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Patel Engineering Limited v. North Eastern Electric Power Corporation Limited (NEEPCO)

Citation	**Special Leave Petition (C) Nos. 3584-85 of 2020**
Court	**Hon’ble Supreme Court of India**
Date	**22 May 2020**
Bench	**R. Banumathi J., Indu Malhotra J., and Aniruddha Bose J.**

Background

- Three declaratory arbitral awards dated 29 March 2016 were rendered against NEEPCO, which were challenged under section 34 of the Arbitration and Conciliation Act, 1996 ('Act'). The Additional Deputy Commissioner (Judicial), Shillong rejected the applications vide common judgment dated 27 April 2018, against which NEEPCO preferred three appeals under section 37 of the Act before the High Court of Meghalaya at Shillong ('HC'). The HC allowed the appeals and set aside the common judgment vide order dated 26 February 2019, which was subsequently challenged by Patel Engineering Limited ('PEL') in three special leave petitions and the same were dismissed in limine by the Supreme Court vide order dated 19 July 2019.

- After dismissal of the SLPs, PEL filed review petitions before the HC contending that the judgment of the HC suffered from errors apparent on the face of the record as it failed to consider amendments made to the Act by the Amendment Act of 2015. However, the review petitions were dismissed by the HC vide order dated 10 October 2019 and the same became the subject matter of challenge before the Supreme Court. ('Impugned Order')

The Award

- The Arbitral Tribunal ('AT') was seized with determination of contractual formula applicable for calculation of extra transportation charges for sand and boulders pertaining to extra lead work carried out by PEL under three separate contracts. The only point at issue was an interpretation of Clauses 2.7 and 3.4 of the BoQ and whether clause 33(ii)(a) or clause 33(iii) of the Conditions of Contract would be applicable for working out the rate payable for transportation. As such, the AT held that the same shall be decided in accordance with clause 33(ii)(a) for all three similar contracts constituting the project.

The HC Judgment

- While allowing the appeals preferred by NEEPCO under section 37 of the Act, the HC rejected the contractual interpretation adopted by the AT and observed that Clause 33(iii) unequivocally provided the correct approach under the contract. It was held that no reasonable person could have arrived at a different conclusion while interpreting Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract and any other interpretation of these clauses would be irrational and in defiance of all logic.

- Furthermore, the HC also held that findings of the AT suffer from the vice of irrationality and perversity as it had considered various irrelevant factors and ignored vital clauses in the contract and tender documents. This would certainly entail 'patent illegality' under section 34(2A) of the Act, a ground exclusively available for setting aside domestic awards after the 2015 amendment. Apart from this, the HC also observed that the award amounted to unjust enrichment of PEL at the cost of public exchequer, which results in contravention of the fundamental policy of Indian law, a ground for setting aside an award under section 34(2)(b)(ii) of the Act. Pertinently, the HC referred to a host of judgments on the issue including the judgment in Oil & Natural Gas Corporation Limited v. Western Geco International Limited (2014) 9 SCC 263 which is no longer good law in light of the 2015 amendment to the Act, which constricts the erstwhile expansive 'public policy' test. However, the HC decision primarily pivots on the reasoning that the award is perverse, and the view taken by the AT is not even a possible view, therefore vitiated by patent illegality appearing on the face of the award.

The Contentions

- PEL chiefly contended that the HC erroneously applied provisions of the Act as applicable prior to the Amendment Act, 2015 and the HC judgment suffers from error apparent on the face of the record. Further, it wrongly relied upon the decisions in Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705 and Western Geco (supra), which are no longer good law after the Amendment Act, 2015 came into effect from 23 October 2015 and thus the HC committed an error in passing the Impugned Order rejecting the review petitions. Reliance was placed on the rulings in HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limted (2018) 12 SCC 471 and Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI) (2019) 15 SCC 131.

- On the other hand, NEEPCO contended the maintainability of the present SLPs on the ground that PEL had made all the above submissions including the effect of amendment to section 34 in its earlier SLPs against the HC judgment, and the same were dismissed after hearing PEL at length. Further, it was contended that PEL must not be allowed to reagitate the matter by filing review petitions once it has faced an order of dismissal without reserving any liberty for the same, even though the SLPs were dismissed by way of a non-speaking order. Thus, the HC rightly rejected the review petitions filed by PEL and the Impugned Order must be sustained.

The Judgment

- The Hon'ble Supreme Court refrained from delving into the aspect of maintainability of the present SLPs preferred against the order dismissing review once challenge to the main HC judgment had been rejected in the earlier SLPs and no express liberty was taken by PEL to move the HC for review. Further, in view of the authoritative pronouncement in Board of Control for Cricket in India v. Kochi Cricket Private Limited and Others (2018) 6 SCC 287, it was held that amended section 34 of the Act would apply in the present case as arbitral awards were rendered much after the cut-off date of 23 October 2015.

- Noting the evolution of concept of 'patent illegality' as a subset of 'public policy' ground for setting aside domestic arbitral awards, the Hon'ble Court referred to the judgments in Saw Pipes (supra) and Associate Builders v. Delhi Development Authority (2015) 3 SCC 49. The Court then proceeded to discuss recommendation of the 246th Report of the Law Commission regarding insertion of the ground of 'patent illegality' through introduction of clause (2A) in section 34 of the Act. While extensively referring to the decision in Ssangyong (supra), the Court observed that the ground of 'patent illegality' appearing on the face of the award is available for setting aside domestic arbitral awards in applications under section 34 of the Act made after 23 October 2015.

- It was further clarified that construction of the terms of the contract is primarily for an arbitrator to decide, unless the arbitrator construes a contract in a manner which no fair minded, or reasonable person would take i.e. if the view taken by the arbitrator is not even a possible view to take and manifestly perverse. Moreover, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction.

- The Hon'ble Supreme Court expressed its agreement with the HC judgment and observed that the HC has arrived at the correct conclusion that the arbitral awards are patently illegal or perverse as finding of the HC is in conformity with paragraph 40 of the judgment in Ssangyong (supra). Furthermore, it was observed that the HC has rightly followed the test set out in paragraph 42.3 of Associate Builders (supra), which was reiterated in paragraph 40 of Ssangyong (supra). Dismissing SLPs filed by PEL, the Supreme Court finally held that while dealing with the appeal under Section 37 of the Act, the HC has considered the matter at length, and while interpreting the terms of the contract, no reasonable person could have arrived at a different conclusion. Ergo, the HC was correct in holding that the awards suffer from the vice of irrationality and perversity and rightly set aside as being patently illegal.