HIGH COURT FOR THE STATE OF TELANGANA

****

COMMERCIAL COURT APPEAL NOs.48 AND 49 OF 2020

COM.C.A. NO.48 OF 2020:

Between:

M/s. Sri Rama Constructions
(formerly known as Rohini Constructions),
A regd. Partnership Firm, S-4,
Sri Harshini Residency, EWS-670,
Road No.3, KPHB Colony, Kukatpally,
Hyderabad, rep.by its Managing Partner
Sri G.Venkata Sri Rama Raju,
s/o. A.Narayana Raju, Aged about 49 yrs.,

.... Appellant

And

M/s. Max Infra (I) Limited,
Plot No.319 & 320, East Avenue,
4th Floor, Ayyappa Society,
Madhapur, Hyderabad, rep.by its
Authorized Signature & Managing
Director Sri K.V.Pradeep and another.

.... Respondents

DATE OF JUDGMENT PRONOUNCED : 02.03.2023

HON'BLE SRI JUSTICE P.NAVEEN RAO
&
HON'BLE SRI JUSTICE J.SREENIVAS RAO

1. Whether Reporters of Local Newspapers may be allowed to see the Judgments ? : **Yes**

2. Whether the copies of judgment may be marked to Law Reporters/Journals : **Yes**

3. Whether Their Lordship wish to see the fair copy of the Judgment ? : No

*** HON'BLE SRI JUSTICE P.NAVEEN RAO**
&
HON'BLE SRI JUSTICE J.SREENIVAS RAO

COMMERCIAL COURT APPEAL NOs.48 AND 49 OF 2020

%02.03.2023

COM.C.A. NO.48 OF 2020:

Between:

M/s. Sri Rama Constructions
(formerly known as Rohini Constructions),
A regd. Partnership Firm, S-4,
Sri Harshini Residency, EWS-670,
Road No.3, KPHB Colony, Kukatpally,
Hyderabad, rep.by its Managing Partner
Sri G.Venkata Sri Rama Raju,
s/o. A.Narayana Raju, Aged about 49 yrs.,

.... Appellant

Vs.

$ M/s. Max Infra (I) Limited,
Plot No.319 & 320, East Avenue,
4th Floor, Ayyappa Society,
Madhapur, Hyderabad, rep.by its
Authorized Signature & Managing
Director Sri K.V.Pradeep and another.

.... Respondents

!Counsel for the appellant : Sri K.Prabhakar in both Appeals

Counsel for the Respondents: Sri A.Venkatesh in both appeals

<Gist :

>Head Note:

? Cases referred:

(2015) 17 SCC 357; 2022 SCC OnLine SC 864; MANU/SC/0484/2022; MANU/SC/0514/2017; MANU/DE/3619/2022; MANU/DE/3882/2022; MANU/DE/1113/2010; MANU/CG/0344/2011; MANU/SC/0253/2989; MANU/TN/9802/2019; (2018) 11 SCC 328

HON'BLE SRI JUSTICE P.NAVEEN RAO
AND
HON'BLE SRI JUSTICE J.SREENIVAS RAO

COMMERCIAL COURT APPEAL NOs.48 AND 49 OF 2020

COMMON JUDGMENT: *(Per Hon'ble Sri Justice P.Naveen Rao)*

Heard learned counsel Sri K.Prabhakar for the appellant and the learned counsel Ms.Pratusha Boppanna appearing for the learned counsel Sri A.Venkatesh for respondent no.1.

2. The appellant in COMCA No. 48 of 2020 and COMCA.No.49 of 2020 is claimant before the learned Arbitrator and petitioner in C.O.P.No.232 of 2017 in the Court of the Judge Commercial Court cum XXIV Additional Chief Judge, City Civil Court, Hyderabad. The respondent herein is respondent before the learned Arbitrator and petitioner in C.O.P.No.195 of 2017. Parties are referred to as arrayed before the learned Arbitrator.

3. The Government of Andhra Pradesh awarded contract to execute balance of the work of 'Thotapally Barrage Project EPC Package-1' to a joint venture comprising of respondent and M/s.Prasad Constructions. The agreement was signed on 31.8.2012. In turn the respondent entrusted the entire work to the claimant with same terms as contained in the agreement dated 31.8.2012 entered with the Government. The agreement was entered into on 10.9.2012 called as

'work order'. However, the agreement envisaged that out of the bills payable for the works executed by the claimant the respondent is entitled to take 17.5 % towards Royalty.

4. Disputes arose between the parties to the agreement dated 10.9.2012. Alleging that the claimant failed to execute the work within the stipulated time, the respondent issued notice dated 26.5.2015 invoking clause 4 of the 'work order' calling upon the claimant to explain within 7 (seven) days from the date of receipt of notice, as to why contract should not be terminated. The claimant responded vide his reply dated 22.6.2015. Respondent terminated the contract.

5. 'Work Order' envisaged resolution of disputes through medium of arbitration. The claimant filed Arbitration Application No. 145 of 2015 before this Court under Section 11 of the Arbitration and Conciliation Act, 1996 (the Act, 1996) seeking to appoint an arbitrator. This Court appointed former Chief Justice of Patna High Court Hon'ble Sri Justice L.Narasimha Reddy as Arbitrator. The claimant set up 12 claims before the learned Arbitrator. The respondent made a counter-claim of 6,47,08,361/- with interest at the rate of 24 % per annum.

6. After considering the submissions of both the parties, the learned Arbitrator framed the following issues:

(i) Whether the termination of the work order dated 30.9.2012 by the Respondent is proper and legal?

(ii) Whether the claimant is entitled to amounts claimed in Claims No.1 to 12 of the Claim petition?

7. Upon considering of the pleadings and the documentary evidence placed on record, the Learned Arbitrator held that there was no justification for the respondent to terminate the 'work order'. The learned Arbitrator allowed Claim Nos.1-A, 2, 4, 5, 8, 10 and 12. Aggrieved by the award, both the parties filed applications under section 34 of the Arbitration and Conciliation Act 1996 before the Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court Hyderabad bearing C.O.P.No. 232 of 2017 and C.O.P.No.195 of 2017. While claimant is aggrieved by the award denying all claims, the respondent is unhappy with the award denying his counter-claim was not considered and also on findings recorded on the issues decided in favour of claimant.

8. The Commercial Court clubbed both the C.O.Ps. After hearing the submissions of both parties, the Commercial Court framed the following issues:

(i) Whether the claimant is entitled for claims which were disallowed by the arbitrator ?

(ii) Whether there is any interference required in the award passed by the arbitrator ? and

(iii) Whether the award passed has to be set aside ?

9. By Common Order dated 1.2.2019 both COPs were disposed of. The Commercial Court observed that the leaned Arbitrator had passed the award without framing any issue with regard to the counter-claim made by the respondent. The Court held that Arbitrator is bound by prudent principles of law to give a finding with respect to the counter-claim of the respondent therein. The Court below ultimately held that due to the above reasons, the Award passed by Arbitrator suffers from patent illegality and goes against the public policy of India. Sets aside the award and directed the parties to initiate fresh proceedings.

CONTENTIONS OF THE LEARNED COUNSEL FOR CLAIMANT:

10. Learned counsel for the claimant contended that the Court below failed to take into consideration the nature of the counter-claim. It is nothing but the alleged extra cost incurred for the execution of work because of the termination of sub-contract. It is contended that once the learned Arbitrator returned the finding that the termination of the Appellant's contract is arbitrary and illegal, the question of non-consideration of the counter-claim does not arise.

10.1. It is further contended that the counter-claim has been referred multiple times in the impugned award and Arbitrator was aware of counter-claim while deciding the issues set up for consideration. Moreover, there was nothing prevented the Court below to exercise its power under section 34(4) of the Act, 1996 and remit the award to the Arbitral Tribunal to cure the defects of non-consideration of the

counter-claim, by resuming the arbitral proceedings. The Court below has erroneously set aside the award. It is therefore submitted that the matter be remitted to learned Sole Arbitrator for re-consideration of the issue, and to cure defects of the award, if any, under the provisions of section 34(4) of the Act, 1996.

10.2. The learned counsel placed reliance on **Ambica Construction v. Union of India[1]; Som Datt Builders Ltd. v. State of Kerala, (2009) 10 SCC 259; National Highway Authorities of India vs P.Nagarju alias Cheluvaiah and Another[2].**

10.3. It is further contended that the counter-claim is nothing but the claim made by the claimant. Termination of contract did not arise as R.A. 19 bill was already submitted.

10.4. He would further submit that the award is set aside only on one ground and other grounds were not even considered.

CONTENTIONS OF THE LEARNED COUNSEL FOR 1ST RESPONDENT:

11. Learned counsel for respondent would contend that the learned Arbitrator grossly erred in not even considering the counter-claim. Further, documents filed in support of respondent were also not considered. Thus, the award is ex-facie illegal. It is against public policy of India.

---

[1] (2015) 17 SCC 357
[2] 2022 SCC OnLine SC 864

11.1. She would further submit that the findings of learned Arbitrator are mutually contradictory.

11.2. It is her further submission that Section 34 cannot cure patent illegality. Remitting the matter to learned Arbitrator may arise if there was a lacuna in the award but not when there is patent illegality.

11.3. She would further submit that unless Section 34 is complied even the Appellate Court under Section 37 cannot remit it to the Section 34 Court or to the learned Arbitrator.

11.4. According to learned counsel for the respondent once the award is set aside Section 34(4) has no application. The matter can only be remitted to the Arbitral tribunal only before setting aside the award. Learned counsel placed reliance on **A.Parthasarathy and Ors. Vs. E Springs Avenues Pvt. Ltd. and Ors**[3]; **KinnariMullick and Ors. Vs. Ghanshyam Das Damani**[4]**; Canara Bank Vs. The State Trading Corporation of India Ltd. and Ors**[5]**; Sushant Gambhir and Ors. Vs. MRJ Infratech Limited and Ors**[6]**; Hindustan Paper Corporation Ltd. Vs. Delhi Paper Products and Ors**[7]**; Satjas Glorocks Pvt. Ltd. Vs. Bharat Aluminum Co. Ltd**[8]**; K.V. George vs. Secretary to the Government, Water and Power**

[3] MANU/SC/0484/2022
[4] MANU/SC/0514/2017
[5] MANU/DE/3619/2022
[6] MANU/DE/3882/2022
[7] MANU/DE/1113/2010
[8] MANU/CG/0344/2011

Department, Trivandrum and Ors[9]; and **Sterlite Technologies Limited and Ors. Vs Bharat Sanchar Nigam Limited and Ors[10].**

12. Issue for consideration is whether Court below erred in setting aside the Award?

13. It is not in dispute that the respondent made counter-claim. The learned Arbitrator has not framed an issue on counter-claim and has not returned finding on counter-claim. The learned Arbitrator has not looked into all the documents presented by parties.

14. The Arbitration clause in the 'Work Order' reads as follows:

> ***"6.0. Dispute Resolution:***
>
> *If a dispute of any kind whatsoever arises with Subcontractor in connection with of arising out of this order the matter in dispute shall be settled amicably through offices of Project Controller/ project Manager of M/s. MIIL failing which the dispute matter shall be finally resolved, in accordance with the Arbitration & Conciliation Act 1996 by a sole Arbitrator to be nominated by the Chairman and Managing Director of M/s. MIIL Hyderabad, the venue shall be Hyderabad. This order is governed as per laws of India and the jurisdiction of only Hyderabad courts shall apply."*

15. It is clear from reading of this clause that it does not impose any restriction on making a counter-claim.

16. The claimant set up 12 claims. The respondent has set up counter-claim for 6,47,08,361/- with interest at the rate of 24% per annum. In the 'Pleadings' section of the Award, the Arbitrator observed the following (*pg.8- 9 of award, running pg.96- 97*),

---

[9] MANU/SC/0253/2989
[10] MANU/TN/9802/2019

> "The respondent filed a detailed rebuttal statement. The fact that the work was entrusted to the respondent for execution on back to back basis was not disputed. Every paragraph of the claim statement dealt with separately, and the contention of the claimant was disputed. It was pleaded that there was serious lapse on the part of the claimant in completion of the work within the stipulated tire. The respondent contended that even after the period was extended. There was no progress to the extent required.
>
> The respondent explained the circumstances under which the insurance policy could not be brought into existence, by referring to the relevant clauses in the agreement and the orders of the Government. It was also stated that a notice of cancellation, as provided for under the agreement was issued and on finding that the explanation offered by the claimant was not satisfactory, the contract was cancelled in accordance with law. It was also alleged that the claimant did not hand over the relevant records.
>
> Individual claims were also dealt with and an attempt is made to explain as to how the claims are not sustainable. ***Ultimately, it is prayed that the claims in their entirety be rejected and that the respondent be reimbursed the expenditure incurred and to be incurred in the arbitration proceedings.***
>
> On receiving the rebuttal statement, the claimant filed a detailed rejoinder, virtually reiterating its claims.
>
> Both the parties have filed quite large number of documents in various volumes, in support of their respective claims." (emphasis supplied)

17. A reading of the above excerpts shows that while considering the pleading of the respondents, the Learned Arbitrator has not made any note or observation with respect to the counter-claim of the respondent.

18. Further, while passing the award, the learned arbitrator only limited his findings to the claims 1 – 12 made by the claimant. The same has been extracted below:

> "IN THE RESULT, the award is passed to the following effect:
>
> <u>PRELIMINARY ISSUE:</u>

Whether the very issuance of the work order dated 10-09-2012 in favour of the claimant (Ex.C-2) by the respondent is *void ab-initio* on the ground that the award of any sub-contract by the respondent is prohibited under Agreement dated 31-08-2012 (Ex.C-1).

The issue is answered against the respondent.

ISSUE NO.1:

Whether the termination of the work order dated 30-09-2012 by the respondent is proper and legal.

It is held that the cancellation of the contract, Ex.C-2, between itself and the claimant is contrary to law as well as the conditions contained in Ex.C-2, and the issue is answered in favour of the claimant.

ISSUE NO. 2: INDIVIDUAL CLAIMS

Whether the claimant is entitled to the amounts claimed in claim Nos. 1 to 12 of the claim petition.

CLAIM NO.1(A): PAYMENT DUE UNDER R.A. BILL NO. 19.

The claimant is entitled to a sum of Rs.306.83 lakhs (Rupees three crores six lakhs eighty three thousand only), covered by RA bill No. 19.

CLAIM NO. 1(B) PAYMENTS DUE AND PAYABLE TOWARDS PRICE ADJUSTMENT OF VARIOUS COMPONENTS

It is held that while the claimant is entitled to be paid the amount, that has been or may be sanctioned by the Government towards price adjustment for various components in the works executed by the claimant, the respondent is entitled to deduct royally of 17.5% from such amount, while passing the amount to the claimant.

CLAIM NO. 2: BALANCE PAYMENT DUE IN RESPECT OF CM & CD WORKS EXECUTED BY THE CLAIMANT

It is held that the respondent is under obligation to pay a sum ofRs.2.84,21.306/- (Rupees two crores eighty four lakhs twenty one thousand three hundred and six only) to the claimant under this component.

CLAIM NO.3: PAYMENTS TOWARDS VARIOUS ITEMS OF WORKS EXECUTED BUT NOT PAID:

This claim is disallowed.

CLAIM NO. 4: LOSS OF PROFIT ON THE VALUE OF THE BALANCE WORK UNEXECUTED:

A sum of Rs. 1,50,00,000/- (Rupees one crore fifty lakhs only) is awarded under this claim.

CLAIM NO.5: REFUND OF THE SECURITY DEPOSIT (RETENTION MONEY):

Claim is allowed subject to the observations made in the body of the award.

CLAIM NO.6: REIMBURSEMENT OF PAYMENT TOWARDS THE EXECUTION/RECTIFICATION OF CYCLONE DAMAGE WORKS:

This claim is disallowed.

CLAIM NP.8: PAYMENT TOWARDS LABOUR AND MATERIAL ESCALATION PAYABLE UNDER G.O. NO. 22. DATED 23-02-2015:

In case a properly documented claim is presented before the Government by the claimant, through the respondent, and any amount is sanctioned there under, the respondent would be under obligation to pass on the same to the claimant after making deductions of royalty, VAT, CESS and TDS, as provided for under Ex.C-1.The respondent shall extend cooperation for this purpose.

CLAIM NO.9: PAYMENT TOWARDS INCOME TAX DEDUCTED AT SOURCEWHICH WAS LATER CREDITED TO THE RESPONDENT'S IT. ACCOUNTS ONTHE RECOVERY OF TDS FROM THE CLAIMANT:

This claim is disallowed as being outside the scope of arbitration.

CLAM NO 10: INTEREST BY WAY OF COMPENSATION ON THE DELAYEDPAYMENTS:

A sum of Rs. 10,00,000/- (Rupees ten lakhs only) is awarded on this account.

CLAM NO. 11: INTEREST BY WAY OF COMFENSATION ON THE AMOUNTSDUE FROM THE DATE OF ITS DUE TILL REALISATION:

This claim is not sustainable in law.

CLAIM NO. 12: COSTS TO BE AWARDED TOWARDS ARBITRATION ANDLEGAL FEES:

Having regard to the facts and circumstances, it is felt that each party may be required to bear their own costs."

19. Therefore, in the framing of issues and in the passing of the award, there is no discussion or decision with respect to the counter-claim of the Respondent anywhere in the award. There is no discussion on all the documents presented by the parties.

20. In Section 34 application, the XXIV Additional Chief Judge, City Civil Court, Hyderabad, framed following issues for consideration:

(i) Whether the claimant is entitled for claims which were disallowed by the arbitrator?

(ii) Whether there is any interference required in the award passed by the arbitrator?

(iii) Whether the award passed has to be set aside?

21. The Court below sets aside the award only on the ground of non-consideration of the counter-claim of the respondent and voluminous documents filed to support the assertions by the learned Arbitrator. Moreover, the Court also observed that the entire claim of the claimants has also not been considered by the Arbitrator in the award. The relevant paragraphs of the impugned order read as under:

> "**14.** ***It is astonishing to note that the respondent has filed voluminous documents but those documents were not marked on the pretext that both parties are agreed that the relevant documents can be marked and the other documents can be looked into, without marking which clearly shows the whims and fancies of the learned Arbitrator that whatever the documents he wish to mark, those documents were marked and the remaining documents were not marked.*** When the learned Arbitrator is at liberty to verify the documents filed by both the parties to contemplate the dispute, the learned Arbitrator has to maintain equilibrium in respect of the loss and profits and the learned Arbitrator also has to consider on whose fault the contract was terminated. Admittedly, the respondent engaged another contractor and see that the contract work is finished. It is also astonishing to note that the respondent has filed a counter claim for which the petitioner filed rejoinder. The claimant is at fault in running the company. The respondent filed counter claim in page No.19 of his counter categorically mentioned that the left over work was allotted to Ms. Mana Infrastructure, Tirupati for rectification work for release of water for right main canal and prayed the Court to pass counter claim of Rs.6,47,08,361/-against the claimant with 25% of the commercial interest. The learned Arbitrator in page No. 17 of the Award categorically mentioned that the counsel for the respondent contended that all the claims filed by the claimant are false and imaginary and also he made a reference to the counter claim made before the Tribunal. The learned Arbitrator, without framing any issue with regard to the counter claim made by the respondent, even though no issue was framed. It is prudent principle to give finding with regard to counter claim made by the respondent before the Arbitral Tribunal. ***The learned Arbitrator, without verifying the counter claim made by the respondent has categorically one way finding of the claims made by the claimant. When the respondent made a specific plea in the counter claim made by the respondent, it is***

> ***the bounden duty of the learned Arbitrator to answer the counter claim. The case on hand, the learned arbitrator neither framed any issue nor considered the counter claim made by the respondent***. Apart from that the learned Arbitrator has categorically mentioned that the claimant is entitled for some of the claims. When the some of the claims are awarded, the learned Arbitrator ought to have consider the counter claim made by the respondent. The case on hand, the learned Arbitrator not even mentioned about the counter claim while deciding the claim of the petitioner and erroneously passed the Award without answering the counter claim. It is not the case of the claimant that the respondent has not filed any counter claim. As there is a counter claim, the claimant has filed a rejoinder."
>
> (emphasis supplied)

22. The Court below after considering all the decisions cited at the bar and pleadings put forth by the parties, came to the conclusion that Arbitral Award suffers from patent illegality, as it fails to wholly consider the counter-claim of the respondent and sets aside the award.

23. The Court below also held that court could not have remanded the matter back to the learned sole Arbitrator for fresh consideration as he was engaged in a constitutional post. Therefore, while setting aside the award the Court below gave liberty to both the parties to resolve the dispute by initiating fresh arbitral proceedings.

24. Though Court below may not be right in the reason for not remitting the matter to the Arbitrator, but once a decision is made in Section 34 application, the Court has no power to remit the arbitration matter to the Arbitrator. As per Section 34(4) of the Act, 1996, if the Court deems it appropriate and it is so requested by a party, adjourn the proceedings in the case to give Arbitral Tribunal opportunity to resume the arbitral proceedings or to take such other action as in the opinion of Arbitral Tribunal would eliminate the grounds for setting

aside the arbitral award. Even this course is available only upon a written application made by a party and not suu-moto. Thus, after a decision is made issue of remitting to the Arbitrator does not arise. Only course available to the Court in the application under Section 34 is to set aside or to uphold the award.

25. In **Kinnari Mullick v. Ghanshyam Das Damani[11],** the short question of law, which came up for consideration before the Apex Court, is whether under Section 34(4) of the Arbitration and Conciliation Act, 1996, do the Courts have power to remand the matter to the Tribunal, once it has already been set aside under Section 34. The Court held,

> "***15.*** On a bare reading of this provision, it is amply clear that the Court can defer the hearing of the application filed under Section 34 for setting aside the award on a written request made by a party to the arbitration proceedings to facilitate the Arbitral Tribunal by resuming the arbitral proceedings or to take such other action as in the opinion of the Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. The quintessence for exercising power under this provision is that the arbitral award has not been set aside. Further, the challenge to the said award has been set up under Section 34 about the deficiencies in the arbitral award which may be curable by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award. No power has been invested by Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section (4) of Section 34. This legal position has been expounded in *McDermott International Inc*. In para 8 of the said decision, the Court observed thus: (*Bhaskar Industrial case*, SCC OnLine Kar)
>
> > ***"8. ... Parliament has not conferred any power of remand to the Court to remit the matter to the Arbitral Tribunal except to adjourn the proceedings as provided under sub-section (4) of Section 34 of the Act. The object of sub-section (4) of Section 34 of the Act is to give an opportunity to the Arbitral Tribunal to resume the arbitral proceedings or to enable it to take such other action which will eliminate the grounds for setting aside the arbitral award."***

[11] (2018) 11 SCC 328

> "***16.*** In any case, the limited discretion available to the Court under Section 34(4) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear that the Court cannot exercise this limited power of deferring the proceedings before it suomotu. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings pending before it, then it is not open to the party to move an application under Section 34(4) of the Act. **For, consequent to disposal of the main proceedings under Section 34 of the Act by the Court, it would become functus officio. In other words, the limited remedy available under Section 34(4) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court."**
> (emphasis supplied)

26. Admittedly, the Arbitrator has not framed issue on counter-claim, has not considered voluminous documents filed before him and has not recorded finding on counter-claim made by the respondent. Therefore, Award is not sustainable. Further, during the pendency of Section 34 application no request was made for remitting the matter to the Arbitrator. Therefore, the Court below could not have remitted the matter to the Arbitrator to deal with counter-claim. Further, the Court below granted liberty to the parties to set in motion fresh arbitral proceedings. We do not see any error in the decision arrived at by the Court below setting aside the Award and granting liberty to take recourse to fresh arbitral proceedings warranting our interference.

27. The Appeals fail. They are accordingly dismissed. Pending miscellaneous applications if any shall stand closed.

P.NAVEEN RAO, J

J.SREENIVAS RAO, J

Date: 02.03.2023
Tvk/KKM

HON'BLE SRI JUSTICE P.NAVEEN RAO
AND
HON'BLE SRI JUSTICE J. SREENIVAS RAO

COMMERCIAL COURT APPEAL NOs.48 AND 49 OF 2020

Date: 02.03.2023

Tvk/kkm