 1996. Especially, when the award seems to be a balance award as most of the claims claimed by the claimant either had not been accepted or reduced down.

The Hon'ble Supreme Court in the matter of **McDermott International Inc**[1] has held that, the claim for damages which has been made prior to invocation of arbitration, becomes a dispute within the meaning of the provision of 1996 Act.

In the matter of **Dharma Pratishthanam**[2], the Hon'ble Supreme Court has held that, it is open to the parties to enlarge the scope of reference by inclusion of fresh disputes that must be held to have done so when they filed the statements putting forward claims not covered by the original reference.

In the matter of **State of Goa v. Praveen Enterprises**[3]**,** the Hon'ble Supreme Court has held that, where the arbitration agreement provides for referring all disputes between the parties, the arbitrator will have jurisdiction to entertain any claim including counter-claim even though it was not raised at a stage earlier to the stage of pleading before the arbitrator. The scope of arbitrator can be curtailed only if the arbitration agreement requires any specific dispute to be referred to the arbitrator in absence of any such specific requirements, the arbitrator is free to decide all the issues raised before the arbitrator.

In the matter of **L.G. Electronics**[4], the Hon'ble Court has held that the position of law stands crystallised to the effect that findings of fact as well as of law, of the Arbitrator/ Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties or ex facie, perverse that interference by this Court, is absolutely necessary. The Arbitrator/Tribunal is

1 (2006) 11 SCC 181
2 (2005) 9 SCC 686
3 (2012) 12 SCC 581
4 2018 SCC Online Del 6780

the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act.

The scope of interference in appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is very limited. In the matter of **Punjab State Civil Supplies Corporation Limited,**[5] the Hon'ble Supreme Court has held that while considering a petition under Section 34 of the 1996 Act, it is well-settled that the court does not act as an appellate forum. The grounds on which interference with an arbitral award is contemplated are structured by the provisions of Section 34 and these provisions shall be strictly followed.

It has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court will not sit as a Court of Appeal over the award of the Arbitral Tribunal and, therefore, the Court would not re-appreciate or re-assess the evidence.

In the matter of **J.G. Engineers (P) Ltd. *v.* Union of India**[6], the Hon'ble Supreme Court has, demarcated the boundary while explaining the ambit of Section 34(2) of the Act, this boundary so demarcated has to be strictly followed.

The Hon'ble Supreme Court in the matter of **ONGC Ltd. v. Saw Pipes Ltd.**[7], held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court, as then it would be opposed to public policy.

The Hon'ble Supreme Court in the matter of **Associate Builders v. Delhi Development Authority**[8], has further clarified the scope of judicial intervention under the appeal in the Act held as under :-

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5 SC Civil Appeal No. 6832 of 2021 (Arising out of SLP(c) No. 10179 of 2017)
6 (2011) 5 SCC 758
7 (MANU/SC/0314/2003 : (2003) 5 SCC 750)
8 (2015) 3 SCC 49

“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[1]. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

In the case of **MTNL v. Fajutshu India Pvt. Ltd[9],** the division bench of Delhi High Court has held that the law is settled where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under Section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under Section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible.

The law is settled that, where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under Section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the Court to interfere with the award

9 2015 (2) ARBLR 332 (Delhi)

merely because in the opinion of the Court, another view is possible. The duty of the Court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the fact, pleadings and evidence before the Arbitrator.

The extent of judicial scrutiny under Section 34 of the Act is limited and scope of interference is narrow. Under Section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under Section 34, in an appeal under Section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings in the award by the Arbitral Tribunal and confirmed by the court under Section 34.

As laid down by the Supreme Court in McDermott International Inc.[1] (supra), the supervisory role of the Court in arbitration proceedings has been kept at a minimum level and this is because the parties to the agreement make a conscious decision to exclude the courts' jurisdiction by opting for arbitration as the parties prefer the expediency and finality offered by it.

That in the matter of **SSangyong Engineering and Construction Company Pvt. Ltd. v. NHAI[10]**, the Hon'ble Supreme Court has clarified that, under no circumstances, can any court interfere with an arbitral tribunal on the ground that justice has not been done in the opinion of the Court. This would amount to, entering into the merits of the dispute, which is contrary to the ethos of Section 34 of the Act, 1996.

Further, in the instant matter, no statement of defence was held neither any substantial objection was raised in the appeal. Hence, the appeal filed under Section 34 of the Act has rightly been dismissed. Aggrieved against which, the present appeal has been filed. The Hon'ble Supreme Court has time and again emphasized on the narrow scope of Section 37 of the Arbitration and Conciliation Act, 1996.

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10 (2019) 15 SCC 131

This Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petitions has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint. Arbitration is a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merit, the speed and, above all, the efficacy of the arbitral process is lost.

In view of the aforesaid propositions of law, the law is well-settled that the scope of interference under Section 37 is very narrow and this is not a case which calls for an interference and hence, the instant appeals are devoid of merit and are, accordingly, **dismissed.**

(Hon'ble Prashant Kumar,J.) **(Hon'ble Manoj Kumar Gupta,J.)**

Order Date :- 24.03.2023

Rama Kant