S.V. Samudram vs The State Of Karnataka on 4 January, 2024

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Bench: Sanjay Karol, Abhay S. Oka

2024 INSC 17 REPO

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8067 OF 2019

S.V. SAMUDRAM …APPELLA

VERSUS

STATE OF KARNATAKA & ANR …RESPOND

JUDGMENT

SANJAY KAROL J.

1. The issue arising for consideration in this Civil Appeal, which lays challenge to a judgment and order dated 7th February, 2017 passed by the High Court of Karnataka (Dharwad Bench) in MFA No. 24507 of 2010 (AA) under Section 37(1) of the Arbitration and

1| Civil Appeal No. 8067 of 2019 Conciliation Act, 19961, is whether the High Court was justified in confirming the order dated 22nd April, 2010 under Section 34 of the Arbitration & Conciliation Act, 1996 passed by the Senior Civil Judge, Sirsi, in Civil Misc. No. 08/2003, whereby the award passed by the learned Arbitrator was modified and the amount awarded was reduced.

FACTS

2. As borne out from the judgments rendered by the Courts below, the facts, are:-

> 2.1 Mr. S.V. Samudram2 is a registered Class II Civil Engineering Contractor and had secured a contract from the Karnataka State Public Works Department to construct the office and residence of the Chief Conservator of Forests at Sirsi for an amount of

Rs. 14.86 Lakhs.

2.2 The said contract was entered into between the parties on 29th January, 1990 with the stipulation that the possession of the construction site would be handed over to the Claimant-Appellant on 8th March, 1990 and the work allotted was to be completed on or 1 A&C Act, for short.

2 Hereinafter, the Claimant-Appellant

2| Civil Appeal No. 8067 of 2019 before 6th May 1992 i.e., 18 months from the date of the agreement excluding the monsoon season.

2.3 It is undisputed that the work as allotted could not be completed by the Claimant-Appellant, for which, he held the authorities of the State responsible as they allegedly did not clear his bills, repeatedly at every stage and also due to delays caused by change of site and in delivery of material for such construction.

2.4 For settlement and adjudication of disputes, the parties to the contract resorted to the arbitral mechanism and resultantly, in Arbitration Petition dated 31st May, 2002, Mr. S.K Angadi, Chief Engineer (Retd.) stood appointed as the Arbitrator on 30th July, 2002.

PROCEEDINGS BEFORE THE LEARNED ARBITRATOR

3. Pursuant thereto, the Claimant-Appellant herein filed his claim before the learned Arbitrator totalling to Rs.18,06,439/- along with an interest payable thereupon @ 18% per annum, payable from 9th March, 1994 till date of payment.

4. Having heard both sides, the three primary issues identified were:-

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(a) inordinate delay in handing over of site for performance of contract;

(b) non-supply of working drawings and designs; and

(c) delay in supply of materials.

5. For each of these issues, the learned Arbitrator, upon examination of the evidence before him found the Respondents liable. A précis of the reasoning adopted, is as under:-

S.No.	Point of Consideration	Reasoning
1	Delay in handing over	1) Non handling over the entire site in time is one of the reasons which resulted in non-

	the entire site for total performance of the contract.	completion of the work within the stipulated time of 18 months. There is a delay of 9 months in handing over possession of complete site.

Possession of office building was handed over on 07.03.1990 Possession of quarters building was handed over on December 1990.

2	Delay in supply of working drawings, designs, etc.	1) Drawing showing typical excavation plan for footings, details of columns were issued to claimant during September 1990, with a delay of 6 months 2) The drawing of R28 was not supplied by April 1991 but on 1st July 1991. There was a delay of 3 months.

3) Drawing showing the details of 1st floor slab of the office of the Conservator of Forest was found to be prepared by 13.10.1992 but

4| Civil Appeal No. 8067 of 2019 supplied on 01.11.1992 i.e. after expiration of contract on 06.05.1992.

4) The drawings with details of lintel beams, roof beams, slab, etc of quarters was prepared by 05.10.1991 & supplied on 15.10.1991 but the changed site for construction was handed over to claimant on 14.02.1991.

3 In the matter of On study of documentary evidence, he found delay in supply adequate steel & cement required for the work of materials was not supplied by the respondent in time.

6. As such, against a total of 11 claims, amounts were awarded against 9 claims. The summary of the award is extracted as under:-

> SUMMARY OF THE AWARD S.No. Description of Claim Amount of Award Claim Amount 1 Payment on loss of Oh. and Rs. 83,300/- Rs. 83,300/-
>
> incidentals 2 Payment on loss of Profit Rs. 83,300/- Rs. 83,300/- 3 Payment on Idle labour Rs. 1,77,300/- Rs. 1,77,300/- 4 Payment on idle machinery Rs.98,500/- Rejected 5 Payment of extra expenses on Rs.24,000/- Rejected procurement of water at the changed site of work 6 Payment of extra expenses on Rs.15,800/- Rs.15,800/-

shuttering, centring, fabrication done earlier subsequently dismantled.

7 Payment on revised rates on the Rs.11,33,000/- Rs.9,67,300/-

work executed beyond the originally stipulated time 8 Payment on refund of freek rates Rs.33,469/- Rs.33,469/-

recovered in work bills 9 Payment on refund of security Rs.57,770/- Rs.57,770/-

deposit 10 Payment of interest, pre @18% p.a. on all Payment of arbitration, pendente lite and amounts due interest @ 18%

5| Civil Appeal No. 8067 of 2019 future interest from claim No.1 p.a. on all to 9 from, amounts due 09.03.94 till the from 09.3.94 till date of payment the date of payment 11 Cost of Arbitration Rs.1,00,000/- Rs.50,000/- PROCEEDINGS UNDER SECTION 34 OF THE A&C ACT

7. Assailing the same, the Respondent preferred a petition under Section 34 of the A&C Act in which the learned Civil Judge, Sirsi, found 2 points to be arising for his consideration which he recorded as: – "1. Whether the petitioner made out the proper grounds that the award passed by the arbitrator is not supported by sound reasonings and it is in arbitrary nature and it is liable to be set aside?

2. What order?"

8. The award passed by the learned Arbitrator was modified and the Respondents were directed to pay Rs.3,71,564 (25% of tender amount) along with Rs.10,000/- as costs towards the arbitration @ 9% interest. The reasons supplied for such modification, as they come forth upon a perusal of the judgement are:-

> 8.1 The change in site of the residential quarters was barely at the distance of 200m from the earlier site. Even if there was a change in site, the work of constructing the office building could have begun as there was no change in that regard but he had not even started
>
> 6| Civil Appeal No. 8067 of 2019 excavation in order to lay down a foundation. Therefore, the question of loss of payment to the labourers and materials collected for construction, does not arise and the losses allegedly suffered by the Claimant-Appellant were "only at his imagination".
>
> 8.2 On the machinery being idle, it was not explained as to how many days the same was idle. It is "for his whims and fancies the petitioner is claiming as if he has sustained loss".
>
> 8.3 So far as the claim for water facilities, the contention of the Respondents has been accepted that per the agreement, the Claimant-Appellant was to look after the same and therefore, Respondents would not be liable therefor.

8.4 Since it is the Claimant-Appellant who did not complete the construction in time, he could not make a claim for the rates for the year 1989–90 and cannot claim interest thereupon.

8.5 No evidence to lend support to the contention of the Claimant-

Appellant that there was a delay in supplying the material. On which material being supplied, was there a delay, is unexplained. Counter allegation, instead is that even after clearing all bills, the Claimant-Appellant had not picked up speed on the work. All the correspondence is only to escape payment of penalty.

7| Civil Appeal No. 8067 of 2019 8.6 The only delay is of handing over of the site of the residential house. The same was done on 7th March, 1990. The Claimant- Appellant has not explained that despite such handing over of possession by August 1990, no excavation work for the foundation had commenced.

8.7 For the changes in design, it is observed that since the changes were minor it does not require any extra payment. The same would only be payable if there was duplication of work/removal of earlier construction as per the alteration. 8.8 The cost of arbitration being awarded at Rs.50,000/- is “at exorbitant rate.” Even if the argument of delay and laches on part of the Department is accepted, “it cannot be ruled out that the Department always in right path” and the extent of the same cannot be accepted.

8.9 It was also observed that there was a justification for the learned Arbitrator to award an amount which is almost equal to the amount of tender, that too on such a high rate of interest which causes an undue encumbrance on the exchequer. 8.10 The remaining critical observations stand dealt with subsequently.

8| Civil Appeal No. 8067 of 2019 PROCEEDINGS UNDER SECTION 37 OF THE A&C ACT

9. The High Court, vide its judgement under challenge before us, has confirmed the modification of the arbitral award as has been done by the learned Civil Judge, Sirsi, dismissing the application on part of the Claimant-Appellant.

9.1 It has been observed that the primary dispute is in respect of claim No. 7 which is the grant of revised rates of the escalated cost of work. The High Court has held that the view of the Arbitrator that the Department is solely responsible for the breach of the contract, cannot be accepted as the shift in venue was only in respect of the residential quarters and not for the office complex. 9.2 The estimation of cost is based on the tender notification relating to the year 1989-90. Costs in the year 1992 could not be expected to have risen hundred percent as claimed. Nothing is reflected on record to show, what precluded the Claimant-Appellant from commencing the work of the office building. It is on this ground that the claim of escalation of the Claimant-Appellant be allowed by the learned Arbitrator, has been termed as perverse and contrary to the public policy.

9| Civil Appeal No. 8067 of 2019 9.3 Findings of delay being solely on account of the Department, cannot be countenanced and the quantification of damages in respect thereto is unreasonable. “It would be a case of misconduct on the part of the arbitrator amenable to Section 34 of the Act” 9.4 Claim No. 3 in respect of idle labour being allowed to the tune of Rs.1,77,300/- “shocks the conscience of the court.” It is so because there was no basis for the labour to be idle. 9.5 The award of Rs.50,000/- towards cost of arbitration is excessive. It was further observed that escalation of costs cannot be granted on “assumptions and presumptions” and, therefore, awarding the claims, that too almost equal to the tender amount, cannot be sustained.

10. The learned Civil Judge, Sirsi, to restate, modified the award passed by the learned Arbitrator reducing the amount awarded as also interest thereupon, i.e., Rs.14,68,239/- @ 18% to only 25% of the tender amount which equals to Rs.3,71,564/- and the interest percentage thereon was reduced to 9%. This was found to be justified by the learned Single Judge.

CONSIDERATION AND CONCLUSION

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11. It is in this background, that we are required to consider whether the modification of the arbitral award as carried out by the learned Civil Judge as confirmed by the High Court, was justified within law?

12. It would be useful to examine the expositions of this Court on the scope to interfere with arbitral awards under Sections 34 & 37 of the A&C Act.

13. The Judgment and Order of the learned Civil Judge was dated 22nd April 2010.

14. The position as to whether an arbitral award can be modified in the proceedings initiated under Sections 34/37 of the A&C Act is no longer res integra. While noting the provisions, more specifically, Section 34(4) of the A&C Act; the decisions rendered by this Court, including the principles of international law enunciated in several decisions recorded in the treatise “Redfern and Hunter on International Arbitration, 6th Edition”, this Court in National Highways Authority of India v. M. Hakeen and Another3, categorically held that any court under Section 34 would have no jurisdiction to modify the arbitral award, which at best, given the same to be in conflict with the grounds specified under Section 34 3 (2021) 9 SCC 1 (2-Judge Bench)

11| Civil Appeal No. 8067 of 2019 would be wholly unsustainable in law. The Court categorically observed that any attempt to “modify an award” under Section 34 would amount to “crossing the Lakshman Rekha”.

15. On the exact same issue we may also note another opinion rendered by this Court in Dakshin Haryana Bijli Vitran Nigam Limited v. Navigant Technologies Private Limited4 in the following terms:-

> "44. In law, where the court sets aside the award passed by the majority members of the Tribunal, the underlying disputes would require to be decided afresh in an appropriate proceeding. Under Section 34 of the Arbitration Act, the court may either dismiss the objections filed, and uphold the award, or set aside the award if the grounds contained in sub- sections (2) and (2-A) are made out. There is no power to modify an arbitral award. In McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held as under : (SCC p. 208, para 52) "52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it." (Emphasis Supplied) 4 (2021) 7 SCC 657 (2-Judge Bench)
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16. The principle stands reiterated as late as 2023 in Larsen Air Conditioning and Refrigration Company v. Union of India & Others5.

17. We may notice certain principles to be considered in adjudication of challenges to arbitration proceedings of this nature. It is a settled principle of law that arbitral proceedings are per se not comparable to judicial proceedings before the Court (Dyna Technologies Private Limited v. Crompton Greaves Limited6). The Arbitrator's view, generally is considered to be binding upon the parties unless it is set aside on certain specified grounds. In the very same decision taking note of the opinion as is in "Russel on Arbitration", reiterated the need for the Court to look at the substance of the findings, rather than its form, stood reiterated and the need for adopting an approach of reading the award in a fair and just manner, and not in what is termed as "an unduly literal way". All that is required is as to whether the reasons borne out are intelligible or not for adequacy of reasons cannot stand in the way of making the award to be intelligibly readable. 5 2023 SCC On Line 982 (2-Judge Bench) 6 (2019) 20 SCC 1 (3-Judge Bench)

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18. Emphasizingly, it is reiterated that if the view taken by the Arbitrator is a plausible view, no interference on the specified grounds is warranted (Konkan Railway Corpn. Ltd. v. Chenab Bridge Project 7).

19. It is also a settled principle of law that an award passed by a technical expert is not meant to be scrutinised in the same manner as is the one prepared by a legally trained mind (Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited8).

20. We are dealing with an award passed on 18th February, 2003, prior to the amendment brought in Section 34 by virtue of the Arbitration and Conciliation (Amendment) Act, 2015. For the purpose of ready reference the relevant portion of the amended and the unamended provisions are extracted as under :-

> "Prior to 2015 Amendment
>
> 34. Application for setting aside arbitral award. -
>
> (1) Recourse to a court against an arbitral awärd may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> (2) An arbitral award may be set aside by the court only if- ...
>
> (v) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the 7 (2023) 9 SCC 85 (Three Judge Bench) 8 (2022) 1 SCC 131 (Two Judges Bench)
>
> 14| Civil Appeal No. 8067 of 2019 parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
>
> (b) the court finds that—
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
>
> (ii) the arbitral award is in conflict with the public policy of India.

Explanation.-Without prejudice to the generality of sub- clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section

81. (Emphasis supplied) Post 2015 Amendment

34. Application for setting aside arbitral award.—(1) 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 sub-section (3). (2) An arbitral award may be set aside by the Court only if— ...

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy

15| Civil Appeal No. 8067 of 2019 of Indian law shall not entail a review on the merits of the dispute.] [(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:

> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]"
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> 21. In so far as the state of the law prior to such Amendment is concerned, the situation stands encapsulated by this Court, in DDA v. R.S Sharma9 where the grounds whereby courts may intervene against arbitral award, were listed.
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> 22. Observations of this Court in Associate Builders v. DDA10 are also of note. It was held:
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> "15. This section in conjunction with Section 5 makes it clear that an arbitration award that is governed by Part I of the Arbitration and Conciliation Act, 1996 can be set aside only on grounds mentioned under Sections 34(2) and (3), and not otherwise. Section 5 reads as follows:
>
> "5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."
>
> 16. It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimise the supervisory roles of courts in the

arbitral process.

9 (2008) 13 SCC 80 (2 Judge Bench) 10 (2015) 3 SCC 49 (2 Judge Bench)

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17. It will be seen that none of the grounds contained in sub-

section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances." (Emphasis Supplied)

23. As it is evident from the extracted provisions, as above that prior to the Amending Act, it was open for the Court to examine the award as to whether it was in conflict with, (a) public policy of India; (b) induced or affected by fraud; (c) corruption; and (d) any violation of the provisions of Section 75 and 81 of the A&C Act.

24. In the instant case, the only provision under which the award could have been assailed was for it to have been in conflict with the public policy of India. This concept has been elaborately considered by this Court in Associate Builders (supra); Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India11, in the following terms:-

25. In Associate Builders (supra) the Court observed-

"19. When it came to construing the expression "the public policy of India" contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] held: (SCC pp. 727-28 & 744-45, paras 31 & 74) "31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy 11 (2019) 15 SCC 131 (Two Judges Bench)

17| Civil Appeal No. 8067 of 2019 connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void." (Emphasis supplied)

26. Ssangyong Engineering (supra) followed the observations of Associate Builders (supra). To efficiently encapsulate the extent thereof particularly in the context of Indian awards, we may refer only to para 37 where it has been held:-

"37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), 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

18| Civil Appeal No. 8067 of 2019 backdoor when it comes to setting aside an award on the ground of patent illegality."

27. The position in Associate Builders (supra) was recently summarised as hereinbelow recorded by Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum12 "42. In Associate Builders, this Court held that an award could be said to be against the public policy of India in, inter alia, the following circumstances:

42.1. When an award is, on its face, in patent violation of a statutory provision.

42.2. When the arbitrator/Arbitral Tribunal has failed to adopt a judicial approach in deciding the dispute. 42.3. When an award is in violation of the principles of natural justice.

42.4. When an award is unreasonable or perverse. 42.5. When an award is patently illegal, which would include an award in patent contravention of any substantive law of India or in patent breach of the 1996 Act.

42.6. When an award is contrary to the interest of India, or against justice or morality, in the sense that it shocks the conscience of the Court." JUDGMENT PASSED UNDER SECTION 34 A&C ACT

28. A perusal of the judgment and order of the learned Civil Judge, in the considered view of this Court, does not reflect fidelity to the text of the statute. Nowhere does it stand explained, as to, under which ground(s) mentioned under Section 34 of the A&C Act, did the Court find sufficient reason to intervene. In fact, quite 12 (2022) 4 SCC 463 (2-Judge Bench)

19| Civil Appeal No. 8067 of 2019 opposite thereto, the Court undertook a re-appreciation of the matter, and upon its own view of the evidence, modified the order.

29. As the above extracted judgment shows, merits of the award are only to be gone into, if the award is demonstrated to be contrary to the public policy of India. The reasons recorded by the learned Civil Judge for modifying the arbitral award, as reflected from a perusal thereof, have been recorded in an earlier section of the judgment. None of those reasons even so much as allude to the award being contrary to the public policy of India, which would enable the court to look into the merits of the award.

30. We have carefully perused the award passed by the Arbitrator in which he has not only referred to and considered the materials on record in their entirety but also, after due application of mind, assigned reasons for arriving at this conclusion, either rejecting, accepting or reducing the claim set out by the Claimant-Appellant. Noticeably, during the arbitral proceedings none of the parties raised any objection to the Arbitrator adjudicating the dispute, be it on any ground, including bias. Each one of the claims stands separately considered and dealt with.

31. We find that the view taken by the Arbitrator is a plausible view and could not have been substituted for its own by the Court.

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32. The reasons assigned by the Court under Section 34 of the A &C Act, to our mind, are totally extraneous to the controversy, to the lis between the parties and not borne out from the record. In fact, they are mutually contradictory.

32.1 In awarding an amount of 25% of the tender amount (incorrectly recorded as “over the tender amount” in some parts of the judgment of the learned Civil Judge, Sirsi) in favour of the Claimant-Appellant, the Court has ipso facto accepted that the Claimant-Appellant had not breached the terms of the contract. In fact, the Court appears to have accepted the Claimant’s contention of delay in handing over the site drawings and supply of materials. The Court while noticing the change in the drawings, resorted to, a misadventure by observing that the changes in the drawings were “only minor” in the dimension of beam which as we find the Court have contradicted itself by recording the same to have been “noticed as essential in the execution of the contract”. The Court, in our considered view had no business to state that the Claimant is claiming the amount is from the pocket of the concerned engineer or his property.

“...Whether the claimant is claiming the such amount is from the pocket of concerned Engineers or from his property, whey should so much amount be paid from exchequer

21| Civil Appeal No. 8067 of 2019 amount, it is heavily cast on the tax payer, that has to be consider by the court…" 32.2 Further observations as we extract hereunder, justifying the interference in the award, in our considered opinion, are totally scandalous: -

> "…Admittedly the arbitrator who is retired Engineer after retirement there will be no holding on the department, when the claimant is going to benefit so much amount there will be benefit to the arbitrator…" 32.3 The Court imputed its personal knowledge in assigning reasons by observing :-
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> "…Even in this case also if the report of the arbitrator is accepted as it is, it is heavy burden on the exchequer not on the department…" 32.4 The reasoning given by the Court in interfering with the award which is extracted immediately hereafter, in our view, is preposterous: -
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> "…It is the common sense and the general observation, whenever the work is entrusted to any contractor to put up the construction what they do is, they use to start excavation to lay a foundation. It is not the case of the 2nd opponent regarding digging at original spot or laying any foundation for construction of the residential house. So, under such circumstances the alleged loss pleaded by the opponent No.2 is only at his imagination."
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> 22| Civil Appeal No. 8067 of 2019 32.5 For it is no business of the Court to consider the burden on the exchequer. All that is required by the Court is to see as to whether the contracting parties have agreed to bind themselves to the terms with the only supervisory jurisdiction of the Court to consider breach thereof, in the light of the grounds specified under Section 34.
>
> 32.6 To our mind, the court lost sight of the fact that the civil contract was composite in nature that is having contracted both of the building of the office and residence together. In these circumstances, the contractor could not have commenced work of part of the project when the complete site and the drawings were not handed over to him. In the absence of the parties have agreed otherwise, work could not have commenced. Hence, observation of the court, advisory in nature, for the contractor to have commenced the work for one part of the contract is unwarranted and uncalled for, in fact perverse.
>
> 32.7 The other observation that there was a delay on the part of the contractor in completing the work or speeding up the work does not reflect in the record. They are nothing short of mere conjectures.

This is more so in view of the absence of invocation of the

23| Civil Appeal No. 8067 of 2019 arbitration clause or initiation of the proceedings thereunder on the part of the Respondent against the contractor as also not raising any counter claims for

adjudication by the Arbitrator. 32.8 Accounting for the legal position, the court could have at best set aside the award and could not modify the same. 32.9 We also notice the learned Arbitrator, to have accepted the contention of the Claimant-Appellant that there was a delay in supply of drawings, which in turn caused delay in placing the orders for steel and other such requirements. The Civil Judge had disagreed therewith on a mere reference to "Ex. R 38 to 95" showing prompt supply. There is no discussion whatsoever. Another instance is noteworthy. It was observed that the question of idleness of the labour does not arise if there was another building to be constructed, and therefore, such claim cannot be paid. This is a clear instance of the court supplanting its view in place of the Arbitrator, which is not a permissible exercise, and is completely de-hors to the jurisdiction under Section 34.

33. As such, the modification of the arbitral award by the learned Civil Judge, Sirsi, does not stand scrutiny, and must be set aside. JUDGMENT UNDER SECTION 37 A&C ACT

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34. Moving further, we now consider the judgment impugned before us, i.e., the order of the High Court upholding such modification, under the jurisdiction of Section 37 of the A&C Act.

35. It has been observed by this Court in MMTC Ltd. v. Vedanta Ltd.13 "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)

36. This view has been referred to with approval by a bench of three learned Judges in UHL Power Company Ltd v. State of Himachal Pradesh14. In respect of Section 37, this court observed:-

> "16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed." 13 (2019) 4 SCC 163 (2 Judge Bench) 14 (2022) 4 SCC 116 (3-Judge Bench)
>
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37. This Court has not lost sight of the fact that, as a consequence to our discussion as aforesaid, holding that the judgment and order under Section 34 of the A&C Act does not stand judicial scrutiny, an independent evaluation of the impugned judgment may not be required in view of the holding referred to supra in MMTC Ltd. However, we proceed to examine the same.

38. We may also notice that the circumscribed nature of the exercise of power under Sections 34 and 37 i.e., interference with an arbitral award, is clearly demonstrated by legislative intent. The Arbitration Act of 1940 had a provision (Section 15) which allowed for a court to interfere in awards, however, under the current legislation, that provision has been omitted.15

39. The learned Single Judge, similar to the learned Civil Judge under Section 34, appears to have not concerned themselves with the contours of Section 37 of the A&C Act. The impugned judgment reads like a judgment rendered by an appellate court, for whom re- examination of merits is open to be taken as the course of action.

40. We find the Court to have held the award to be perverse and contrary to public policy. The basis for such a finding being the 15 Larsen Air Conditioning and Refrigration Company v. Union of India and Others 2023 SCC OnLine 982 (2-Judge Bench)

26| Civil Appeal No. 8067 of 2019 delay on the part of the contractor in completion of the work which "could have been avoided". Significantly, as we have observed earlier such a finding is not backed by any material on record.

41. What appears to have weighed with the court is that the factoring of the cost escalation between the years 1989-90 and 1992 by 100% was exaggerated. But then equally, there is no justification in granting lump sum escalation by 25% of the contract value. Well, this cannot be a reason to modify the award for the parties are governed by the terms and conditions and the price escalation stood justified by the petitioner based on cogent and reliable material as was so counted by the Arbitrator in partly accepting and/or rejecting the claims.

42. In our considered opinion, the court while confirming the modification of the award committed the very same mistake which the Court under Section 34 of the A&C Act, made.

The Court under Section 37 had only three options:-

(a) Confirming the award of the Arbitrator;

(b) Setting aside the award as modified under Section 34; and

(c) Rejecting the application(s) under Section 34 and 37.

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43. The learned single Judge has examined the reasoning adopted by the learned Arbitrator in respect of certain claims (claims 3 and 7, particularly) and held that allowing a claim for escalation of cost, was without satisfactory material having been placed on record and is "perverse and contrary to the public policy". However, it appears that such a holding on part of the Judge is without giving reasons therefor. It has not been discussed as to what the evidence was before the learned single Judge to arrive at such conclusion. This is of course, entirely without reference to the

scope delineated by various judgements of this Court as also, the statutory scheme of the A & C Act.

44. Having referred to J.G Engineers (P) Ltd. v. UOI16 and more particularly para 27 thereof, it has been held that the award passed by the learned Arbitrator is "patently illegal, unreasonable, contrary to public policy." There is no reason forthcoming as to how the holding of the learned Arbitrator flies in the face of public policy.

ON INTEREST

45. On the issue of interest, we notice that the Arbitrator has awarded interest @ 18% p.a., w.e.f. 09 March 1994 which stood 16 (2011) 5 SCC 758 (2 Judge Bench)

28| Civil Appeal No. 8067 of 2019 reduced to 9%. The transaction being commercial in nature, we see no reason as to why the claimant could not be entitled to interest in terms of the rate quantified by the Arbitrator which includes the period of pre-arbitration, pendante lite and future. We notice this Court to have stated in Hyder Consulting (UK) Ltd. v. State of Orissa17, through S.A. Bobde, J. (as His Lordship then was) speaking for the majority as under:

> "4. Clause (a) of sub-section (7) provides that where an award is made for the payment of money, the Arbitral Tribunal may include interest in the sum for which the award is made. In plain terms, this provision confers a power upon the Arbitral Tribunal while making an award for payment of money, to include interest in the sum for which the award is made on either the whole or any part of the money and for the whole or any part of the period for the entire pre-award period between the date on which the cause of action arose and the date on which the award is made... The significant words occurring in clause (a) of sub-section (7) of Section 31 of the Act are "the sum for which the award is made". On a plain reading, this expression refers to the total amount or sum for the payment for which the award is made. Parliament has not added a qualification like "principal" to the word "sum", and therefore, the word "sum" here simply means "a particular amount of money". In Section 31(7), this particular amount of money may include interest from the date of cause of action to the date of the award.
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> ... .
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> 7. Thus, when used as a noun, as it seems to have been used in this provision, the word "sum" simply means "an amount of money"; whatever it may include — "principal" and "interest" or one of the two. Once the meaning of the word "sum" is clear, the same meaning must be ascribed to the word in clause (b) of sub-section (7) of Section 31 of the Act, where it provides that a sum directed to be paid by an arbitral award

17 (2015) 2 SCC 189 (3-Judge Bench)

29| Civil Appeal No. 8067 of 2019 “shall … carry interest …” from the date of the award to the date of the payment i.e. post-award. In other words, what clause (b) of sub-section (7) of Section 31 of the Act directs is that the “sum”, which is directed to be paid by the award, whether inclusive or exclusive of interest, shall carry interest at the rate of eighteen per cent per annum for the post-award period, unless otherwise ordered.

…

9. The purpose of enacting this provision is clear, namely, to encourage early payment of the awarded sum and to discourage the usual delay, which accompanies the execution of the award in the same manner as if it were a decree of the court vide Section 36 of the Act.” (Emphasis Supplied)

46. Keeping in view the aforesaid observations of this Court, it cannot be doubted that the Claimant-Appellant is entitled to interest. We find that the learned Arbitrator, as hitherto observed, has awarded 18% interest and the same stood reduced by the Courts below to 9% without any legal basis therefor. In exercise of our powers under Article 142, we deem it appropriate to, in order to ensure substantial justice, inter se the parties, of awarding interest @ 9 % p.a. from the date of award pendante lite and future, till date of payment.

CONCLUSION

47. In the absence of compliance with the well laid out parameters and contours of both Section 34 and Section 37 of the A&C Act, the impugned judgement(s) referred to in Para 1 (supra) are required to

30| Civil Appeal No. 8067 of 2019 be set aside. Consequently, the award dated 18th February 2003 of the learned Arbitrator is restored, for any challenge thereto has failed.

48. The appeal is allowed with a direction to the State of Karnataka to expeditiously pay the amount. No costs.

.....J. (ABHAY S. OKA) .....J. (SANJAY KAROL) Place : New Delhi;

Dated: 4th January 2024.

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