IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Appeal From Order No. 174 of 2020

M/s Ravindra Kumar Gupta
and sons. .....….....Appellant.

Through: Shri Aditya Pratap Singh, learned counsel for the appellant.

-Versus-

Union of India
and others. ……...Respondents.

Through: Shri V.K. Kaparwan, learned Standing Counsel for Union of India / respondents.

With
Appeal From Order No. 175 of 2020

M/s Ravindra Kumar Gupta
and sons. .....….....Appellant.

Through: Shri Aditya Pratap Singh, learned counsel for the appellant.

-Versus-

Union of India
and others. ……...Respondents.

Through: Shri V.K. Kaparwan, learned Standing Counsel for Union of India / respondents.

With
Appeal From Order No. 183 of 2020

Union of India
and another. ……...Appellants.

Through: Shri V.K. Kaparwan, learned Standing Counsel for Union of India / Appellants.

-Versus-

M/s Ravindra Kumar Gupta
& Co. .....….....Respondent.

Through: Shri Aditya Pratap Singh, learned counsel for the respondent.

With
Appeal From Order No. 184 of 2020

Union of India
and another. ……...Appellants.

Through: Shri V.K. Kaparwan, learned Standing Counsel for Union of India / Appellants.

-Versus-

M/s Ravindra Kumar Gupta
& Co. .....….....Respondent.

Through: Shri Aditya Pratap Singh, learned counsel for the respondent.

Judgment reserved on: 22.07.2022
Date of Judgment : 21.10.2022

Coram:
Shri Sanjaya Kumar Mishra, J.
Shri Ramesh Chandra Khulbe, J.

Per: Shri Sanjaya Kumar Mishra, J.

1. These appeals, under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for brevity), have been preferred by the Union of India through Garrison Engineer, Military Engineering Services, Roorkee, District Haridwar and Contractor – M/s Ravindra Kumar Gupta & Sons against the judgments passed by the learned Addl. District Judge, Commercial Court, Dehradun dated 27.02.2020 and 27.02.2020 in Arbitration Case Nos. 245 and 247 of 2019 respectively. As per impugned judgment dated 27.02.2020 passed in Arbitration Case No. 247 of 2019, initiated under Section 34 of the Act, the Appellate Court has rejected the claim nos. 1 and 9 of the Contractor amounting to Rs. 33,66,989.86 and Rs. 2,00,000/-

and vide judgment dated 27.02.2020 passed in Arbitration Case No. 245 of 2019, the Original Court has rejected the claim no. 7 (b) of the Contractor amounting to Rs. 25,50,390/-. The Contractor has approached this Court for restoration of his claims, as awarded by the Arbitral Tribunal and the Union of India has approached this Court for setting the aside the judgment of the Court as well as Arbitral Awards dated 28.03.2017 and 10.01.2019.

2. Learned Standing Counsel for the Union of India would submit that the Arbitrator, under the condition 70 of I.A.F.W. 2239, had to pass the award within 6 months, which could have been extended only with the consent of both the parties. The six month period expired on 05.11.2016 and even then, both the parties did not extend the time. The award is not within time and against the procedure due to which it is against the public policy therefore, is liable to be set aside. Under the stated condition 70, it is also the provision that the arbitration proceeding cannot be conducted without completion of the work or expiry of the contract. The work of the road is not complete and therefore, the matter could not be referred to arbitration. Due to this reason also the Arbitral Tribunal did not have jurisdiction. The accepting officer on 16.04.2013 fixed the height of wiftwall to be 6.8 meter which was last and binding. Against this arbitration proceeding should not have been conducted. The mediator did not have jurisdiction of this. It is also stated that decision of the Arbitral Tribunal in relation to the wiftwall, as there was no contradiction, is also wrong and is against the terms of the contract and is against the acknowledgement of the Contractor. His conclusion is also wrong that decision of the Accepting Officer does not come under condition No. 6A. The payment made under Claim No. 1 being against condition No. 6A and 70 I.A.F.W. 2236 is against the public policy. The Applicant had thought about the Claim No. 2

related to the Wingwall from which the Contractor also agreed due to which in this relation monetary award cannot be passed. Similarly in relation to Claim No. 3A the Union of India had consented to which the Contractor agreed, therefore, in this relation also no award can be passed. Due to the same reason, no award could have been passed in relation to Claim 3B. In relation to Claim No. 4 both the parties agreed for Rs. 97,500/-. Due to which in relation to this also award cannot be passed. Claim No. 9 the Contractor wanted Sawstation and pump house building Kota Stone Flooring. There was provision of Antistatic in the drawing. The Arbitral Tribunal has wrongly concluded that for this, there was provision of P.C.C. flooring. The Contractor had done Kota Stone Flooring in place of Anti-Static Flooring. The Mediator has not taken into consideration the said facts and hence the award passed is against the law. The Applicant had no right for change in floor. The Arbitral Tribunal has awarded Rs. 2,00,000/- in favour of the Contractor without deciding the counter-claim which is against the law and public policy. The parties agreed in relation to the Claim No. 10 and 11 and therefore this is liable to be set aside. The Contractor was given the work of total Rs. 1,18,83,557/- for lump sum price as determined by it for construction of Road, route etc. He performed the total work of Rs. 55,65,472.69/-, from which it is clear that work of Rs. 63,18,084.31 is still remaining and due to this the Claim No. 14 cannot be awarded in favour of the Contractor. The Union of India has filed counter claim of Rs. 2,09,56,509.45 against the Contractor, without considering which the Arbitrator has passed the interim award. It is prayed that the award passed by the Arbitral Tribunal be set aside.

3. The Contractor in his Objection 38C2 has stated that while appointing the Arbitrator, the Hon'ble High Court had not

decided any time limit and the Arbitrator even after completion of the work, the Arbitrator was given order to continue. The Arbitrator has held the first hearing on 11.07.2015 after which the Contractor continuously took part in the arbitration proceedings. In these circumstances, after 3 years, the said objections are also not maintainable and valid under the Waiver of Right to object under Section 4 of the Arbitration and Conciliation Act, 1996. The arbitration proceeding which is being held by the Arbitraro, the same has been started in between orders dated 06.11.2014 and 04.05.2016 passed by the Hon'ble High Court. In this any objection must have been raised by the Contractor before the Arbitrator. There is no such provision in the Act under which the arbitration proceedings in between can be stopped. Therefore, the appeals of the Union of India are liable to be dismissed.

4. After taking into consideration, the cases of both the parties, and after re-appreciating the evidence, learned Addl. District Judge, Commercial Court, Dehradun, by virtue of the judgments impugned has set aside claim nos. 1, 9 and 7 (b) decided in favour of the Contractor by the Arbitral Tribunal amounting to Rs. 33,66,989/-, Rs. 2,00,000/- and Rs. 25,50,390/- respectively.

5. The sole question that arises before this Court at this stage is - Whether the learned Addl. District Judge, Commercial Court, Dehradun has jurisdiction under Section 34 of the Act to re-appreciate the evidence and modify the same? The question of limitation etc., we are not emphasised upon by Mr. V.K. Kaparwan.

6. Learned counsel for the Contractor – Shri Aditya Pratap Singh would rely upon the judgment in case of **McDermott International Inc. Vs. Burn Standard Co. Ltd. and others (2006)**

11 SCC 181 wherein the Hon'ble Supreme Court has determined such powers of the Court under Section 34 of the Act.

7. Shri V.K. Kaparwan, learned Standing Counsel for the Union of India, on the other hand, would submit that the Hon'ble Supreme Court in the case of **Oil and Natural Gas Corporation Limited Vs. Western Geco International Ltd. (2014) 9 SCC 263** has held that the Court has jurisdiction under Section 34 of the Act where on the face of the award, there has been a miscarriage of justice, the award of the Arbitral Tribunal can be modified, depending upon whether the offending part is or is not severable from the rest.

8. In the written arguments filed by the learned Standing Counsel for the Union of India, the Union of India has taken a specific ground regarding re-appreciation of several other awards given in favour of the Contractor and in fact, learned Standing Counsel requires this Court to re-appreciate the evidence and set aside the impugned judgments / awards.

9. In the case of **Delhi Airport Metro Express Pvt. Ltd. Vs. Delhi Metro Rail Corporation Ltd. (2021) SCC online SC 695**. The Hon'ble Supreme Court in paragraphs 24 to 26 has held as under:

> *"25. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by courts while examining the validity of the arbitral awards. The limited grounds available to courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the courts. There is a disturbing tendency of courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by*

either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

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

27. Section 34(2) (b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015

Amendment Act, clarified the expression 'public policy of India' and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice. In Ssangyong (supra), this Court held that the meaning of the expression 'fundamental policy of Indian law' would be in accordance with the understanding of this Court in Renusagar Power Co. Ltd. v. General Electric Co. 1994 Supp (1) SCC 644. In Renusagar (supra), this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the 'national economic interest', and disregarding the superior courts in India would be antithetical to the fundamental policy of Indian law. Contravention of a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian law and neither can it be brought within the confines of 'patent illegality' as discussed above. In other words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would not be enforced given the prevailing mores of the day."

10. Thus, it is clear that the Hon'ble Supreme Court, in a very clear term, has interpreted Section 34 of the Act and has recognized that restraint should be shown while examining the validity of the Arbitral Awards. Only when there is patent illegality, which goes to root of the matter or when there is contravention of law linking to public policy and public interest,

then it is within the scope of the Court to take a different view and interfere with the findings.

11. In this case, Shri V.K. Kaparwan, learned Standing Counsel for the Union of India, neither in the oral arguments nor in the written arguments, has demonstrated that there has been a patent illegality going to root of the matter or that the Arbitral Award is in conflict with the public policy of India or that the dispute is not capable of settlement by arbitration under the law for the time being in force. Learned Standing Counsel for the Union of India, on the other hand, has argued that certain items of expenses should not have been allowed by the Arbitral Tribunal as well as it should have been set aside by Addl. District Judge, Commercial Court, Dehradun.

12. The ground of challenge does not fall within the scope and ambit of Section 34 of the Act, so it is not necessary to go into the detail of those aspects. Suffice it to say that the Union of India has not made out any ground for setting aside the award.

13. In the counter appeal, the only point agitated by learned counsel for the Contractor – Shri Aditya Pratap Singh is that the Appellate Court, under Section 34 of the Act, cannot modify the award by partly allowing the some of the claims and rejecting the others.

14. In the context the ratio decided by the Hon'ble Supreme Court in the case of **McDermott (supra)** is relevant. The Hon'ble Supreme Court has categorically held that under Section 34 of the Act, there has to be complete non interference with pure questions of fact and appreciation of evidence. The same view has been taken by the Hon'ble Supreme Court in the case of **Project Director, National Highway No. 45 E & 220 National Highways**

Authority of India Vs. M Hakeem and another (2021) 9 SCC 1. In this case, the Hon'ble Supreme Court has held that Section 34 of the Act provides only for setting aside the arbitral award on a very limited ground. Such grounds contained in sub-section (2) and (3) of Section 34 of the Act. Further, 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-section (2) and (3) of the Act. "Recourse" is defined as 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 there are limited grounds of challenge under sub-section (2) and (3) of Section 34. An application can only be made to set aside an award. Such view becomes even clearer in view of sub-section (4) of Section 34 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 proceeding or to take such action as will eliminate the grounds for setting aside the arbitral award. The Hon'ble Supreme Court has further held that there can be no doubt that given the law laid down by the Supreme Court, Section 34 of the Act, cannot be held to include within its power to modify an award. To state that the judicial trend appears to favour an interpretation that would read into Section 34 of the Act, a power to modify, revise or vary the award would be to ignore the previous law contained in the Arbitration Act, 1950 and as also to ignore the fact that the Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985, which makes it clear that given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the limited

remedy under Section 34 of the Act is coterminous with limited right namely either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Act.

15. Thus, it is clear that Addl. District Judge, Commercial Court, Dehradun committed an error by partly upholding the award of the Arbitral Tribunal disallowing the three claims of the Contractor. Thus, learned Addl. District Judge, Commercial Court, Dehradun has also not held that the Arbitral Tribunal has failed to draw an inference, which ought to have been drawn by him or if he has drawn an inference, which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by the Arbitral Tribunal that enjoys considerable latitude and play at the joints in making award will be open to challenge and may cast or modify depending whether offending part is severable from the rest.

16. In other words, in the impugned judgments the learned Addl. District Judge, Commercial Court, Dehradun has not given any finding that if each of the claims especially claims no. 1, 9 and 7 (b), which were set aside, is severable part of the award or not.

17. Thus, a reading of the aforesaid judgments reveals that learned Addl. District Judge, Commercial Court, Dehradun, has not found any manifest and patent error in the awards. Thus, this Court is of the opinion that judgments passed by the Addl. District Judge, Commercial Court, Dehradun, cannot be sustained and are liable to be set aside. Hence, the appeals filed by the Contractor are allowed and appeals filed by the Union of India are dismissed. Orders passed by the Additional District Judge, Commercial Court, Dehradun to the effect of disallowing the claims of Contractor at claim nos. 1 and 9 in Arbitration Case No. 247 of 2019 amounting to Rs. 33,66,989.86 and Rs. 2,00,000/- and

claim no. 7 (b) in Arbitration Case No. 245 of 2019, amounting to Rs. 25,50,390/- are set aside and impugned Arbitral Awards are hereby affirmed. Let copy of this judgment be placed in each connected appeal and records of Courts below be sent back.

(Ramesh Chandra Khulbe, J.) (Sanjaya Kumar Mishra, J.)

(Grant urgent certified copy of this judgment, as per Rules)

SKS