* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **FAO No. 286/2017**

% **10th July, 2017**

UNION OF INDIA ..... Appellant

Through: Mr. Satyawan Shekhawat, Advocate for Mr. Saurav Agarwal, Advocate with Mr. Jai Inder Sharma, Executive Engineer, AIIMS PD CPWD.

versus

M/S VED PRAKASH MITHAL AND SONS ..... Respondent

Through: Mr. Peeyoosh Kalra, Mr. Shiva Sharma and Ms. Swati, Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. Nos. 23615/2017, 23616/2017 (for exemptions)

Exemptions allowed, subject to all just exceptions.

The CMs stand disposed of.

FAO No. 286/2017 and C.M. Appl. No. 23614/2017 (for stay)

1. This first appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') impugns the judgment of the court below dated 30.5.2017. By the impugned

judgment the court below by relying upon the judgment of the Division Bench of this Court in the case of ***M/s Prakash Atlanta JV Vs. National Highways Authority of India, 227 (2016) DLT 691*** has held the objections filed under Section 34 of the Act were time-barred. ***M/s Prakash Atlanta's*** case ***(supra)*** holds that the period of limitation for filing objections under Section 34 of the Act commences not from the date of receiving of the copy of the amended award or the order passed under Section 33 of the Act but from the date of passing of the order under Section 33 of the Act. It may be noted that after an award is passed, the provision of Section 33 of the Act entitles a party to the arbitration proceedings to move an application to correct administrative mistakes etc in the award. The Act provides vide Section 34 (3) that the objections which are filed under Section 34 of the Act are to be from the date of disposal of the application under Section 33 by the Arbitration Tribunal.

2. The appellant argues before this Court that the judgment of the Division Bench relied upon by the court below has no application whatsoever to the facts of the present case because the issue which was decided in the case of ***M/s Prakash Atlanta (supra)*** by the Division Bench was whether the period of filing objections to the award under Section 34 of the Act commences from the date of the

disposal of the application under Section 33 of the Act or from the date of receiving of the order passed under Section 33 of the Act, and the Division Bench held that the date of receiving of the order passed under Section 33 of the Act is not material and that the limitation would commence, in view of the language of Section 34 (3) of the Act, for filing of the objections from the date of disposal of the application under Section 33 of the Act, whereas in the present case the admitted facts are that the award was passed by the Arbitrator on 30.10.2015, the certified copy of the award was received by the appellant on 7.11.2015, the appellant filed an application under Section 33 of the Act on 16.11.2015 and which application was disposed of by the Arbitrator vide order dated 14.12.2015, and objections were filed by the appellant under Section 34 of the Act before the court below within the limitation period on 11.3.2016 i.e if the period of limitation of ninety days is to be taken to have commenced from 14.12.2015 when the order under Section 33 was passed, and in accordance with the ratio of the Division Bench judgment in the case of ***M/s Prakash Atlanta (supra)***, the period of ninety days would expire on 14.3.2016, and that the objections under Section 34 of the Act were already filed on 11.3.2016 by the appellant and hence were clearly within the period of

ninety days prescribed for filing of the objections under Section 34 of the Act.

3. The opinion of this Court in view of the aforesaid admitted position, and applying the ratio of the judgment in the case of ***M/s Prakash Atlanta (supra)*** that limitation for filing of objections under Section 34 of the Act should be taken from the date of disposal of the application under Section 33 of the Act, the objections filed on 11.3.2016 being within the period of ninety days from the date of decision/disposal of the application under Section 33 of the Act on 14.12.2015, the court below has clearly erred in holding that the objections under Section 34 of the Act were time-barred.

4. Learned counsel for the respondent has placed great stress on the judgment of the Supreme Court in the case of ***State of Arunachal Pradesh Vs. M/s Damini Construction 2007 (3) SCALE 576*** to argue that a Court before holding that the limitation period commences from the date of disposal of the application under Section 33 of the Act has to ensure that the application which is filed under Section 33 of the Act is actually one within the scope of Section 33 of the Act, and that even if on merely because the application is titled as under Section 33 of the Act, but if the same is in fact in the nature of a

review petition or an application which does not fall within the four corners of Section 33 of the Act, then the disposal date of such an application will not be the date of commencement of limitation period of ninety days for filing of the objections under Section 34 of the Act, and that the application filed under Section 33 of the Act which was disposed of on 14.12.2015 was not an application falling within Section 33 of the Act. In view of the argument so raised by the respondent, we have to examine whether the application filed by the appellant under Section 33 of the Act fell within the boundaries as required by Section 33 of the Act for limitation period of ninety days to commence on the disposal thereof.

5. There were two parts to the application filed by the appellant under Section 33 of the Act before the Arbitrator. It is conceded on behalf of the appellant before this Court that the first part of the application was in the nature of review, and in such situation the first part of the application seeking the relief of review would not fall under Section 33 of the Act, however, it is argued that the second part of the application pleading administrative mistake with respect to allowing by the Arbitrator of claim no. 13 fell within the limits of Section 33 of the Act, and therefore, it is when this issue of claim no. 13 was decided by the Arbitrator on 14.12.2015, it is then that the

limitation period of ninety days commenced for filing of the objections by the appellant under Section 34 of the Act.

6. In order to understand the issue, this Court would set out here under the relevant portion of the award of the Arbitrator dated 30.10.2015 below with the relevant portion of the application filed by the appellant under Section 33 of the Act, however, a limited preface is required to be given with respect to claim no. 13 which was dealt with in the arbitration proceedings. The contract in question awarded in favour of the respondent by the appellant pertained to construction of auditorium/business centre (Blocks C and D) and Block E for International Centre of Alternative Dispute Resolution at plot No. 6, Vasant Kunj, Institution Area, Phase II, New Delhi. Claim no. 13 was the claim filed by the respondent/claimant for amounts to be awarded with respect to extra items having been done by the respondent beyond the scope of the contract. One such extra item is with respect to polishing and machine cutting of marble work. With respect to various such extra items claim no. 13 was filed and we are only concerned with a part of the claim no. 13 pertaining to the serial nos. 11(a) and 11(b) of cutting and polishing of marble work. The dispute which the Arbitrator decided was as to the rate to be awarded with respect to these items 11(a) and 11(b) under the head of 'extra items executed'.

Arbitrator in this regard held as per the relevant discussion in para 13 of the award that the respondent/claimant should not be prejudiced by granting the lesser rate than the rate as awarded by the running account bills. The Arbitrator held that the respondent was entitled to the rate of Rs.8,019.71 with respect to the extra items of work under serial nos. 11(a) and 11(b). The appellant was aggrieved by the figure of Rs.8,019.71 in this relevant portion of the award because as per the appellant there was an *ex-facie* error inasmuch as the running account bills gave a rate of Rs.5,000/- as per the common provisional rate statement which was signed by the parties after submitting of the 8th running account bill but the Arbitrator instead of allowing the rate as granted by the running account bill of Rs.5,000/- granted the rate of Rs.8,019.71/- and hence the appellant filed an application under Section 33 of the Act stating that there is a clear cut error being an administrative error in observing that the approved rate of running account bills was Rs.8,019.71/- whereas it was Rs.5,000/- as this was the agreed full rate of items 11(a) and 11(b) as per the agreed full rate of these items in terms of the agreed provisional rate statement jointly signed by the parties after submission of the 8th running account bill by the respondent/contractor.

7. Now let me reproduce the relevant portion of the award pertaining to claim no. 13 as also the relevant portion of the application filed by the appellant under Section 33 of the Act, and which reads as under:-

(i) Relevant portion of the award with respect to claim no. 13:-

"13.0 Claim No.13: Less payment made for Extra Items substituted Items-Rs.15,00,000/-

Claimant has filed details of claim for Rs.1613779/- vide C-5(page 58-64/CD-1) Claimant has demanded rate of extra items already paid in RA bills but reduced in final bill.

Respondent submitted that claimant did not follow provisions of clause 12.2 to claim rates of extra items within 15 days of its occurrence and claimant vide letter dt. 31.03.2012 (R-22/RD-2) has given undertaking that he will accept rates of extra items as per DSR 2012 and now he cannot turn around to claim different rates. As such, claimant is stopped to make such claim.

Claimant submitted that such letter was given under economic duress as their large capital was locked with respondents.

I decline to accept the pleading of duress raised first time during arbitration hearing held on 13.04.2015 as no such issue of duress was raised by claimant in his rejoinder filed in Jan. 2015. Except making bald statement that he has claimed rate of extra items with analysis of rates no evidence has been led by claimant that rate of extra items were claimed during execution of work. It is observed that rate of items listed at Sl. No.1,6, 10, 12 to 16 are only available in DSR 2012 and rest of the items are non-scheduled items not available in DSR 2012. I, therefore allow DSR 2012 rates for items listed at Sl. No.6, 10, 12 to 16. DSR-2012 rate of item listed at Sl. No.1 comes at Rs.231/- per cum against the rate of Rs.217.95 per cum paid in final bill but I allow the rate of Rs.226/- per cum as demanded by claimant.

Rest of the items are not available in DSR-2012. I find no force in the argument advanced by respondents that claimant has never claimed rate of extra items under clause 12.2 of the agreement. In fact, claimant is not claiming some different rates other than the rates allowed by respondents in intermediate payments. I decide that rate of extra items paid once in RA bills cannot be reduced at later stage because these conveys contractor in unmistakable terms that this is the rate is going to be paid to him as approved by Engineer-in-Charge. I have referred the part rate statement attached with 7th, 8th, 9th & 10th RA bills and rates paid in respective RA bills where EE has indicted full rate against extra items and part rate as allowed in respective RA bills. I hold that rate of extra items paid in RA bills cannot be reduced in final bill. This view of arbitrator has been held by Delhi High Court in the case of **UOI Vs. N.N. Buildcon Pvt. Ltd.**

(OMP No.259/2015 decided on 21.04.2015). It is also interesting to note that two rates has been paid against one extra items listed at Sl. No.11. I find no reason to pay two rates for one extra item. The amount payable to claimant is listed below in Table 4.

Table-4

Sl. No.	Oty. Executed	No. of RA bill	Full Rate as indicated in Part Rate Statement	Rate paid in final bill	Rate allowed	Balance Amount to be paid
1	11958.27	9th	226	217.95	226	96264
2.	89.29	7th	350	289.97	350	5360
3.	39.68	7th	650	484.17	650	6580
4.	351.79	9th	6958.05	4464.5	6958.05	877206
5.	88	9th	1558	1280.47	1558	24423
6.	244.35	10th	73	65.92	65.92	00
7.	25	9th	13488.2	12986.05	13488.2	12554
8.	1756.96	9th	271	157.7	271	199064
9.	26.5	8th	950	573.4	950	9980
10.	74	9th	816.12	579.75	579.75	00
11(a).	26	8th	**8019.71**	6061.85	8019.71	50904
11(b).	37.95	8th	**8019.71**	6445.35	8019.71	59747
12.	14.6	9th	243.15	243.15	243.15	0
13.	80.57	9th	296.5	296.5	296.5	0
14.	1.6	9th	364.1	364.1	364.1	0
15.	295.68	9th	453.65	453.65	453.65	0
16.	978.56	9th	86.45	86.45	86.45	0
					Total:	1342082

I award Rs.1342082/- to the claimant against claim No.13."

(ii) Relevant portion of the application under Section 33 of the Act filed by the appellant:-

"Claim No. 13:-

The full rate for extra item at sl. no. 11(a) and 11(b) as per part rate statement of 8th RA is Rs.5000/- and not Rs8019.71/- as mentioned in table no. 4 at page no. 18 of award letter. The copy of said part rate statement of 8th RA bill is enclosed herewith under Annexure II.

Therefore, in pursuance of Section 33 (a) of the Arbitration and Conciliation act, the Respondents respectfully make prayer that the Ld. Arbitrator may be please review the facts as stated above in respect of claim no. 6 and give the make amendment in the award accordingly."

(emphasis added)

8. Parties have filed before this Court the 8th running account bill along with the attached provisional rate statement signed by both the parties. In this provisional rate statement, it is clearly found that for the extra work pertaining to polishing and machine cutting of marble work specifies the full rate at Rs.5,000/- and the provisional interim payment rate at Rs.4,500/-. Therefore, this provisional rate statement signed by both the parties herein, the appellant as also the respondent/contractor shows that with respect to the disputed rate of marble work the full rate was agreed at Rs. 5,000/- and the provisional part rate of payment under the 8th running account bill was Rs.4,500/-. Therefore, in the opinion of this Court the appellant was entitled to believe that there was an error apparent in the nature of an administrative mistake in the award referring the full rate at Rs.8019.71/- for claim no.13, because, the full rate indicated in the agreed provisional rate statement signed by both the parties was Rs.5,000/- and not Rs.8019.71/-. Further, in my opinion even assuming that there is some strength in the argument urged on behalf of the respondent that the full rate is Rs.8019.71/-, and though which rate amount I do not find in the provisional rate statement signed by both the parties after submission of the 8th running account bill, in any case, there were therefore two views possible as per the record with

respect to what was the full rate for the extra item of marble work i.e Rs.5,000/- as stated in the agreed provisional rate statement or Rs.8,019.71/- as contended and originally claimed by the respondent and so held by the Arbitrator. In law, if an application is *ex facie* not maintainable under Section 33 of the Act then limitation would not commence after the disposal of the application as held by the Supreme Court in the case of ***M/s Damini Construction (supra)***, but once it is found that two views are possible from the situation, with one view being in favour of the party who files an application under Section 33 of the Act, it cannot be held that the filing of the application under Section 33 of the Act was wholly misconceived and the application under Section 33 of the Act was completely beyond the provisions of Section 33 of the Act.

9. I may note that the Arbitrator while dealing with the claim no.13 in para 13 of the Award at internal page 18 of the Award gives a finding that the Arbitrator has to allow the rates to the respondent/claimant as per the interim rates allowed in the intermediate payments and that such rates granted as per the intermediate payments of running account bills cannot be reduced at a later stage in the final bill, and after so holding the Arbitrator however wrongly refers to the interim rate in the running account bills including the 8th running

account bill as Rs.8,019.71/- instead of the agreed interim payment rate of Rs. 5,000/-. If the reasoning of the Arbitrator is correct that the rates should be allowed as per the interim full rate allowed in the running account bills then the rate had to be allowed at Rs.5,000/- per month in terms of the agreed and jointly signed provisional rates statement prepared after the submission of the 8th running account bill. The Arbitrator however has wrongly taken the interim payment rate under the running account bill as Rs.8019.71/-. The appellant therefore was entitled to have a *bonafide* belief that this is clearly an administrative mistake because in the admitted provisional rates statement prepared after the 8th running account bill the full rate payable with respect to the items in question was of Rs.5,000/-at which the work in question was to be paid. Putting it differently, the respondent agreed to receive the full rate of Rs.5000/- with respect to the polishing and machine cutting of extra marble work and as per the provisional rates statement prepared after the 8th running account bill taking the full rate of Rs.5000/- in the running account bill and that the interim running amount released to the respondent was at the provisional rate of Rs.4,500/-. Once the Arbitrator gave a finding that the amount should be paid at the full rate of Rs.5,000/- as the rate at which item was paid under the running account bills, the appellant had rightly applied under

Section 33 of the Act for correction of the Award mentioning the full rate at Rs.8019.71/- instead of the full rate of Rs.5,000/- as mentioned in the admitted provisional rates statement signed by both the parties.

10. Once the application under Section 33 of the Act was validly filed, the limitation period as per the case of ***M/s Prakash Atlanta (supra)*** for filing of objections commences from the date of disposal of this application under Section 33 of the Act. The application under Section 33 of the Act having been disposed of on 14.12.2015, the objections filed by the appellant on 11.3.2016 were thus very much within limitation i.e within the period of ninety days of the passing of the order under Section 33 of the Act.

11. In view of the aforesaid discussion, the impugned judgment of the court below dated 30.5.2017 is set aside. However, the observations made by this Court with respect to the merits of the matter of what should be the rate allowed under claim no.13 of items 11(a) and 11(b) will be taken as *prima facie* in nature only and the court below will decide the issue on merits as to the rate entitled to the respondent/claimant with respect to item nos. 11(a) and 11(b) in terms of the objections filed by the appellant and duly replied to by the respondent/claimant.

12. Since the impugned judgment is set aside any consequential orders passed of attachment in execution proceedings in favour of the respondent would also stand vacated.

13. The appeal is accordingly allowed, leaving the parties to bear their own costs

14. The court below will now decide the objections under Section 33 of the Act in accordance with law.

15. Parties to appear before the District and Sessions Judge (Saket Courts), New Delhi on 18th August, 2017 and the District and Sessions Judge will mark the objections under Section 34 of the Act for disposal to a competent court in accordance with law.

JULY 10, 2017 **VALMIKI J. MEHTA, J**

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