# THE HIGH COURT OF SIKKIM:GANGTOK

(Civil Appellate Jurisdiction)

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**DIVISION BENCH: THE HON'BLE MR. JUSTICE BISWANATH SOMADDER, CHIEF JUSTICE**
**THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**

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## Arb. A. No. 04 of 2024

Union of India,
Represented by Chief Engineer,
Project Swastik,
C/O 99 A.P.O.,
Pin – 931717. ..... Appellant

***versus***

M/s M.K. Infrastructure (P) Ltd.,
Represented by Director Smt. Lalita Kandoi,
Resident of 4 Agrasen Road,
Siliguri, West Bengal,
PIN – 734005. ..... Respondent

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**Appeal under section 37(1) of the Arbitration and Conciliation Act, 1996**

[*against the judgment dated 05.12.2023 passed by the learned Commercial Court, Gangtok, in Commercial (Arbitration) Case No. 02 of 2023 in M/s M.K. Infrastructure (P) Ltd. vs. Union of India*]

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**Appearance:**

Ms Sangita Pradhan, Deputy Solicitor General of India assisted by Ms Natasha Pradhan and Ms Sittal Balmiki, Advocates for the Appellant.
Mr. Amit Lal Chakravorti, Advocate and Mr. Gourav Mandal, Advocate for the Respondent.

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# J U D G M E N T

( 8th May, 2025 )

***Bhaskar Raj Pradhan, J.***

The process of arbitration is initiated on a consensus of the parties when they desire to resolve their disputes arising out of the agreement through the process of

arbitration instead of following the normal process of courts. The effort of the legislature in enacting *the Arbitration and Conciliation Act, 1996* (in short, *the Arbitration Act*) is to ensure that this process is fair, efficient and capable of meeting the needs of the specific arbitration and to minimise the supervisory role of courts in the arbitral process. It is precisely for this reason that section 19 provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. It further provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. Failing any agreement, the arbitral tribunal may conduct the proceedings in the manner it considers appropriate. The power of the arbitral tribunal while conducting the proceedings in the manner it considers appropriate, includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

2. The ambit and scope of section 34 of *the Arbitration Act* is no longer *res integra*. Interference in an arbitration dispute for setting aside an arbitral award is limited to sub-section (2) and sub-section (3) of section 34. section 34 has been interpreted by the Hon'ble Supreme

Court with sufficient clarity. It is the settled legal position that in an application under section 34, the Court is not expected to act as an Appellate Court and re-appreciate the evidence. Interference would be warranted when the award is in violation of "*public policy of India*", which has been held to mean "*the fundamental policy of Indian law*". It would be impermissible to interfere on the merits of the award. An award could also be interfered with on the ground that it is in conflict with justice or morality which is now understood as a conflict with "*most basic notions of morality or justice*". It is only such arbitral award that shocks the conscience of the Court that can be set aside on the ground of patent illegality appearing on the face of the award and goes to the root of the matter. Mere erroneous application of law would not be a ground for interference. A perverse decision would amount to patent illegality.

3. In ***Punjab State Civil Supplies Ltd. vs. Sanman Rice Mills***[1], the Hon'ble Supreme Court held as under:

> "***Conclusion***:
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> ***20.*** *In view of the above position in law on the subject, the scope of the intervention of the court in arbitral matters is virtually prohibited, if not absolutely barred and that the interference is confined only to the extent envisaged under Section 34 of the Act. The appellate power of Section 37 of the Act is limited within the domain of Section 34 of the Act. It is exercisable only to find out if the court, exercising power under*

[1] 2024 INSC 742

> *Section 34 of the Act, has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the power so conferred. The Appellate Court has no authority of law to consider the matter in dispute before the arbitral tribunal on merits so as to find out as to whether the decision of the arbitral tribunal is right or wrong upon reappraisal of evidence as if it is sitting in an ordinary court of appeal. It is only where the court exercising power under Section 34 has failed to exercise its jurisdiction vested in it by Section 34 or has travelled beyond its jurisdiction that the appellate court can step in and set aside the order passed under Section 34 of the Act. Its power is more akin to that superintendence as is vested in civil courts while exercising revisionary powers. The arbitral award is not liable to be interfered unless a case for interference as set out in the earlier part of the decision, is made out. It cannot be disturbed only for the reason that instead of the view taken by the arbitral tribunal, the other view which is also a possible view is a better view according to the appellate court.*
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> ***21.*** *It must also be remembered that proceedings under Section 34 of the Act are summary in nature and are not like a full-fledged regular civil suit. Therefore, the scope of Section 37 of the Act is much more summary in nature and not like an ordinary civil appeal. The award as such cannot be touched unless it is contrary to the substantive provision of law; any provision of the Act or the terms of the agreement."*

4. The records reveal that the parties had entered into a contract for construction of living shelters, structures, sheds on Jawaharlal Nehru Marg in the State of Sikkim. The contract had an arbitration clause. When dispute arose between the parties, the respondent invoked the arbitration clause and approached the appellant for appointment of an Arbitrator. On 02.01.2019, Col. S. Gopikrishnan was appointed as the sole Arbitrator. Subsequently, Col. Anil Kothiyal replaced Col. S. Gopikrishnan for adjudication of the dispute. Pleadings were thereafter exchanged. The respondent filed its statement of claims on 15.01.2022. On

24.02.2022, statement of defence was filed by the appellant. The respondent thereafter filed a rejoinder on 06.05.2022 which was followed by a reply to the rejoinder by the appellant on 22.06.2022. Thereafter, on 16.07.2022, the appellant filed paragraph wise reply to the claims filed by the respondent. It was only, thereafter, that the sole Arbitrator passed the arbitral award on 27.12.2022.

5. The arbitral award dealt with all the claims made by the respondent. It was held that the appellant did not cancel the contract in the initial stages giving sufficient time to the respondent to complete the subject work. The respondent could not complete the work on time and sought for extension at various occasions which was granted. The site was handed over to the respondent on 04.04.2009, after which, several diligence notices were issued to accelerate the progress of the work but the respondent failed to mobilize resources resulting in delay in completion of work. When the respondent did not resume the work, final notice was issued on 24.10.2015. Inspite of the final notice, respondent did not commence work which led to the cancellation of the contract according to the terms of condition-54 of the General Conditions of Contract. Accordingly, the sole Arbitrator rejected all the claims of the respondents and

awarded the claim of the appellant for balance amount to be recovered from the respondent and the cost thereof; cost of reference to arbitration; and interest at the rate of 12% after three months from the date of award of the judgment till date of receipt of payment.

6. The respondent preferred an application under section 34 of *the Arbitration Act* for setting aside the arbitral award. The challenge to the arbitral award was substantially on the merits of the dispute between the parties.

7. Before the learned Commercial Court, the respondent contended that the arbitral award ought to have been passed on or before 01.01.2020, i.e., within 12 months from the date of entering upon reference as per *the Arbitration and Conciliation (Amendment) Act, 2015 (for short, the 2015 Amendment)*. It was further contended that the subsequent sole Arbitrator who was appointed on 30.06.2021, should have passed the award on 29.06.2022, but it was passed on 27.12.2022, with a delay of five months and twenty-nine days. It was contended by the respondent that there was no extension of time either by the parties or by the Court and as such, the award was passed beyond the

timeframe envisaged under section 29-A of *the Arbitration Act*.

8. The learned Commercial Court was in agreement with the submissions made by the respondent and vide judgment dated 05.12.2023, allowed the section 34 application on the ground that the sole Arbitrator, who passed the impugned arbitral award, had become *functus officio* on 01.10.2020 and the arbitral award passed on 27.12.2022 was *non-est*. It was held that the arbitral award was passed on 27.12.2022 which was beyond the stipulated time under section 29-A(1) and (3) of *the Arbitration Act* as amended by *the 2015 Amendment*. It was further held that there was nothing on record to show that prior to or after the expiry of the prescribed period, the Court had made any extension as prescribed under section 29-A(4). Accordingly, it set aside the arbitral award.

9. The learned Commercial Court did not examine anything else. The learned Commercial Court did not examine the scope of section 34. The learned Commercial Court did not find that the arbitral award was against the public policy of India or the fundamental policy of Indian law or in conflict with the most basic notions of morality and

justice. The arbitral award was also not held to be against any substantive provision of law or Act. More importantly, the learned Commercial Court did not examine whether the issue of non-compliance of section 29-A(1) as amended by *the 2015 Amendment* was only an erroneous application of law and therefore, not a ground for interference.

10. The moot question for this Court to examine in this appeal under section 37 of *the Arbitration Act* is, whether the ground on which the learned Commercial Court set aside the reasoned arbitral award is a valid ground for setting aside an award under section 34 of *the Arbitration Act*?

11. The effect of the impugned judgment is, therefore, to set aside the final award passed at the behest of the losing party after the sole Arbitrator had completed the process of arbitration invoked by the respondent. This is not what was envisaged by the legislature when it provided specific grounds for challenge under section 34 of *the Arbitration Act*. Whether the sole Arbitrator failed to pass the arbitral award within the timeframe set by section 29-A(1) and (3) of *the Arbitration Act* (as amended by *the 2015 Amendment*) would not fall under any of the specific grounds

provided in sub-sections (2) and (3) of section 34 in the facts of the present case. The arbitral award, to a very limited extent, may be open to challenge if it is passed after inordinate and unexplained delay. That would render it in conflict with the public policy of India or patent illegality that shocks the conscience of the Court. This is so as we cannot lose sight of the fact that one of the objective of alternative dispute resolution by the process of arbitration is to have expeditious and effective disposal of disputes through a private forum of party's choice. This was not, however, what was argued and evident in the facts of the case.

12. Section 29-A(1) is a procedure for the arbitrator to follow and does not confer any right or impose any obligation on the parties. This would be true both under *the 2015 Amendment* as well as *the Arbitration and Conciliation (Amendment) Act, 2019 (for short, the 2019 Amendment)*. Further, sub-section (3), even under *the 2015 Amendment* of section 29-A, makes it evident that the timeline set for the Arbitrator under sub-section (1) was not sacrosanct as the said provision provides that the timeline could be extended for a further period of six months by consent of the parties. Even thereafter, by virtue of the provision of sub-section (4)

thereof, the Court could further extend the period for making the award by six months.

13. The rules of procedure are essentially intended to subserve the cause of justice - being the handmaidens of justice - and not for punishing the parties in the conduct of the proceedings.

14. In ***Narinder Singh & Sons vs. Union of India***[2], the Hon'ble Supreme Court observed that the newly enacted section 29-A emphasises on quick and prompt adjudication. Idioms carping "delay" and "hurry" in adjudication highlight the importance of both speedy disposal and reasonable opportunity, as both are essential for an even-handed and correct decision. Neither should be sacrificed nor inflated as to prolong or trample a just and fair adjudication. A pragmatic and common-sense approach would invariably check any discord between the desire of expeditious disposal and adequacy of opportunity to establish one's case.

15. As per record, the reference was made on 02.01.2019 and when *the 2019 Amendment* came into force

[2] 2021 INSC 747

on 30.08.2019, the arbitration proceeding was pending as the award was passed only on 27.12.2022.

16. The learned Commercial Court was of the view that section 29-A of *the Arbitration Act* (as it stood during the time when the first Arbitrator was appointed), brought into force by *the 2015 Amendment* on 23.10.2015, would be the applicable law. As such, the learned Commercial Court considered the date of reference as the starting point for the period provided therein. The learned Commercial Court examined section 29-A post *2015 Amendment*, w.e.f., 23.10.2015 which remained in force till it was further substituted by section 29-A, w.e.f., 30.8.2019. It noted the requirement under sub-section (1) of passing the award "*within a period of twelve months from the date the arbitral tribunal enters upon reference.*" It noted that under sub-section (3), the parties may, by consent, extend the period specified in sub-section (1) for making an award for a further period not exceeding six months. It also noted that sub-section (4) provided "*If the award is not made within the period specified under sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the*

*period*." Reading the said provision in its entirety, the learned Commercial Court opined that the arbitrator was required to pass an award within a period of twelve months from the date the arbitral tribunal enters upon reference. The learned Commercial Court observed that there was nothing on record to show that the parties consented to extend the period for making the arbitral award by another six months and even if such consent is presumed, the final award ought to have been made on or about 1.10.2020.

17. Insofar as the question sought to be raised by the learned Deputy Solicitor General of India before this Court is concerned, the learned Commercial Court noted the submission that the time limit for passing the award within a period of twelve months would begin from the date of completion of pleadings and since the pleadings were completed on 16.7.2022 and the arbitral award was passed on 27.12.2022, the impugned order was well within the prescribed time. However, the learned Commercial Court did not examine in detail whether *the 2015 Amendment* or *the 2019 Amendment* was applicable, as it opined that since *the 2015 Amendment* was effective from 23.10.2015 until it was further substituted on 30.8.2019 by *the 2019 Amendment*, *the 2015 Amendment* would be the applicable law.

18. The appellant challenges this opinion of the learned Commercial Court and contends that section 29-A as amended by *the 2019 Amendment* would be the applicable law and therefore, the starting point of the twelve months period would be the date of completion of pleadings under sub-section (4) of section 23.

19. The learned Deputy Solicitor General of India relying upon the judgment of the Hon'ble Supreme Court in ***Tata Sons Pvt. Ltd. vs. Siva Industries and Holdings Ltd.***[3] submitted that *the 2019 Amendment* would be applicable in the present case and as the award was passed within twelve months from the date of completion of pleadings as required under section 29-A(1), sub-section (7) of section 29-A would have no relevance.

20. The learned counsel for the respondent counters this argument by submitting that since the first sole Arbitrator Col. S. Gopikrishan was appointed on 02.01.2019, the arbitration proceeding is to be governed by *the 2015 Amendment* as it remained in force till 30.08.2019 from when *the 2019 Amendment* came into force.

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[3] 2023 INSC 13

21. In ***Tata Sons*** (supra), the Hon'ble Supreme Court was deciding a *lis* relating to an international commercial arbitration. However, it arrived at some findings of facts that would be relevant for the present case. It was held that the provision of section 29-A was introduced into *the Arbitration Act*, w.e.f., 23.10.2015 by Act 3 of 2016, i.e., *the 2015 Amendment* and further section 29-A was substituted by Act 33 of 2019; i.e., *the 2019 Amendment*, w.e.f., 30.8.2019. It also held that whereas *the 2015 Amendment* in terms of section 26 of Act 3 of 2016 was prospective in nature, *the 2019 Amendment* did not contain any provision equivalent to section 26 of Act 3 of 2016 evincing a legislative intent making the application of the amended provision prospective.

22. These findings of the Hon'ble Supreme Court in ***Tata Sons*** (supra) would be applicable even for cases relating to domestic arbitrations. The Hon'ble Supreme Court also concluded that *the 2019 Amendment* is remedial in nature insofar as international commercial arbitration is concerned, in that, it carves out international commercial arbitrations from the rigour of the timeline of six months. Viewed in this light, we notice that *the 2019 Amendment* of section 29-A

also changes the timeline for passing of a domestic award within twelve months from the date the arbitral tribunal "*enters upon the reference*", to twelve months from the date of "*completion of the pleadings*" under sub-section (4) of section 23. In such view of the matter, therefore, we are of the considered opinion that even for domestic arbitrations *the 2019 Amendment* to section 29-A would be remedial in nature. As such, the change in the starting point of the twelve months to the date of completion of pleadings instead of date of reference for the arbitrator to make an award does not confer any rights or obligation on any party. We are, therefore, of the view that section 29-A(1), as a mandate, being remedial in nature even for domestic arbitration, it should be applicable to all pending arbitral proceedings as on the effective date, i.e., 30.8.2019, from which date *the 2019 Amendment* came into effect. It is not in dispute that in the present case the arbitral proceedings between the two parties were pending as on 30.8.2019.

23. If we, therefore, consider *the 2019 Amendment* of section 29-A is the applicable procedural law, the arbitral award passed on 27.12.2022 was well within the time frame of twelve months envisaged in section 29-A(1) of *the Arbitration Act* from the date of completion of pleadings.

24. There is nothing on record to suggest that the respondent protested on the jurisdiction of the sole Arbitrator beyond the period of twelve months under sub-section (1) as being *functus officio* beyond the period before the arbitral award. The protest came only when the arbitral award rendered by the sole Arbitrator was against the respondent in the form of section 34 application.

25. Infact, the arbitral award records that the respondent requested for granting time up till 15.01.2022 to submit his statement of claims and he submitted his claim vide letter dated 15.01.2022, which was received on 01.02.2022. Therefore, it would be unthinkable that the respondent desired the award to be made even before he would submit his statement of claims. The appellant, according to the arbitral award, submitted his statement of defence on 24.02.2022. The arbitral award also records that the respondent submitted his rejoinder to the statement of defence on 06.05.2022, after making a request to allow them time up to 30.04.2022. It further records that time and again the respondent had sought time for pleadings and hearing till 05.09.2022. These facts establish that the extension of time was at the behest of the respondent.

26. We also take judicial notice of the fact that during the period of arbitration, COVID-19 pandemic had set in and the Hon'ble Supreme Court in *Suo Moto Writ Petition (C) No. 3/2020 in Re: Cognizance for extension of limitation*, had directed that the period between 15.03.2020 till 28.02.2022 shall stand excluded in computing the period prescribed under sections 23(4) and section 29-A of the Arbitration Act. Therefore, not only did the parties got extended period for completion of pleadings under section 23(4), but the sole Arbitrator also got an extension of the period envisaged in section 29-A for passing the award within timelines prescribed therein. If the learned Commercial Court had examined the issue raised by the respondent regarding the timeline the Arbitrator had to follow as narrated in paragraph 7 above in light of the orders passed by the Hon'ble Supreme Court in *Suo Moto Writ Petition (C) No. 3/2020 in Re: Cognizance for extension of limitation*, exempting the period of 15.03.2020 till 28.02.2022, it would have noticed that almost the entire period was directed to be excluded due to the Covid-19 pandemic.

27. We summarize our findings as under:

i) The learned Commercial Court had failed to consider the limited jurisdiction it had while examining

the challenge to the arbitral award under section 34 of *the Arbitration Act*.

ii) The ambit and scope of section 34 of *the Arbitration Act* is limited to the extent provided in sub-sections (2) and (3), thereof. An appeal under section 34 is not a regular appeal.

iii) In the facts of the present case, the learned Commercial Court exceeded its jurisdiction under section 34 of *the Arbitration Act*.

iv) Section 29-A(1) of *the Arbitration Act* is a procedure to be followed by the arbitral tribunal and does not confer any right or impose any obligation on the parties. It is also remedial in nature.

v) Section 29-A(1) does not lay down any sacrosanct timeline as sub-section (3) permits further extension of six months by consent of parties. Even thereafter, sub-section (4) gives the power to the Court to extend the period further by six months.

vi) Section 29-A(1) as amended by *the 2019 Amendment* and not *the 2015 Amendment* would govern the procedure to be followed by the Arbitrator as the arbitration was pending when *the 2019 Amendment* was brought into force on 30.08.2019.

28. We are, therefore, of the opinion that the impugned judgment dated 05.12.2023, setting aside the arbitral award passed by the sole Arbitrator, was unwarranted. We, therefore, set it aside.

29. Arbitration Appeal is allowed and stands disposed of, accordingly.

**(Bhaskar Raj Pradhan)**
**Judge**

**(Biswanath Somadder)**
**Chief Justice**

Approved for reporting : **Yes**
Internet: **Yes**
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