Serial No. 06
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Arb.A.No.1/2018 with
MC (Arb.A.) No.1/2018

Date of order: 31.03.2022

State of Meghalaya & ors Vs. M/s Patel Engineering Private Limited

Coram:
Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellants : Mr. A. Kumar, Advocate-General with
Ms. S Laloo, GA
Mr. AH Kharwanlang, GA

For the Respondent : Mr. A. Dholakia, Sr.Adv with
Mr. R. Dangwal, Adv
Ms. P. Prakash, Adv

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

The appeal is directed against a judgment and order dated March 29, 2018 on a challenge to an arbitral award dated December 9, 2010 in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996.

2. The contract between the parties pertained to the construction of a dam near Mawphlang. There is no dispute that the work has been completed. In course of the execution of the contract, the work actually executed deviated from what was contemplated under the contract in respect of some items of work. Several clauses in the detailed contract provided for the mechanism to deal with such a situation. The claims of the respondent contractor in this case were in respect of the negative deviation in the work relating to three items, in

the sense that in each case a much higher quantum of work was contemplated than the contractor was actually required to execute.

3. Three principal grounds have been urged by the State to discredit the award rendered by a tribunal of three retired High Court judges. According to the State, the very acceptance of the claim on account of deviation is at variance with the contract. In other words, the appellants question the authority of the Arbitral Tribunal to travel beyond the bounds of the contract to prescribe a remedy that was not contemplated in the contract. The second count of attack is based on the amendment to Section 28 of the Contract Act, 1872. According to the appellants, the bid was submitted by the contractor in this case on August 6, 1996 and the acceptance of the bid was communicated to the contractor on August 20, 1996. On the rudimentary principle of offer and acceptance and the formation of the contract thereupon, the State contends that the substantive amendment of Section 28 of the Act of 1872 brought about on January 8, 1997 would not govern the contractual terms. While on this aspect, it may be noticed that the contract between the parties was executed on April 22, 1997, more than three months after the relevant amendment was incorporated in Section 28 of the Act of 1872. The final ground of challenge to the arbitral award is in it providing for pendente lite interest despite the relevant clause in the contract prohibiting the payment of interest on any account whatsoever.

4. On the first ground, the appellants refer, in particular, to clause 33 of the general conditions of contract (GCC) which is intituled as "Deviation". Such clause covers various circumstances in which any deviation may occur from the original design or drawing or the items of work contemplated to be executed. The four major sub-clauses thereunder chart out the course of action that would be followed by the parties qua revision of rates and charges as a consequence of any deviation.

5. Clause 33.1 permits the engineer-in-charge to call for any deviation in the original specifications or drawings or the like as may be necessary for the execution of the work. The clause specifies that such deviation or extra work or additions or omissions or alterations or substitutions would be deemed to be an integral part of the contract and it would not do for the contractor to cite the addition or alteration or variation or omission to not perform the contract. Clause 33.2 deals with the rates for the items of work as may be required to be executed due to the deviation called for by the engineer. It is necessary to see clause 33.2 in its entirety, except the detailed modalities pertaining to the third limb thereof:

> "33.2 The rates for such item of works as are required to be executed due to deviations, as stated aforesaid shall be payable in the manner as stated hereunder :
>
> (i) The rates already provided in the scheduled of quantities, shall apply in respect of the same item(s) of work to be executed due to variations.

(ii) The rates of such items, as far as practicable, shall be derived from the quoted rates of analogous item(s) in the schedule of quantities after actual observance at site. The decision to select analogous item(s) shall be taken by the Engineer-in-charge which shall be conclusive and binding on the contractor.

(iii) Provided where analogous items are not available in the schedule of quantities the rates for such items to be executed shall be determined by the Engineer-in-charge on the basis of actual analysed cost taking the following into consideration:

…"

6. As indicated above, the details omitted to be quoted pertain to how, in terms of clause 33.2(iii) of the GCC, certain parameters are to be taken into account to ascertain the rates for such deviated items of work for which there is nothing analogous in the agreed schedule of quantities to go by.

7. It is also necessary to see amended clause 33.4 of the GCC as has been set out at internal page 9 of the award under challenge:

33.4 (<u>After amendment</u>):-

"Both parties agreed that the contract rates shall be valid upto a variation of + or – 30% (plus or minus thirty percent) of the scheduled quantities of items in Schedule of Quantities as stipulated in the tender documents with corrections agreed to during pre-bid meeting stands. However, the last sentence that "No claim on account of (-) minus variation in contract shall be entertained "is not meaningful in view of the statement agreed at pre-bid meeting."

8. For the completeness of the discussion on such aspect, it may be noticed that initially the relevant clause did not provide for additional payment to the contractor for any negative deviation in any executed item of work, in the sense that the contractor would be entitled to additional payment if there

was any positive deviation (extra work) above 30 per cent of the scheduled work, but the contractor could not claim any additional amount for any negative deviation (less work) in any executed item of work. This was later modified to incorporate the additional charges to be applicable if the extent of the deviation in the executed work was either above 30 per cent of the work originally envisaged or even above 30 per cent less than the work originally envisaged in respect of the particular item. Also, as a consequence of the amendment, the embargo on the additional payment being claimed for negative deviation stood removed as will appear from last three lines of the amended clause above.

9. According to the contractor, in respect of the three items of work, the actual execution of work fell woefully short of the original quantum envisaged under the contract. Accordingly, a claim was fashioned as per the table below:-

"Sl.No.	Description of Item	Quantity as per Schedule of Quantities	Quantity actually executed	Quantity executed in % of BOQ	Variation Limit	Actual Variation
1.	Drilling holes of minimum 75 mm dia vertical or inclined in all formation of rock/concrete by rotary method including washing with air and water under pressure for core drilling.	1430 M [Schedule Item No.4.3.1 (a) + (b)]	145 M	10.14%	30% (± plus or minus)	89.86% (-) Minus Variation
2.	M-15 controlled	59100 M^3	38864.08	65.76%	30%	34.24%

	concrete with max 150 mm size aggregate for non-overflow section, spillway section, bucket, training wall, concrete gravity section (Zone C-1 as indicated in the drawing)	(Schedule Item No. 8.1.2)	4 M^3		(± plus or minus)	(-) Minus Variation
3.	M-20, controlled concrete with 20 mm max size of aggregate for spillway bridge slabs, beam, parapet and kerbs (Zone C-6 as indicated in the drawing)	650 M^3 (Schedule Item No. 8.1.3)	185.886 M^3	28.60%	30% (± plus or Minus)	71.40% (-) Minus Variation"

10. In respect of the deviation aforesaid, the contractor claimed a total amount of Rs.4,47,45,787.00/- in principal as per a further table incorporated in the statement of claims as follows:

"Item No.	Rate as Per Agreement per M^3	Rate claimed by Claimant per M^3	Quantity In M^3	Amount due in Rs.
4.3.1	Rs. 2, 750	Rs. 5, 200	145.00	3,55,250.00
8.1.2	Rs. 2, 163	Rs. 3, 261	38864.08	4,26,72,764.00
8.1.3	Rs. 3, 500	Rs. 12, 742	185.86	17, 17,773.00
			Total Rs.	4,47,45,787.00"

11. In dealing with such head of claim, the Arbitral Tribunal noticed that there was no formula which was prescribed in the contract in respect of the deviation of work greater than 30 per cent of the work originally envisaged, whether on the negative or on the positive side. Clearly, such opinion of the Arbitral Tribunal is unimpeachable as clause 33.4, indeed, does not provide for

a mechanism for calculation of the additional costs on an account of the vast deviation in the execution of any item of work from what may have been originally envisaged in respect thereof.

12. The contractor reasoned before the Arbitral Tribunal that since the price payable for the additional items of work which the contractor had to execute in terms of the contract and at the behest of the engineer would have to be determined in terms of clause 33.2 of the GCC, a similar basis for ascertaining the additional payment that the contractor would be entitled to should apply to the instances of deviation of more than 30 per cent in the actual execution in respect of any item of work, whether on the negative or the positive side. The contractor further claimed before the Tribunal that since there could be no analogous or comparable work for the purpose of determining the additional costs to be paid for the negative deviation of more than 30 per cent in respect of any item of work, the assessment had to be made in accordance with the guidelines and parameters detailed in the third limb of clause 33.2 of the GCC.

13. In discussing the claim, the Arbitral Tribunal first noticed the amendment to clause 33.4 and, after a detailed discussion on the aspect, agreed that the parameters in clause 33.2(iii) may have to be applied for determining the rates that the contractor would be entitled to on account of any major deviation in the work. In essence, the Arbitral Tribunal held that when a

contractor had quoted the rates upon anticipating a certain quantum of work to be executed, if the actual quantum of work executed was much less than what had been originally bargained for, the contractor had to be compensated on account of mobilising extra men, masons, machines, equipment and material to execute the larger chunk of work specified in the contract.

14. The Arbitral Tribunal then observed that the uncovered costs had also to be spread over the executed quantity and that would be the appropriate approach. It was an aspect that the Arbitral Tribunal, in the backdrop of the wide words of the arbitration clause in this case, was empowered to adjudicate on and the same cannot be called into question in the limited scope of judicial review available under Section 34 of the said Act.

15. It must be appreciated, at this stage, that the appellants here have challenged the award of the amount as claimed by the contractor both in principle and as to the quantum awarded. As to the underlying basis for the head of claim, the further contention of the appellants is that since clause 33.2 indicated how the rate of additional or altered work had to be determined, the Arbitral Tribunal ought to have confined itself to such clause for the purpose of determining, if at all, whether the contractor was entitled to any additional sum. The State refers to the award and the reliance therein on the rates in such regard determined by the Central Water Commission and the award is assailed on the ground that the Arbitral Tribunal took irrelevant considerations into

account by seeking to apply the CWC guidelines pertaining to deviation rather than confining the determination to within the scope of the contractual terms.

16. The State's contention in such regard is completely flawed. It is evident from the award that the Assistant General Manager of the contractor was examined in course of the arbitral reference and such official asserted that, "the respondents had referred to the claims of the claimant in respect of positive variation and extra works for fixation of rates to Central Water Commission and new rates were arrived at by the respondents and the Central Water Commission relying upon the guidelines of the Central Water Commission on River Valley Projects ...".

17. The arbitral award went on to observe that the evidence of the concerned official "virtually remains unassailed". The Arbitral Tribunal then reasoned as follows:

> "... The crux of the argument of ... learned counsel for the respondents centered around the question of payment of compensation for negative variation. Since the price for positive variation was received as per C.W.C. guidelines and amount paid, the claim for negative variation prepared following the guidelines of the same authority cannot be rejected unless errors in calculation is *(sic, are)* pointed out. The respondents have not challenged the details of calculation in Ext.C-IV/26. C-IV/27 and C-IV/28 in any manner".

18. Thus, what is apparent from the award is that the principle on which the Arbitral Tribunal treated the matter was that since for positive variation in the quantum of work executed, the CWC guidelines had been resorted to by

the parties by abandoning the parameters indicated in clause 33.2(iii); the same CWC guidelines ought to be applicable to the negative variation in work. It was a possible view that fell within the domain of the Arbitral Tribunal and the same cannot be questioned on the basis of any permissible ground under Section 34 of the said Act.

19. It must be added that it does not lie in the mouth of the appellants at this stage to question the quantum awarded on such head of claim since, admittedly, the appellants herein did not question the calculations furnished by the contractor on the basis of CWC guidelines before the Arbitral Tribunal.

20. There is no merit in the principal ground urged on behalf of the appellants and considerable Court time has been wasted in such regard.

21. As to the so called relinquishment of rights in terms of a clause of the contract, the appellants refer to clause 39.1 of the GCC that speaks of a time-limit for claims to be made by the contractor. The relevant clause reads as follows:

> "39.1 Any claim raised by the contractor should have been registered with the Engineer-in-charge and not before any subordinate authority within 90 (ninety) days. He is precluded from raising any such claim after the expiry of the above period".

22. In support of the appellants' case that since the acceptance of the offer in this case was completed prior to the amendment to Section 28 of the Contract Act coming into effect on January 8. 1997, a judgment reported at

(2016) 9 SCC 720 *(Union of India v. Indusind Bank Ltd)* has been placed. The judgment is instructive as it goes into various previous Law Commission recommendations for the amendment of Section 28 of the Contract Act and the ultimate amendment thereof. The judgment also dwelt on whether the amendment was substantive or it was clarificatory or declaratory in nature. The discussion in such regard concludes with the observation that it was a substantive amendment that was brought about and, as a consequence, it would operate prospectively since the amendment did not provide for any retrospective operation thereof. However, the dictum in such case is confined to the rule enunciated that a clause in any contract entered into subsequent to the amendment to Section 28 of the Contract Act which falls foul of the amended provision will be invalid, but a clause in any contract executed prior to such statutory amendment will be governed by the unamended provision.

23. Paragraph 24 of the report in *Indusind Bank Ltd* may be seen in the present context:

> "24. On a conspectus of the aforesaid decisions, it becomes clear that Section 28, being substantive law, operates prospectively, as retrospectivity is not clearly made out by its language. Being remedial in nature, and not clarificatory or declaratory of the law, by making certain agreements covered by Section 28(*b*) void for the first time, it is clear that rights and liabilities that have already accrued as a result of agreements entered into between parties are sought to be taken away. This being the case, we are of the view that both the Single Judge and the Division Bench were in error in holding that the amended Section 28 would apply."

24. This second ground of challenge to the arbitral award may be dealt with on the basis of a simple reference to the fact that the contract in this case was executed between the parties on April 22, 1997, more than three months after the statutory amendment came into effect. However, the additional argument made here is that since the acts of offer and acceptance were completed by August 20, 1996, the amended provision would not apply in this case.

25. The mere acceptance of an offer can lead to the formation of a contract and the rights and obligations of the parties are somewhat determined upon the acceptance of an offer. However, the exact rights and obligations of the parties in, inter alia, how the work would be executed and what would be regarded as executed terms and what other as executory terms are spelt out only upon the formation of the detailed contract and its due execution. In this case, the appellants' argument may have been acceptable and the dictum in *Indusind Bank Ltd* applied if the acceptance of the offer or any letter of intent issued in August, 1996 contained the stipulation as in clause 39.1 of the GCC. But that is not the appellants' case. Such clause was contained in the contract and, as such, it was only upon the parties executing the contract on April 22, 1997 that clause 39.1 of the GCC came to be born, so to say.

26. Accordingly, the appellants' second ground of challenge fails and, on the basis of the dictum in *Indusind Bank Ltd*, it is held that since the contract in

this case was executed after Section 28 of the Contract Act was amended, it is such amended provision which will govern the parties. Accordingly, clause 39.1 of the GCC would have to be read down or seen to be invalid as a consequence of amended Section 28 of the Contract Act.

27. As an aside, it is respectfully submitted that the dictum in *Indusind Bank Ltd*, binding as it is under Article 141 of the Constitution, may be worth revisiting. Of course, this may only be an academic exercise as more than a quarter of a century has elapsed after the relevant amendment was introduced in Section 28 of the Contract Act. There is no doubt that the *ratio decidendi* in *Indusind Bank Ltd.* is that the "rights and liabilities that have already accrued as a result of agreements entered into between parties" prior to the amendment coming into effect would not be affected by the amendment of Section 28 of the Contract Act. However, it is submitted that the more appropriate consideration would be the date when the claim is made and such claim is sought to be resisted on the ground of the relinquishment clause in the contract between parties, irrespective of when the contract may have been entered into.

28. Section 28 as amended in 1997 makes an agreement by which any party thereto is absolutely restricted from enforcing his rights under or in respect of any contract by usual legal proceedings or which limits the time for enforcement of rights or which extinguishes the rights of any party or discharges any party from any liability, under or in respect of any contract on

the expiry of a specified period so as to restrict any party from enforcing his rights, void to such extent. That would imply that, irrespective of when the contract between the parties is entered into, the relevant date would be when a claim is asserted, whereupon the relinquishment clause in the agreement is cited to deny the claim. It is not as if the entirety of the contract is voided by Section 28 of the Contract Act; it is only such part of the contract which is a derogation of the rule that is indicated in the provision, that is voided. If a claim was made prior to January 8, 1997 and by virtue of a relinquishment clause in the governing agreement, such claim could not have been made or pursued, Section 28 of the Contract Act would not come into play. However, if the claim was made subsequent to January 8, 1997 and the relinquishment clause in an agreement executed prior to January 8, 1997 was cited to relinquish the claim, the relinquishment will not apply to the extent it is at variance with Section 28 of the Contract Act. The date of the execution of the contract may not be of any significance. If the disability under a relinquishment clause had fastened to a party prior to the amendment being effected in Section 28 of the Contract Act, the amendment will not have any effect. However, if the disability in terms of the relinquishment clause in the contract does not fasten to the party prior to the amendment coming to the effect, by virtue of the amendment, the relinquishment clause can no longer be of any effect.

29. The final limb of argument pertains to the award of interest. The appellants have relied on paragraph 34 of the three-Judge Bench judgment in a reference reported at (2016) 6 SCC 36 *(Union of India v. M/s Ambica Construction)*:

> "34. Thus, our answer to the reference is that if the contract expressly bars the award of interest pendente lite, the same cannot be awarded by the arbitrator. We also make it clear that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal, as ouster of power of arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court, it would be for the Division Bench to consider the case on merits."

30. Even without referring to any other material and on the basis of the binding law as laid down at paragraph 34 of the judgment in *Ambica Construction*, it is evident that there is no merit in the appellants' suggestion that by virtue of the relevant clause in the contract between the parties, no interest could have been awarded in favour of the contractor.

31. Clause 39.1 of the GCC, which is relevant for the present discussion, provides as follows:

> "36.1 No claim for interest or damages will be entertained by the Department with respect to any money or balance which may be lying with the Department owing to any dispute, difference or misunderstanding between the Engineer-in-charge on the one hand and contractor on the other or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payments or in any other respect whatsoever".

32. On a plain reading of such clause, it is apparent that the clause prohibits payment of interest in certain specified cases and it also contains a

residuary limb in the words "or in any other respect whatsoever" that ostensibly precludes the payment of interest on any account. However, the dictum in *Ambica Construction* instructs that unless the payment of pendente lite interest is specifically prohibited, a general bar of payment of interest will not be interpreted to also include a prohibition as to pendente lite interest. The principle of party autonomy permits the exclusion of several ordinary rights, but such exclusion has to be express and specific and may not be easily inferred unless unambiguously stated.

33. In any event, the dictum in *Ambica Construction* has been interpreted subsequently in a judgment reported at (2017) 14 SCC 323 *(Ambica Construction v. Union of India)*. Paragraphs 5 and 6 of the judgment are relevant in the present context:

> "5. The impugned order passed by the High Court dated 17-6-2005, limited to the determination with reference to pendente lite interest, has been assailed by the appellant, through the instant civil appeal. During the course of hearing, it was not disputed, that the contractual obligation between the parties expressly provided, that interest could not be claimed, either on earnest money or on the security deposit, and even on amounts payable to the claimant. The relevant clause affirming the above position is extracted hereinbelow:
>
> > "(2) *Interest on amounts.* – No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract, but government securities deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon."
>
> The aforesaid clause has been relied upon by the learned counsel representing the Union of India to contend, that when interest was not payable even on the principal amount, there was no question of

the same being payable during the period the matter remained pending for adjudication. It is therefore apparent, that the learned counsel for the respondent, relied upon the contractual obligation contained in the clause, extracted hereinabove, to counter the claim of pendente lite interest and to support the impugned order passed by the High Court.

6. The only contention advanced at the hands of the learned counsel for the appellant, was based on the judgment of this Court in *Union of India v. Ambica Construction*, wherein, having examined the legal position declared by this Court by a Constitution Bench in *Irrigation Deptt., State of Orissa v. G.C. Roy*, it was held as under: (*Ambica Construction case*, SCC p.59, para 34)

> "34. Thus, our answer to the reference is that if the contract expressly bars the award of interest pendente lite, the same cannot be awarded by the arbitrator. We also make it clear that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal, as ouster of power of arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court, it would be for the Division Bench to consider the case on merits."

A perusal of the conclusions drawn by this Court in the above judgment, rendered by a three-Judge Division Bench, leaves no room for any doubt, that the bar to award interest on the amounts payable under the contract, would not be sufficient to deny payment of pendente lite interest. In the above view of the matter, we are satisfied, that the clause relied upon by the learned counsel for the Union of India, to substantiate his contention, that pendente lite interest could not be awarded to the appellant, was not a valid consideration, for the proposition being canvassed. We are therefore satisfied, that the arbitrator, while passing his award dated 28-6-1999, was fully justified in granting interest pendente lite to the appellant."

34. An ancillary ground asserted by the appellants is that interest has been awarded at an exhorbitant rate of 15 per cent per annum.

35. The award of interest at such high rate does not call for any interference. First, in view of Section 31 of the Act of 1996, it is the prerogative of the Arbitral Tribunal, subject to any agreement between the parties, as to what should be the quantum of interest. Secondly, considering that the contract in this case was of the year of 1996 and the dues have not been cleared yet, a reasonable quantum has been awarded by way of interest by the Arbitral Tribunal that does not shock the conscience of this Court for it to be minded to interfere therewith.

36. The other contention of the appellants is that the court of the first instance failed to appreciate the matter in its proper perspective and merely parroted the words of the Arbitral Tribunal in dealing with the legal issues raised under Section 34 of the Act.

37. In the light of the comprehensive discussion on all three grounds urged by the appellants in challenging the award, as to whether appropriate considerations were taken into account in the judgment and order impugned pales into insignificance.

38. The appellants have needlessly barked up the wrong tree in seeking to challenge the arbitral award despite the same being eminently justified and every limb of the adjudication and finding reflected therein being within the authority of the Arbitral Tribunal.

39. As it is, the scope of interference with an arbitral award is limited to the few grounds available under Section 34 of the Act. Qualitatively, the assessment under Section 34 of the Act is not as in a regular appeal. In substance, the Court looks for errors of jurisdiction committed by the Arbitral Tribunal rather than errors committed by an Arbitral Tribunal within the bounds of its authority. The only exception is on account of patent illegality or perversity of the kind that shocks the conscience of the Court.

40. Ordinarily, the Arbitral Tribunal, particularly when, as in this case, it has expansive authority to construe the contract in view of the wide words of the arbitration agreement, if one of several possible views on an aspect is taken by an arbitral tribunal, the Court will not intervene to supplant its view over the Arbitral tribunal's. At the same time, it must be kept in mind that an Arbitral tribunal has only such authority as has been conferred by the agreement of the parties; and, an arbitrator being a creature of an agreement cannot act contrary to the terms of the agreement, particularly when the arbitration clause is contained in the matrix contract itself. The plenary authority available to a Court, by virtue of the Court being a part of the sovereign scheme of dispensation of justice, is not available to an arbitrator.

41. In the rarified atmosphere of an appeal from a failed challenge to an arbitral award, the scope of interference is even more constricted. Unless the Court of the first instance is found to have applied completely wrong tests and

the Arbitral Tribunal appears to have committed errors of jurisdiction or the award results in manifest miscarriage of justice that would shock the conscience of the appellate court, there is little room to interfere with an arbitral award at this level.

42. In the present case, the appellants do not meet the high benchmark set for this Court to interfere with the arbitral award. Not only do the grounds canvassed by the appellants not appeal to this Court, but also the reasons furnished in support of the award and in dealing with the objections raised by the appellants appear to be appropriate and satisfactory.

43. For the reasons indicated hereinabove, there is no merit in the appellants' challenge to the arbitral award of December 9, 2010. Accordingly, Arb.A.No.1 of 2018 and MC (Arb.A.) No.1 of 2018 are dismissed with costs assessed at Rs 2 lakh; of Rs 1 lakh will be paid as a token amount to the respondent contractor and the balance to the Meghalaya State Legal Services Authority within a month for valuable Court time being needlessly wasted.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
31.03.2022
"Lam DR-PS