

(2023) 05 DEL CK 0003

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) No. 191 Of 2022, Civil
Miscellaneous Application No. 32544 Of 2022

M/S. Superb Minerals India Pvt. Ltd

APPELLANT

Vs

Union Of India & Anr

RESPONDENT

Date of Decision : 01-05-2023

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8, 31(7)(a), 34, 34(2), 34(2)(b)(ii),
37, 75, 81
Commercial Courts Act, 2015 — Section 13
Code Of Civil Procedure, 1908 — Section 2(12)

Citation : (2023) 05 DEL CK 0003

Hon'ble Judges : Siddharth Mridul, J; Talwant Singh, J

Bench : Division Bench

Advocate : Arjun Vinod Bobde, Sarthak Bhatia, Apoorva Prasad, Astha Shukla,
Smanisha Rawat, Monika Arora

Final Decision : Dismissed

Judgement

Siddharth Mridul, J

1. The present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 [hereinafter referred as 'the said Act'] read with Section 13 of the Commercial Courts Act, 2015, has been instituted on behalf of the appellant praying as follows:-

* Set-aside impugned order dated 14/12/2021 passed by an Hon'ble Single Judge of this Hon'ble Court and set-aside the Arbitration Award dated 24/06/2021 passed the Arbitral Tribunal in the arbitration proceedings between the Appellant and the Respondents;

* Pass such other orders as this Hon'ble Court may deem fit.

2. At the outset, it is relevant to observe that, the petition under Section 34 of the said Act assailed an Arbitral Award dated 24th June, 2021; whereby the

appellant (Claimant before the learned Arbitrator) was directed to pay mesne profits/damages for over-staying his tenancy in a rental premises, at the rate of Rs.1,00,000 per month w.e.f., April, 2013 to November, 2020, along with cost of proceedings of Rs.6,00,000/-, and interest at the rate of 12% per annum from the date of passing of the Award till the time the entire amount is paid.

3. In view of the foregoing, and in the backdrop of the limited controversy between the parties, it would be appropriate to extract in extenso the observations made by the learned Single Judge in the impugned judgment dated 14.12.2021. The relevant paragraphs of the impugned judgment are extracted hereinbelow:-

"6. This Court has considered the submissions of the counsel and does not find any merit in the same. The license period came to an end on 17th January, 2013 whereafter, the Petitioner call upon the Respondent to renew the agreement for a further period of three years, which request was rejected by the Respondent. The Petitioner was then called upon to vacate the premises, however, despite the expiry of the agreement by efflux of time, the Petitioner failed to do so and instead invoked arbitration. Proceedings before the sole arbitrator thus commenced. Respondent contested the proceedings and filed a counter-claim for possession and mesne profits. In such circumstances, the objection of non-arbitrability of disputes was rightly rejected by the learned Arbitrator, in the following words:

"19. I have considered the rival contentions of the parties. First of all, I am of the view that the judgments referred to and relied upon by learned counsel for the claimant are in the context of different facts and are of no help. In the said cases landlords/lessors had filed suits for recovery of possession, mesne profits and damages on expiry of lease period/tenancy; wherein applications were filed by the tenants/lessees under section 8 of the Act thereby invoking the arbitration clause. In these facts, it was held that arbitration clause could have been invoked during the subsistence of tenancy/lease and not thereafter. In the present case claimant had invoked the arbitration clause way back in the year 2013. The respondent appointed the Arbitrator and the proceedings commenced, in as much as filed SOC. In the pending arbitration, in my view, respondent was well within its rights to file a counter claim seeking possession and award of mesne profits/ damages as well as water and electricity charges; while opposing the relief of extension of license period. In fact, the claimant is estopped from challenging the arbitrability of the Counter Claim of the respondent. The reliefs claimed by the respondent were consequential to the reliefs claimed by the claimant; thus, respondent cannot be relegated to other independent proceeding before a different forum, in order to avoid multiplicity of proceedings and conflicting judgments; in the same facts between the same parties.

7. In support of this observation, Arbitrator has also relied upon the judgement of the Supreme Court in Vidya Drolia & Ors. v. Durga Trading Corporation, 2021 2 SCC 1, and held that the dispute regarding mesne profits after the expiry of

the term of the license period was indeed arbitrable. The caselaws relied upon by the Petitioner were also cited in arbitration and rightly distinguished on facts. Nevertheless, this court has also examined the same and finds the judgments to be wholly inapplicable.

8. As regards the merits of the case, the contentions of the Petitioner are misconceived. Petitioner's continuation in the licensed premises after the expiry of the term of contract, justified the award of damages qua it. The learned arbitrator has given a finding of fact regarding the Petitioners' lack of intention to hand over the possession of the premises, which cannot be faulted with. This finding is rendered on the basis of the material placed on record and the statement made by Mr. Amarnath Pandey, Petitioner/Claimant's witness, who, during cross-examination, failed to show any document on record exhibiting intention to hand over possession of the leased premises to the Respondent.

9. The arbitrator has relied upon the judgement of this Court in Hindustan Petroleum Corporation Ltd. v. Mohan Jit Singh,(RFA. No. 20 of 2016 decided on 31st July 2019) to award the mesne profits - which is in consonance with Section 2(12) of the Code of Civil Procedure, 1908. No ground is made out to interfere with the same.

10. In view of the above, the court does not find any merit in the arguments of the Petitioner for impugning the award.

11. Petition is dismissed."

4. The present appeal preferred by the appellant seeks setting aside of the aforementioned impugned judgment dated 14.12.2021, passed by the learned Single Judge of this Court in O.M.P. (COMM) 363/2021 titled as "M/S. Superb Minerals India Pvt. Ltd. Versus Union Of India & Anr"; and Arbitration Award dated 24.06.2021 passed by the learned Sole Arbitrator.

5. Mr. Arjun Vinod Bobde, learned counsel appearing on behalf of the appellant assails the impugned judgment and Arbitral Award, whilst submitting that the Arbitral Award dated 24.06.2021 passed by the Ld. Arbitrator is prima facie in excess of the jurisdiction conferred upon the Arbitral Tribunal, under the arbitration clause, and prima facie contrary to the public policy of India. The primary contention canvassed by the appellant rests on the issue that the learned Arbitral Tribunal has not decided the disputes "in terms of the contract" and also that there was misapplication of law.

6. Learned counsel appearing on behalf of the appellant would further argue that as per Clause No.16 of the Arbitration Agreement, the disputes which were "in respect of the interpretation, conduct or performance of any terms or conditions" of the agreement, could be referred to arbitration. The claim for mesne profits, for the period after 21.01.2013, does not in any way relate to "interpretation, conduct or performance of any terms or conditions" of the agreement. Thus, the claim of mesne profits existed independently and falls outside the scope of the

disputes as envisaged in the arbitration agreement.

7. Learned Counsel appearing on behalf of the appellant would also argue that, the only judgment cited in the Arbitral Award by the Ld. Arbitrator and in the impugned judgment by the Ld. Single Judge, is the judgment of the Supreme Court of India in the case of Vidya Drolia & Ors. v. Durga Trading Corporation reported as (2021) 2 SCC 1, which in fact did not deal with the question in issue, raised by the appellant herein.

8. In sum and substance, it is asseverated by learned counsel appearing for the appellant, that the claim for mesne profits could not have been decided in an arbitration proceeding. It was further argued that a dispute can be referred to arbitration only in the event when there is a written agreement, encapsulating that particular dispute; or with the consent from both the parties; and that the same cannot be referred to arbitration in absence of the aforesaid.

9. At this juncture, it would be relevant to observe that, the present dispute has been raised under the said Act. There is no gainsaying the legal position that the main objectives of the said Act are to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration; and also to ensure that the Arbitral Tribunal gives reasons for its Arbitral Award; and further to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction; and lastly and most significantly to minimize the supervisory role of courts in the arbitral proceedings.

10. On a conjoint reading and harmonious interpretation of the provisions of the said act, considered in the backdrop of the relevant, applicable and binding decisions, elucidated hereinafter, we are of the view that the jurisdiction conferred with the courts is fairly narrow; particularly in relation to the scope of an appeal under Section 37 of the said Act; and the jurisdiction of an appellate court in adjudicating an order rendered under Section 34 of the said Act, whether setting aside or refusing to set aside an Award, is all the more circumscribed. In PSA SICAL Terminals Pvt Ltd vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin & Ors reported as 2021 SCC Online SC 508, the Hon'ble Supreme Court of India, reiterated its view taken in MMTC Limited v. Vedanta Limited reported as (2019) 4 SCC 163, explaining the reasons for vesting such limited jurisdiction with the High Court, in exercise of the powers under Section 37 and 34 of the Arbitration Act. The relevant portion of the judgment is extracted herein below for the sake of facility:-

"40. Before that, it will be apposite to refer to judgment of this Court in the case of MMTC Limited (supra), wherein this Court has revisited the position of law with regard to scope of interference with an arbitral award in India.

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

"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.

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.”

(emphasis supplied)

11. The Hon’ble Supreme Court further in *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.* reported as (2019) 20 SCC 1 has adjudicated upon the limitations of the Court while exercising powers under Section 34 of the said Act, more particularly in paragraphs 24 and 25 thereof, which paragraphs are extracted hereinbelow for the sake of facility: -

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act”

12. Furthermore, the Hon’ble Supreme Court of India in *Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd* reported as (2019) 7 SCC 236, whilst advertng to the previous decisions passed in *McDermott International Inc. v. Burn Standard Co. Ltd.* reported as (2006) 11 SCC 181 and *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* reported as (2012) 5 SCC 306 , has observed as follows: -

“9.1. ... After referring Section 28(3) of the Arbitration Act and after considering the decisions of this Court in *McDermott International Inc. v. Burn Standard Co. Ltd.* [*McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , SCC paras 112-113 and *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* [*Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 306] , SCC paras 43-45, it is observed and held that an Arbitral Tribunal must

decide in accordance with the terms of the contract, but if an Arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. It is further observed and held that construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. It is further observed by this Court in the aforesaid decision in para 33 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. It is further observed that 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.

9.2. Similar is the view taken by this Court in *NHAI v. ITD Cementation India Ltd.* [*NHAI v. ITD Cementation India Ltd.*, (2015) 14 SCC 21 : (2016) 2 SCC (Civ) 716] , SCC para 25 and *SAIL v. Gupta Brother Steel Tubes Ltd.* [*SAIL v. Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] , SCC para 29."

(emphasis supplied)

13. The Hon'ble Supreme Court of India has also in *South East Asia Marine Engg. & Constructions Ltd. (SEAMEC Ltd.) v. Oil India Ltd.*, reported as (2020) 5 SCC 164, observed that, where there are two possible views, the Court should be cautioned in interfering with a plausible view taken by the Arbitrator. The relevant portion of the ratio is extracted hereinbelow:-

"12. It is a settled position that a court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the courts. Recently, this Court in *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.* [*Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*, (2019) 20 SCC 1] laid down the scope of such interference. This Court observed as follows : (SCC p. 12, para 24)

'24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would

stand frustrated.'

13. It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning. This Court in Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1] observed as under : (SCC p. 12, para 25)

'25. Moreover, umpteen number of judgments of this Court have categorically held that the Court should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.' "

14. The Hon'ble Supreme Court of India in Indian Oil Corp. Ltd. vs. Shree Ganesh Petroleum Rajgurunagar reported as (2022) 4 SCC 463, clearly and unequivocally observed that, a court does not sit in appeal over an Award passed by an Arbitral Tribunal and does not ordinarily interfere with the contractual interpretation made by the Arbitral Tribunal. The relevant and germane exposition of the law is extracted herein below for the sake of facility:-

"43. An Arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract.

44. However, a distinction has to be drawn between failure to act in terms of a contract and an erroneous interpretation of the terms of a contract. An Arbitral Tribunal is entitled to interpret the terms and conditions of a contract, while adjudicating a dispute. An error in interpretation of a contract in a case where there is valid and lawful submission of arbitral disputes to an Arbitral Tribunal is an error within jurisdiction.

45. The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one."

(emphasis supplied)

15. In its very recent decision as well, the Hon'ble Supreme Court of India in Indian Railway Construction Company Limited versus National Buildings Construction Corporation Limited reported as 2023 SCC OnLine SC 294 (Decided on March 17, 2023), has whilst allowing the appeal, pointed out that pendente lite interest awarded by the arbitral tribunal was not required to be interfered with by the learned Single Judge, in exercise of the powers conferred under

Section 34 of the said Act; and even by the Division Bench of the High Court, while exercising the powers under Section 37 of the said Act. It was further observed that unless there is a specific bar under the contract, it is always open for the Arbitrator to award pendente lite interest, in view of Section 31(7)(a) of the said Act. The relevant paragraphs of the said judgment are extracted hereinbelow:-

28. Now, so far as the quashing and setting aside the award passed by the Arbitral Tribunal awarding interest @ 18% on advance for the hypothecation of equipment, by the learned Single Judge confirmed by the Division Bench is concerned, at the outset, it is required to be noted that the Division Bench of the High Court has upheld the order passed by the learned Single Judge quashing and setting aside the interest awarded by the learned Arbitral Tribunal on advance for the hypothecation of equipment on the ground that there is no such stipulation in the agreement/contract. However, the High Court has not at all considered Section 31(7)(a) of the Arbitration Act, which permits the arbitrator that unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the Arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. Thus, unless there is a specific bar under the contract, it is always open for the arbitrator/Arbitral Tribunal to award pendente lite interest. Identical question came to be considered by this Court in the case of Raveechee and Company (supra). In the said decision, it is observed and held by this Court that an arbitrator has the power to award interest unless specifically barred from awarding it and the bar must be clear and specific. In the said decision, it is observed and held that the liability to pay interest pendente lite arises because the claimant has been found entitled to the same and had been kept out from those dues due to the pendency of the arbitration, i.e., pendente lite.

29. Applying the law laid down by this Court in the aforesaid decision to the facts of the case on hand, once it was found that the advance amount was paid for hypothecation of equipment and thereafter when the Arbitral Tribunal awarded the interest on advance for hypothecation of equipment, the same was not required to be interfered with by the learned Single Judge in exercise of the powers under Section 34 of the Arbitration Act and even by the Division Bench of the High Court while exercising the powers under Section 37 of the Arbitration Act. However, at the same time to award the interest @ 18% can be said to be on a higher side. In the facts and circumstances of the case, if the interest is awarded @ 12% on advance for the hypothecation of equipment, the same can be said to be reasonable interest."

16. On a conspectus of the judgments of the Hon'ble Supreme Court of India extracted hereinabove, we are axiomatically of the considered view that the jurisdiction of the court under Section 37 of the said Act to adjudicate the Award

and order passed under Section 34 of the said Act, is fairly narrow and circumscribed.

17. We are, acutely, conscious of the legal position that so long as the view taken by the learned Arbitral Tribunal, 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 have taken the same view or a different view on the merits of the matter; and therefore, the Arbitral Award does not warrant any interference and, is required to be upheld.

18. Consequently, we find no ground to interfere in the Arbitral Award dated 24.06.2021 as well the impugned judgment dated 14.12.2021 passed by the learned Single Judge.

19. The appeal is dismissed and disposed of accordingly. Pending application also stands disposed of.

20. A copy of this Judgment be uploaded on the website of this Court forthwith.