*** THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE**

AND

THE HON'BLE SRI JUSTICE N.TUKARAMJI

+ Commercial Court Appeal No.8 of 2017

% 24.11.2023

Between:

V.B.Ramsagar Appellant

Vs.

M/s.Srijay Constructions,
Plot No.44, Methodist Colony,
Begumpet, Hyderabad rep by its
Proprietor Mr.K.Srinivas Rao & others.

Respondents

! Counsel for Appellants : Mr. V.Hari Haran

^ Counsel for Respondents : Mr. M.Rama Krishna
for M/s.Bhaskari Advocates

<GIST:

> HEAD NOTE:

? Cases referred
1 MANU/AUSH/0028/1954
2 (1994) 6 SCC 485
3 (2009) 5 SCC 142
4 (2019) 15 SCC 131
5 (2022) 1 SCC 131

THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE

AND

THE HON'BLE SRI JUSTICE N.V.SHRAVAN KUMAR

Commercial Court Appeal No.8 of 2017

JUDGMENT:*[as per Hon'ble Sri Justice N.V.Shravan Kumar]*

This Commercial Court Appeal filed under Section 13 of Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 r/w Section 37 of the Arbitration and Conciliation Act, 1996 (in short 'the Act' hereinafter) arises out of the petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 in C.O.P.No.21 of 2016 on the file of XXIV Addl. Chief Judge, City Civil Court which was filed challenging the award passed by the sole arbitrator dated 15.02.2012.

BRIEF FACTS:

2. The facts in brief are that respondent No.1 is a proprietary firm and respondent No.2 is the proprietor of respondent No.1 / Constructions (hereinafter referred as respondents). The appellant herein had entered into a development agreement originally on 15.05.1996 with respondents for developing land admeasuring 350 sq.yds.,

in plot bearing No.44, situated at Methodist Colony, Kundanbagh, Begumpet, Hyderabad.

3. In the said development agreement, there was an understanding to share built up area in the ratio of 32% to the appellant and 68% to the builders i.e., respondent Nos.1 and 2. Thereafter, certain disputes arose among the partners of respondents and a fresh development agreement dated 11.10.1997 was entered into between the parties which was thereafter cancelled unilaterally by the appellant vide letter dated 19.07.1999. Subsequently, there were *inter se* disputes between the respondent partnership firm and respondent No.1 which was reduced into proprietary concern and thereafter respondent No.1 raised one flat in second floor and partly two other flats and proceeded with the construction of outer walls of the super structure and the said structures on the subject land was found to be defective.

4. Thereafter, respondent No.2 shifted to the flat which was developed in the second floor of the building under construction in the subject property and was

residing in the said flat. The appellant had filed a complaint before the Municipal Corporation Hyderabad vide letters dated 05.05.2001 and 29.05.2001 requesting the authorities to demolish the structures raised by the respondents by stating it as 'not fit for human habitation'. The respondents in view of the arbitration clause in the development agreement, have approached the then Hon'ble High Court of Andhra Pradesh for appointment of arbitrator. The then Hon'ble High Court of Andhra Pradesh vide orders in Arbitration Application No.51 of 2003 appointed sole arbitrator to adjudicate the disputes between the parties and the arbitrator by an order dated 15.02.2012 has rejected the application filed by the applicants therein and they were further directed to deliver possession of the vacant site to respondents after pulling down the building and clearing the debris within two (2) months.

5. The applicants / respondents therein challenged the award dated 15.02.2011 of the sole arbitrator before the XXIV Addl. Chief Judge, City Civil Court, Hyderabad vide C.O.P.No.21 of 2016 under Section 34 of the Act. The

petitioners before the Tribunal submitted that sole arbitrator found a new case for respondent which was not pleaded and that the findings of the arbitrator are perverse in nature and he has no jurisdiction to pass an award directing the petitioners to deliver the possession of the vacant site to respondent No.1 after pulling down the constructions and clearing the debris which does not found part of the terms of the reference and was not supported by any pleadings.

6. In the award, the learned arbitrator observed that the respondents have committed breach of the development agreement dated 11.10.1997 and it is an undisputed fact that building was not constructed as per the agreement and the construction was stopped in the middle and structures raised are not sound and safe and the life of the constructed building would not be more than two decades. It was further observed that the respondents therein would acquire right to the agreed share only after completion of the whole complex and till then they have no right to compel the appellant to register their entitled share in the land without completing the construction of the

whole complex. On the other hand, the appellants therein would submit that the respondents have constructed only one flat and started residing therein without constructing the entire complex and thus, the appellant being the owner of the subject land was deprived of his valuable rights over the property by unscrupulous means and recalcitrant manner in which agreement was handled and prayed for the dismissal of the Commercial Original Petition No.21 of 2016.

6.1. The learned arbitrator further held that fresh building license is required to proceed with further construction and considering the present unsound and unsafe structure, it may not be possible to obtain permission to continue with present building structure and observed that it is ideal to pull down the building and construct new building for safe and secure accommodation and finally held that the petitioners / applicants therein are not entitled to any relief sought by them and they are bound to deliver the vacant site after pulling down the construction and clearing the debris.

6.2. The learned trial Court Judge while considering the submissions of both the petitioners and respondents observed that the appellants / respondents has not sought for the relief of pulling down the construction and handing over the vacant site to the appellants / respondents and when there is no such clause between the parties to the contract, the learned arbitrator travelled beyond the scope of arbitral proceedings and passed order dated 15.02.2012 to pull down the construction and held that the arbitrator has acted in excess of jurisdiction and thereby set aside impugned award passed by the arbitrator dated 15.02.2012. Aggrieved by the same, respondent No.1 has preferred the present appeal.

SUMISSIONS:

7. Mr.Hariharan, learned senior counsel for the appellants would submit that the order of the XXIV Additional Chief Judge dated 03.04.2017 was wholly illegal and contrary to the provisions of Section 34 of the Act and that the learned Judge erred in reversing and setting aside the award of the learned arbitrator without moulding the relief appropriately and would further submit that inspite of the fact that the respondents have admitted that the

project has not even completed even today, the learned Judge has failed to appreciate the breach committed by the respondents and has left the entire property to the enjoyment of the respondents. He would further submit that though the learned Judge has not disturbed the findings of the learned arbitrator with respect to safety and stability and non-obtaining of completion certificate which itself is violation in terms of the sanction and had set aside the arbitral award dated 15.02.2012 without giving any reasons to the breach committed by the respondents.

8. Learned senior counsel would further submit that the award to deliver back the subject property is just and proper even in accordance with the provisions of Specific Relief Act, 1963 and demolition is only incidental. He would further submit that Municipal laws are violated and prayed to set aside the orders passed by the trial Court judge.

9. In support of his submissions, learned senior counsel relied upon a judgment of High Court of Australia

in the case of ***Bellgrove v. Eldridge*** decided on ***20.08.1954*** reported in ***MANU/AUSH/0028/1954***.

10. Per contra, learned counsel for the respondents would submit that the arbitrator has travelled beyond the scope of dispute and supports the order of learned trial Judge and submits that there is no ground for interference under Section 37 of Act and that.

11. Heard both sides. Perused the material on record.

ANALYSIS AND CONCLUSION:

12. The learned trial Court Judge without going into all the aspects of the agreement considered by the learned arbitrator and without considering the detailed reasons given, held that the arbitrator travelled beyond the scope of arbitral proceedings and passed an award to pull down the construction without jurisdiction however, when such agreement is not present between the parties. The learned trial Court Judge also miserably failed to appreciate that the respondents were in possession of the property as per the development agreement and the order setting aside the

award passed by the learned arbitrator dated 15.02.2012 would preclude the right of the appellants. A specific finding was given by the arbitrator that the respondents have committed breach of clauses 7, 8, 9 and 21 of the development agreement dated 11.10.1997.

13. It is an undisputed fact that the building is not completed and is not fit for human habitation and also the permission is not renewed and thereby the constructions were stopped in the middle and there is a complete stalemate. The learned Arbitrator considering all these aspects has rightly observed that the semi-finished building has to be pulled down for raising new structure for safe and secure admission and in furtherance has directed the respondents to deliver the vacant site of the appellants after pulling down the construction and clearing the debris. The order of the learned Arbitrator appears to be reasonable.

14. In the case of ***State of Rajasthan v. Puri Construction Company Limited***[1] the Hon'ble Supreme Court observed as follows:

> *"The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. In Sudarsan Trading Co. v. Govt. of Kerala 1989 Indlaw SC 463 it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the burden of saying that*

[1] ***(1994) 6 SCC 485***

this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator."

15. In the ***M/s. Kwality Manufacturing Corporation vs. Central Warehousing Corporation***[2]**,** the Hon'ble Supreme Court held that:

"At the outset, it should be noted that the scope of interference by courts in regard to arbitral awards is limited. A court considering an application under Section 30 or 33 of the Act, does not sit in appeal over the findings and decision of the arbitrator. Nor can it re-assess or

[2] (2009) 5 SCC 142

re-appreciate evidence or examine the sufficiency or otherwise of the evidence. The award of the arbitrator is final and the only grounds on which it can be challenged are those mentioned in Sections 30 and 33 of the Act. Therefore, on the contentions urged, the only question that arose for consideration before the High court was, whether there was any error apparent on the face of the award and whether the arbitrator misconducted himself or the proceedings."

16. The Hon'ble Supreme Court in a catena of judgments has settled the law and scope of ambit of the jurisdiction to interfere with an arbitral award.

17. In ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI),***[3] while considering the applicability of A&C (Amendment) Act, 2015, the Hon'ble Supreme Court has explained the scope, permissibility, interference, restrictions and grounds of challenge to the arbitral award passed by the learned arbitrator. The Hon'ble Supreme Court accordingly held as follows:

[3] ***(2019) 15 SCC 131***

"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders.

35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in

conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality

as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator

to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A).

41. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

18. In ***Delhi Airport Metro Express (P) Ltd., v. Delhi Metro Rail Corporation Ltd.,***[4] the Hon'ble Supreme Court has also made reference to ***Ssangong Engineering (supra).*** The relevant paragraphs are extracted herein;

> *"29. 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*

[4] ***(2022) 1 SCC 131***

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'.

30. 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."

19. In the case on hand, the constructions which are raised cannot be regularized at this point of time. Apart from that the building is incapable of human habitation. The trial Court has failed to observe that the respondents were not acting as per the terms of the agreement. The respondents have already enjoyed the property for a period of 27 years and all these years the appellant was deprived of his legitimate rights over the subject property. In our considered opinion, the learned Arbitrator has not travelled beyond the scope of submission made by the parties in the arbitration proceedings and orders passed by the learned arbitrator is neither perverse nor illegal.

20. Having considered the rival submissions and various judicial pronouncements, we hereby do not find any reason to interfere with the award dated 15.02.2012 passed by the sole arbitrator and accordingly set aside the order in C.O.P.No.21 of 2016 dated 03.04.2017 passed by XXIV Additional Chief Judge, City Civil Court, Hyderabad

and in order to meet the ends of justice, the respondents are directed to vacate the subject property No.44, situated at Methodist Colony, Kundanbagh, Begumpet, Hyderabad and handover the same to the appellant within a period of two (2) months from the date of receipt of a copy of this order.

21. Accordingly, this Commercial Court Appeal is disposed of.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

ALOK ARADHE, CJ

N.V.SHRAVAN KUMAR, J

24.11.2023
Note: LR Copy to be marked.
B/o
mrm