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IN THE COURT OF DISTRICT JUDGE - 2
PUNE AT PUNE

[Presided by : Sunil G. Vedpathak]

CIVIL M.A. NO.1256/2018
CNR NO.MHPU010162322016
EXH NO. 62

Pune Municipal Corporation
Corporation formed under
Maharashtra Municipal Corporations Act,
Having address-
Pune Municipal Corporation Main Building
Shivajinagar, Pune
Through Authorized Signatory
Shri. Amar Shinde working as
Executive Engineer with PMC

... ... Petitioner

VERSUS

M/s. Bombay Cable Car Company
Private Limited,
A Company incorporated under
Indian Companies Act, 1956,
having its registered office at 101-D,
Poonam Chamber, Worli,
Mumbai-400018.

... ... Respondent

Application u/s. 34 of Arbitration and Conciliation Act,
1996.

Appearances :-

Learned advocate Shri. Makrand Aadkar for applicant
Learned advocate Shri. B. R. Phatak for respondent

J U D G M E N T
(Delivered on 14.02.2024)

This is an application under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter ‘The Act’) to set aside the arbitral award dated 27th June, 2016 and subsequently clarification on the same dated 16th August, 2016 passed by Sole Arbitrator Shri. Arvind V. Sawant.

FACTS IN BRIEF :-

2] The respondent is original claimant, Bombay Cable Car Company Private Limited is a Company incorporated under the Companies Act 1955 having its registered office at address mentioned above. The respondent company is carrying on business of transportation of tourists and local, citizens on Mono Bio Cable Car System (“the rope-way system”).

3] The applicant proposed to install a rope-way system from Sarasbaug to Parvati which is a hill area. This was proposed under the Development Plan of Pune Municipal Corporation in the year 1988. Accordingly, tenders were called by giving advertisement in ‘Times of

India' dated 11th March, 1988. Many of the companies filled the tenders and out of that tender of respondent was came to be accepted on certain terms and conditions. As such, the rope-way was to be completed within two years after signing the lease-deed. A lease deed was came to be executed on 5th July, 1991 for the period of 74 years to facilitate the erection, operation and maintenance of rope-way system. The said lease deed was confirmed by Registered Deed of Confirmation dated 10th November, 1993.

4] It was expected that the respondent shall start their work and complete it at earliest and scope of their work was initiating construction at the lower terminal as well as upper terminal. The proposal for change of zoning was put before the General Body of the PMC and it was allowed on 22nd April, 1997. However, it was rejected thrice before that. Stop work notice was issued by applicant to respondent on 30.07.1994. So, by way of series of communications and due to stop of work, the respondent invoked arbitration clause of lease deed and accordingly appointment of Justice Pendse was made as Sole Arbitrator. Justice Pendse has passed award in favour of respondent. The applicant challenged the said award and it was confirmed on 5th August, 2000 by District Court, Pune. The decision of District Court, Pune is again

challenged before Hon'ble Bombay High Court. On 3rd March, 2005 Hon'ble High Court of Bombay set aside award of Justice Pendse as well as judgment of District Court, Pune observing that the appointment of Justice Pendse as Arbitrator was illegal. Subsequently, new arbitrator i.e. Justice Palkar was appointed. Due to his sad demise again by order dated 9th September, 2010 in Arbitration Petition No.38 of 2010 Hon'ble High Court made appointment of Justice Arvind Sawant. Before arbitrator the respondent claimed specific performance of demise of lease dated 5th July, 1991 read with confirmation deed dated 10th November, 1993 in addition to compensation of Rs.2,47,08,000/-.

5] Upon pleadings of both parties, arbitrator had framed in all 20 issues and after full contest ultimately on 27th June, 2016 arbitrator had passed an award and subsequent clarification being additional award on the same dated 16th August, 2016.

6] Being aggrieved by the above referred award, the applicant has filed this application and challenged the said award by raising following certain grounds.

- i] Award is outcome of total non-application of mind.
- ii] Award is unreasoned.
- iii] Learned arbitrator did not consider the evidence on

record and had given findings ignoring certain evidence and legal provisions. As such, award is based on perverse findings which suffers from patent illegality.

iv] Learned arbitrator has not considered the relevant legal provisions.

v] Learned arbitrator ought to have conducted the arbitral proceedings denovo and independently, however, arbitrator relied upon the discussions, conclusions and findings rendered by earlier arbitrator Justice Pendse whose appointment was illegal and thereby award passed by him was void-ab-initio much less nullity.

So, according to applicant, since award suffers from aforesaid grounds so it is liable to be set aside.

7] On the other hand, on behalf of respondent the application / petition is strongly opposed by filing say below Exh.15. It has denied all adverse allegations made in the application. According to it, learned arbitrator has considered the contentions of both parties reflected through their pleadings, considered the evidence and certain legal provisions by its proper perspective and by making elaborate discussion rendered the findings on each and every issues. So also, arbitrator concerned had complied the principles of natural justice. Therefore, at any costs it cannot be said that award suffers from patent illegality as the findings given by arbitrator cannot be said

to be perverse. Further, it is submitted that this court is not permitted to make review of findings rendered by learned arbitrator by entering into the merits of the case and then it is not permitted to make the reappraisal of findings and conclusion drawn by learned arbitrator unless findings are perverse which resulted in patent illegality. In short, the respondent has fully justified the award under challenge and submitted that application being devoid of merits, it is liable to be dismissed.

8] It may be noted that this court by passing order below Exh.09 dated 20.04.2019 while staying the execution of award directed the applicant to deposit an amount of Rs.3,00,75,291/- only in the court and furnish Bank Guarantee for remaining amount i.e. Rs.13,03,16,321/- only within two weeks.

9] Following points arise for determination and I record findings thereon for the reasons stated below.

Sr. No.	POINTS	FINDINGS
1.	Whether award under challenge is unreasoned, without application of judicial mind and ignoring the relevant legal provisions ?	.. Yes.
2.	Whether award suffers from patent illegality on its face ?	.. Yes.
3.	Whether interference in the award is	.. Yes.

	necessary ?	
4.	What order ?	As per final order.

REASONS

AS TO POINT NOS. 1 TO 3 :-

10] I have gone through the award and copies of record and proceedings conducted before Arbitral Tribunal. So also, I have gone through the written notes of arguments submitted on behalf of both parties coupled with cases upon which they had placed reliance.

11] First of all, it is to be noted that while dealing with application under section 34 of the Act, this court cannot sit as a appellate court in order to review the findings and conclusion drawn by learned arbitrator. So also, scope of section 34 of the Act does not permit the court to make reappraisal of evidence and replace the view taken by arbitrator with its own view by entering into the merits of the award. In short, the very limited scope is there to the court while deciding the challenge to arbitral award under section 34 of the Act.

12] In present matter the applicant has come with the case that the award under reference suffers from patent illegality on its face, same is unreasoned and

without following the principles of natural justice and ignoring basic principles of law and procedure. The said submission is strongly opposed on behalf of respondent. In this regard, the applicant has placed reliance on the observations of Their Lordships of Apex Court in the case of Associate Builders Vs. DDA, (2015) 3 SCC 49, with respect to scope of challenge of award under section 34 of Arbitration and Conciliation Act regarding non application of mind, unreasoned award and patent illegality. According to applicant, the principles laid down in the case of Associate Builders are still applicable and can be relied upon even after amendment in section 34. For this, the applicant has pointed out the observations and ratio laid down in the case of Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India reported in (2019) 15 SCC 131 which has been relied upon by the respondent.

13] I have gone through the observations in Ssangyong Engineering and Construction Company Limited cited supra, then it can be gathered that, Their Lordships have affirmed various aspects clarified in the case of Associate Builders. In that regard following observations are made.

"...31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable

person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or*
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held: (SCC p. 317, para 7)

"7.... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 4291, it was held: (SCC p. 14, para 10) "10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon,

howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

Justice

36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs.45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality-for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside..."

Therefore, considering above observations of Their Lordships of Apex Court in the case of **Ssangyong Engineering and Construction Company Limited**, it has to be accepted that whatever grounds applicant has raised in order to challenge the award are very much maintainable.

14] Now coming to the first ground that whether award suffers from patent illegality and non-application of mind.

15] In this regard, it is submitted that admittedly, Hon'ble High Court has set aside the award passed by earlier arbitrator Justice M. L. Pendse on the ground that his appointment was illegal. So, by this situation Justice Pendse had no jurisdiction to pass the award. Thus, obviously the award passed by Justice Pendse was non est much less void-ab-initio. Once said award was set aside then subsequent arbitrator i.e. Arvind Sawant was to conduct the arbitral proceedings denova with application of his own mind to the facts, evidence and certain legal provisions while passing the award. However, Hon'ble Justice Arvind Sawant did not do so and he has merely adopted and taken into account the findings and calculations of certain amount made by earlier arbitrator i.e. Justice Pendse. Therefore, placing reliance on certain observations made in award which is non est or void-ab-initio and adopting the same findings is absolutely violation of certain principles of law and it is perversity amounts to patent illegality.

16] On the other hand, it is argued on behalf of respondent that the award passed by Justice Pendse was

set aside on limited ground that his appointment was not in accordance with law. No observations have been made by Hon'ble High Court regarding observations and findings given by Justice Pendse. Therefore, it cannot be said that the award passed by Justice Arvind Sawant suffers from patent illegality.

17] Upon rival contentions of both parties, the answer of this controversy will find in the observations of Their Lordships in following cases.

i] In the case of Dharma Prathishthanam Vs. Madhok Construction Ltd reported in (2005) 9 SCC 686 wherein it is held that :-

"In the event of the appointment of an arbitrator and reference of disputes to him being void ab initio as totally incompetent or invalid the award shall be void and liable to be set aside dehors the provisions of Section 30 of the Act, in any appropriate proceedings when sought to be enforced or acted upon. This conclusion flows not only from the decided cases referred to hereinabove but also from several other cases which we proceed to notice."

ii] In the case of Union of India Vs. Ajit Mehta and Associates reported in AIR 1990 Bom 45 : (1989) 3 Bom CR 535 the Division Bench held that :-

"The court has suo motu power to set aside an

award on grounds other than those covered by Section 30 such as an award made by arbitrators who can never have been appointed under section 8, as such an award would undoubtedly be ab initio void and non est."

iii] In the case of Union of India Vs. K. S. Kalra reported in AIR 1992 MP 47 and Rajendra Dayal Vs. Govind reported in 1970 MPLJ 322 both Division Bench decisions in which it is observed that :-

"In certain situations the court may set aside an award even without there being an application under section 30 or even if the petition under section 30 has not been filed within the period of limitation if the court finds that the award is void or directs a party to do an act which is prohibited by law or is without jurisdiction or patently illegal."

iv] In the case of Union of India Vs. Ajit Mehta and Associates, Pune referred above, the following observations in specific words are made.

"Assuming, therefore, that we are right in our view that the Court has suo motu powers to set aside an award on grounds other than those covered by S. 30, the present awards which are made by arbitrators who can never have been appointed under S. 8 are undoubtedly ab initio void and non est. The present is not a case of a mere invalidity of the award either on account of an error apparent on the face of the award or on

account of its being outside the scope of the reference or being made pursuant to an invalid reference. In the present case, the award is a nullity from its inception since the very appointment of the arbitrator was without jurisdiction. The Court which made the appointment had no power under S. 8 to appoint the arbitrator and hence no arbitrator could have been appointed under the said section at all. This is not a matter of mere illegality in the appointment of the arbitrator but a lack of power to appoint the arbitrators in question. Since the arbitrator/s in question could not have acted in law, they had no legal existence. The arbitrators so appointed were prohibited by law to proceed with the arbitration. Hence the proceedings conducted and the award/s made by him/them are non-est from the beginning and will have always to be regarded as such. The award is thus patently illegal and void. This illegality which goes to the very foot of the award is not necessarily covered only by S. 30. It can be raised as a ground to set aside the award even independently of the said section. Hence the Court not only has the power but also a duty to quash the award or to ignore it."

18] So, if the findings rendered by learned arbitrator are observed in the light of above referred legal aspects then it can safely be concluded that the findings given in impugned award are passed or adopted on the findings and conclusion drawn by earlier arbitrator whose

appointment was illegal and thereby the award passed by him was void-ab-initio much less non est and nullity. So, this particular aspect allows me to observe that, the award under challenge is based on patent illegality on its face. So, on this sole ground it is liable to be set aside.

19] Coming to the next ground that the award under challenge is unreasoned and in violation of mandatory provisions of section 31 (3) of the Act. Section 31 (3) of the said Act mandates the award to state the reasons upon which it is based. However, having gone through the observations of arbitrator in award from para nos.19 to 22 then clearly it indicates that there is no findings and reasoning with respect to issue of cause of action. Since cause of action goes to the root of the matter and in absence of its consideration thereof clearly makes an award untenable and unsustainable. This particular aspect finds support of observations of Apex Court in the case of **Somdutt Builders Ltd. Vs. State of Kerala** reported in **(2009) 10 SCC 259** wherein it has been held in following words.

"The requirement of reasons in support of the award under Section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the Arbitral Tribunal. It is true that the Arbitral Tribunal is not expected to write a judgment like a court nor

is it expected to give elaborate and detailed reasons in support of its finding(s) but mere noticing the submissions of the parties or reference to documents is no substitute for reasons which the Arbitral Tribunal is obliged to give. Howsoever brief these may be, reasons must be indicated in the award as that would reflect the thought process leading to a particular conclusion. To satisfy the requirement of Section 31(3), the reasons must be stated by the Arbitral Tribunal upon which the award is based; want of reasons would make such award legally flawed."

20] However, in this regard on behalf of respondent it is submitted that, the observations in above referred case cannot be made applicable as said judgment has been passed prior to amendment of section 34 of the Act in October 2015. So, in view of observations made in Ssangyong Engineering & Construction Company Ltd., referred above as per the amended law, it is incumbent upon an applicant to show a patent illegality appearing on the face of the award which goes to the root of the matter but which does not amount to mere erroneous application of law. Further more, it is also made clear that reappreciation of evidence, cannot be permitted under the ground of patent illegality appearing on face of the award. So, the applicant has failed to show any lack of reasoning in the award. Merely because the applicant disagrees with the reasoning of the Hon'ble Arbitrator does not mean that

the award is an unreasoned award.

21] Considering the rival submissions of both parties on this aspect and having gone through the findings recorded by learned arbitrator, it can be seen that learned arbitrator instead of giving his own findings with respect to relevant issues adopted the findings as well as calculations of amount recorded by arbitrator in award which was non est. So, I find that there is sufficient scope so as to accept the submission of applicant that the award under challenge is unreasoned. Therefore, in my view the award becomes illegal if it is not supported with reasoning.

22] In his further submission learned advocate for applicant has pointed out that, the respondent in its claim made specific performance as a principle prayer and in addition to that damages and as alternative prayer the respondent has prayed for other reliefs. Hence, there are two sets of prayer i.e. Prayer (A) along with (B) and Prayer (C) in alternative for. So, it is apparent that the respondent has prayed for damages in addition to specific performance, Prayers (A) and (B) is one set of prayer and go jointly, whereas prayer (C) is separate and in alternative. During the course of proceedings, the respondent itself gave up the prayer of specific

performance and suggested novation of contract with revision of rates which does not fit in the definition of contract, unless agreed upon. The said fact is evident from Para no.42 of the award under challenge. However, learned arbitrator has only considered prayer (B), which is part of composite prayer and which is in addition to prayer (A), inspite of respondent giving up the principle prayer of specific performance. Since prayer (A) and (B) comes under purview of section 21 (3) of the Specific Relief Act, hence both are to be considered as composite prayer and further to that of remaining prayers are made alternatively, which the learned arbitrator has failed to do.

If the wording of section 21 (3) of Specific Relief Act is seen then it says that, all the decisions are supposed to be on merits that is granting or refusing specific performance, but if the claimant himself drops the prayer for specific performance, then the prayer for damages does not survive.

23] The applicant in support of this submission relied upon the observations of Their Lordships in the case of Board of Control For Cricket in India Vs. Deccan Chronicle Holdings Ltd., reported in (2021) SCC Online Bom 834 wherein it is held that :

"On the principle of law laid down by the Privy Council in Ardeshir Mama. v. Flora Sasoon,

(1927-28) 55 IA 360: (AIR 1928 PC 208) and under Section 16 of the Specific Relief Act, 1963 specific performance cannot be enforced in favour of a person who fails to prove that he has always been and still is ready and willing to perform the essential part of the contract which are to be performed by him. The claim for specific performance was not pressed at the trial. It was really abandoned. The plaintiff contended at the trial that he was entitled to damages. The suit for specific performance must, therefore, fail. Once a suit for specific performance fails by reason of the fact that claim for specific performance was not pressed or abandoned at the trial, the question of damages for specific performance in substitution also fails. The question of claiming damages for breach of contract under Section 73 of the Contract Act is an entirely different cause of action on the principle laid down in Mama v. Sassoon. It is also clear from Section 24 of the Specific Relief Act, 1963 that the dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract."

24] On the other hand, on behalf of respondent assailed the above referred arguments made on behalf of applicant and submitted that case law relied upon by the applicant in connection with this point has no application to the facts of the present case as in para no.32 of the award it is observed that the claimant was always ready

and willing to perform its part of contract. The Hon'ble Arbitrator has also reached a conclusion that the respondent has breached the terms of the contract. It is important to note that the claimant has stated during the course of arguments that it is willing to undertake the work and complete the project subject to escalation in costs due to passage of time to which present applicant refused. So, in view of decisions in the case of (i) Saradmani Kandappan Vs. S. Rajalakshmi reported in (2011) 12 SCC 18, (ii) Nirmala Aanand Vs. Advent Corp Pvt. Ltd. reported in (2002) 8 SCC 146, (iii) Paratap Lakshman Vs. Shamlal Uddavasdas Wadhawa reported in (2008) 12 SCC 67, it cannot be said that merely because the respondent expressed desire to have escalation in costs due to passage of time, it was not ready and willing to perform the contract as sought to be contended by the applicant.

25] The arbitrator has specifically observed in award that the damages are adequate remedy in the present matter and, therefore, having regard to the said submission and the circumstances where applicant had added extraneous conditions to the contract which the respondent was not ready to accept, the Hon'ble Arbitrator chose to grant damages in lieu of specific performance. It is settled law that when damages are granted in lieu of

specific performance, they are granted having regard to the same principles as are enumerated under section 73 of the Contract Act. Therefore, the arguments submitted on behalf of applicant and case law relied upon in that regard do not sustain.

26] Thus, in view of rival submissions made on behalf of both parties and the fact that the respondent gave up the prayer of specific performance and suggested novation of contract which does not fit in the definition of Contract unless agreed upon. This particular aspect is evident from para no.42 of the award. Therefore, the observations in the case of **Board of Control For Cricket in India Vs. Deccan Chronicle Holdings Ltd.**, cited above is there and applicable to the facts of the case in hand wherein it has been held that, once a suit for specific performance fails by reason of the fact that claim for specific performance was not pressed or abandoned at the trial, the question of damages for specific performance in substitution also fails. Therefore, in my opinion the ground raised by applicant that arbitrator without considering the legal aspect passed the award without application of mind and so it being patently illegal cannot be sustained is required to be accepted.

27] Therefore, in view of discussion in above

foregoing paras, I find that the applicant has made out the grounds set out in the application so as to brand award illegal, unreasoned, without application of mind and certain legal provisions and thereby it suffers from patent illegality within the meaning of section 34 (2A) of the Arbitration and Conciliation Act. So, in the result I pass the following order.

ORDER

- 1] Application is allowed.
- 2] Award dated 27th June, 2016 and subsequent clarification on the same dated 16th August, 2016 passed by Sole Arbitrator Shri. Arvind V. Sawant is hereby set aside.
- 3] Parties to bear their costs own.

Pune.
Date : 14.02.2024

(Sunil. G. Vedpathak)
District Judge-2, Pune.

I affirms that, the contents of this P. D. F. file Judgment are same word for word as per original Judgment.

Name of Steno	S. Y. Shaikh, Stenographer (Grade-I)
Court Name	Sunil G. Vedpathak District Judge-2, Pune.
Date	14.02.2024
Judgment signed by Presiding Officer on	21.02.2024
Judgment uploaded & PDF on	22.02.2024