

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

% **Date of Order: 3rd March, 2023**

+ O.M.P. (COMM) 96/2023 & I.A. 4264/2023 & I.A. 4265/2023 &
I.A. 4266/2023 & I.A. 4267/2023 & I.A. 4268/2023 & I.A.
4269/2023 & I.A. 4270/2023

UNION OF INDIA Petitioner

Through: Mr. Ruchir Mishra, Mr. Sanjiv Kr.
Saxena, Mr. Mukesh Kr. Tiwari,
Ms. Reba Jena Mishra and Ms.
Poonam Mishra, Advocates

versus

M/S SATISH BUILDERS Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant objection petition under Section 34 of the Arbitration and Conciliation (Amendment) Act, 2015 has been filed on behalf of the petitioner seeking the following reliefs:

- “a) Set aside the award passed by the Ld Arbitrator dated 22.10.2022 passed by the learned Sole Arbitrator Sh J .S. Sharma in Agreement No. 01/EE/MPD-I/2018-19 titled as M/s Satish Builders Vs Union of India in Arbitration Case No. JSS/ARB/4, received by Petitioner on 22.10.2022, to the extent it awards claims to the respondent contractor and rejects counter claims of the petitioner;*
- b) Direct cost of the proceedings in favour of the petitioners/objectors and against the respondent;*

c) Pass any other or further order as this Hon'ble tribunal deem fit and proper in the fact and circumstances of the case.”

FACTUAL MATRIX

2. In January 2018, the Contractor/respondent was awarded a Contract for work by the Central Public Works Department (CPWD) (hereinafter referred to as “CPWD/petitioner”). The first Contract was awarded *vide* Agreement No. 06/EE/CUHPD/2017-18 for the tendered value of INR 21,44,15,236 which was shut as the funds allocated by the client for the same were exhausted.

3. In between the execution of the work under the first Contract, another Contract for work *vide* letter dated 18th May 2018 was awarded to the respondent, and Agreement no. 01/EE/MPD-1/2018-19 was executed for the tendered value of INR 2,84,94,777. The stipulated time of completion was 6 months.

4. On or about 16th November 2018, the 6th RA bill was released whereby the Central University of Haryana (CUH) Mahendergarh (hereinafter referred to as "Client") was requested to provide funds as there was a temporary unavailability of funds in the month of December 2018 and January 2019.

5. The issue of funds was known to the respondent in view of which a letter dated 20th December 2018 was sent by the respondent requesting the CPWD/petitioner to grant extension and release the amount withheld from 6th RA bill. In the aforesaid letter the respondent undertook that no extra claims would be made.

6. The respondent's request was approved by the then Assistant Engineer, CPWD vide letter dated 21st December 2018, and extension of time till 31st March 2019 and the release of the withheld amount of INR 7,12,444 was granted on 27th December 2018.

7. On the very next date of extension, the respondent *vide* letter dated 22nd December 2018 submitted the 7th RA bill claiming INR 92,11,697 which was later revealed to be a design to repudiate the Contract. The 7th RA bill was passed for INR 43,90,947 after adjustment of amount advanced earlier as per the Clause 10B of the Agreement, INR 1 was released on 7th March 2020.

8. While the funds were awaited from the Client, the respondent, repudiated the said Contract *vide* letter dated 18th January 2019.

9. In the month of January 2019, when the funds were made available, a meeting between the CPWD/petitioner and the Agencies including the respondent was held on 11th February 2019 and the minutes of meeting thereto were issued *vide* letter dated 12th February 2019, *inter alia*, to the effect that the respondent shall complete the work. By agreeing to complete the work, the repudiation letter by the respondent stood withdrawn casting an obligation to complete the work.

10. From April 2019 to October 2019 various letters were issued granting extension of Contract so as to enable the respondent to complete the balance work. On 30th October 2019, the respondent *vide* letter *inter alia* stated that the work is not closed.

11. On account of respondent not resuming work, several letters/reminders were issued by the CPWD/petitioner requesting the respondent to start the work.

12. On 30th December 2012 the CPWD/petitioner issued a final notice to the respondent demanding that the work may be resumed immediately, failing which it would determine the Contract as per Clause 3(a) and 3(b), and in consequent to the final notice, the Contract was determined by the CPWD/petitioner *vide* letter dated 7th January 2021.

13. A Dispute Resolution Committee was set-up on 25th February 2021 on account of the respondent raising disputes/claims. The DRC had rejected all the claims of the respondent.

14. Statement of Claims was filed by the respondent before the learned Arbitral Tribunal raising 18 claims and a few amendments were made to the Statement of Claims at a later date followed by a Statement of Defence filed by the CPWD/petitioner .

15. The Learned Arbitrator passed the impugned Award dated 22nd October 2022 which was communicated to the CPWD/petitioner through email

16. Aggrieved with the findings recorded in the impugned Arbitral Award, the CPWD/petitioner has approached this Court under Section 34 of the Arbitration Act.

SUBMISSIONS

(On behalf of the CPWD/petitioner)

17. Learned counsel for the petitioner submits that Impugned Award is liable to be set aside as the findings of the Learned Arbitrator to the effect of repudiating Contract are justified whereas the determination of Contract is unjustified.

18. Learned counsel for the CPWD/petitioner submits that findings in Para 28 of the Impugned Award are erroneous as the said paragraph does not take into consideration and even refers to the letter dated 22nd February 2019 which prove that funds were available with department but the work was not resumed.

19. Learned counsel for the petitioner further submits that the works such as Earthwork, which were already paid, are allowed based on CPWD specification. It is further submitted that Earthwork as inspected by the independent engineer was not visible as it was beneath the earth.

20. The learned counsel for the petitioner submits that the award of amount of INR 42,052 is without any evidence as that quantum of work done by the respondent was duly measured and paid for by the CPWD/petitioner.

21. The learned counsel for the petitioner further submits that as per the Agreement, the amount cannot be paid for the items not provided. However, the item no. 2.3 claimed under sub claim 1.1 has been allowed by the impugned Award awarding INR 73,270.

22. The learned counsel for the petitioner further submits that items claimed under statement 1.3 were substituted items and the CPWD/petitioner already paid the respondent at market rates. However, the substituted items were alleged to be extra items, which the arbitrator accepted *vide* award dated 22nd October 2022 and awarded INR 32,97,769, treating substituting items as extra items.

23. The learned counsel for the petitioner submits that that the learned Arbitrator failed to appreciate that under Clause 29, CPWD is entitled to recover due amounts from the respondent under another Contract.

24. The learned counsel for the CPWD/petitioner submits that award of amount of INR 51,321 against statement 1.9 is contrary to agreement provision 10B(iv) and award of INR 84,162 against claim under statement 1.14 is contrary to Agreement provisions.

25. The learned counsel for the CPWD/petitioner submits that the award of INR 6,61,430 against Claim 3 is against Agreement Clause 1A and that the Learned Arbitrator has committed illegality in releasing the security amounts deducted by CPWD from RA bills prematurely as defect liability period is yet to get over and on the other hand that learned Arbitrator erred in not appreciating that the said security amounts were rightly forfeited by CPWD on determination of the Contract as per Clause 3 of the Agreement.

26. The learned counsel for the CPWD/petitioner submits that Performance Bank Guarantee (hereinafter "PBG") submitted by the respondent for INR 12,60,000 as per Clause 1 has been directed to be

released by the learned Arbitrator contrary to Agreement provisions and Claim 4 has been allowed and Counter-Claim 1 has been rejected. It is submitted that the facts of the present case are indicative of the fact that respondent voluntarily did not execute the work.

27. The learned counsel for the CPWD/petitioner submits that the findings in the award in support of release of PBG that release of PBG by the CPWD on earlier occasion confirms that the respondent performed the Contract, is perverse finding as a part of PBG was released by the CPWD in accordance with OM dated 13th May 2020.

28. The learned counsel for the CPWD/petitioner submits that findings in the award are self-contradictory as the award rejects the claim no. 5 and 6 for want of proof/documentary/evidence/necessary details by the respondent. However, some claims which were not supported were also allowed by the learned Arbitrator.

29. The learned counsel for the CPWD/petitioner further submits that award of INR 2,55,390 against Claim 7 is perverse as the respondent had himself requested to shift milestone specifically agreeing that he would not claim anything extra, therefore, no award could be awarded under Claim 7.

30. The learned counsel for the CPWD/petitioner further submits that respondent issued notice dated 31st December 2018 conveying its intention to repudiate the Contract. Therefore, even if the respondent is entitled to overhead expenses, the Award cannot be awarded till 18th

January 2019 as the respondent had already made up his mind to repudiate the Contract.

31. The learned counsel for the CPWD/petitioner submits that the learned Arbitrator passed the Award on the premise that the repudiation is justified, is bad, perverse and contrary to the agreement provisions.

32. The learned counsel for the CPWD/petitioner submits that Counter Claim 3 has been erroneously rejected by the Learned Arbitrator on the ground that compensation under Clause 2 is not payable to CPWD as the balance work has not been executed. It is submitted that balance work was not available due to reasons attributable to the respondent.

FINDINGS AND ANALYSIS

33. Heard learned counsel for the petitioner and perused the record. I have also perused the impugned arbitral award as well as the entire arbitral record brought on record. I have also given thoughtful considerations to the submissions advanced by the parties.

34. The challenge to the impugned arbitral award *inter alia* has been made on the ground that the learned Arbitrator has failed to consider relevant evidence on record to award the claims made by the respondent.

35. Another ground which has been relied upon by the learned counsel for the petitioner is that the learned Arbitrator's finding that the repudiation is justified, is bad perverse and contrary to agreement provisions.

36. The arbitral judgment stands at the centre of the current dispute and is being contested on the grounds of patent illegality, perversity, and at odds with India's fundamental policy before delving into the judicial decisions, it is pertinent to reproduce the relevant portion of Section 34 of the Act, 1996:-

"34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application [establishes on the basis of the record of the arbitral tribunal that]—

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India. [Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,— (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.]"

37. A bare reading of the Section 34 of the Act makes it abundantly clear that in order to set aside an Arbitral Award, it should be found to be patently illegal and contrary to the fundamental policy of Indian Law.

38. The law regarding patent illegality and public policy of India is no more *res integra* and has been authoritatively clarified by the Hon'ble Supreme Court in a number of judicial pronouncements.

39. In *Ssangyong Engineering & Construction Co. Ltd. (Supra)*, the Hon'ble Supreme Court while explaining the scope of the expression 'public policy of India' made the following pertinent observations:

"23. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

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25. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary

to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with. 26. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

27. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

28. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

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30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of

Associate Builders (supra), while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

40. In the case of ***Associate Builders vs. Delhi Development Authority***, (2015) 3 SCC 49, the Hon’ble Supreme Court clarified the meaning and scope of “*Fundamental Policy of Indian Law*” in the context of Section 34 of the Arbitration Act in the following manner:

*“28. In a recent judgment, **ONGC Ltd. v. Western Geco International Ltd.**, 2014 (9) SCC 263, this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held-*

*35. What then would constitute the “fundamental policy of Indian law” is the question. The decision in **ONGC [ONGC Ltd. v. Saw Pipes Ltd.**, (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression “fundamental policy of Indian law”, we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the*

rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a “judicial approach” in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the for a concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking.

The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available. 40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.”

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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:

- 1. a finding is based on no evidence, or*
- 2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or*

3. ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

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33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.....”

41. It is, therefore clear, that the decisive test is that *first*, the learned arbitrator had to adopt a judicial approach; *second*, the principles of natural justice had to be upheld; *third*, the decision must not have been egregious, or rather, perverse.

42. In *R vs. Northumberland Compensation Appeal Tribunal. Ex Parte Shaw, 1952 1 All ER 122*, Lord Denning made the following pertinent observations:

"Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means: see the statute 9 and 10 Will. III, c. 15. At one time an award could

not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in Kent v. Elstob, (1802) 3 East 18, that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in Hodgkinson v. Fernie, (1857) 3 C.B.N.S. 189, but is now well established.”

43. The Privy Council in ***Champsey Bhara Company vs. The Jivraj Balloo Spinning and Weaving Company Ltd.***, AIR 1923 PC 66, held as follows:

*“The law on the subject has never been more clearly stated than by Williams, J. in the case of **Hodgkinson v. Fernie (1857) 3 C.B.N.S. 189:-***

“The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think firmly established viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.”

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Now the regret expressed by Williams, J. in Hodgkinson v. Fernie has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the

reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying: "Inasmuch as the Arbitrators awarded so and so, and inasmuch as the letter shows that then buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Cl.52." But they were entitled to give their own interpretation to Cl. 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt, J was right and the conclusion of the learned Judges of the Court of Appeal erroneous."

44. The Hon'ble Supreme Court in *Associate Builders (supra)*, while explaining the meaning and scope of patent illegality, held as follows:

"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads

42.1 (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:

*"28. Rules applicable to substance of dispute.—
(1) Where the place of arbitration is situated in*

India,— (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;”

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.

42.3 (c) Equally, the third sub-head of patent illegality is really a contravention of Section 28 (3) of the Arbitration Act, which reads as under:

*“28. Rules applicable to substance of dispute.—
(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”*

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

45. A relevant portion of the Impugned Arbitral Award has been reproduced below, to apply the test as to whether the Learned Arbitrator had indeed wrongly appreciated, or ignored relevant evidence.

“CLAIM N0.5:

CONTRACTOR CLAIMS ON ACCOUNT OF COST OF TOOLS & PLANTS, MACHINERY, SCAFFOLDING, CENTERING AND SHUTTERING MATERIAL ETC. WRONGLY, ILLEGALLY AND UNILATERALLY RECOVERED MOBILISATION ADVANCE BEFORE 80% WORKDONE IN 7TH RA BILL AND CONFISCATED BY RESPONDENT.

Under this claim, the Claimant I Contractor had sought the value of the Tools, Plant and Machinery that was brought on to the site by the Claimant itself and for which the advances were also given by the Respondent Department.

It is submitted on behalf of the Claimant that despite recovering the advances vide various EA Bills, the said tools, plant and machinery were illegally retained at the site by the Respondent Department.

In support of the above contention, the Claimant has placed reliance upon the 2nd RA Bill to show that the Respondent Department had issued advance for various tools, plant and machinery tools, plant and machinery advance after assessing in date market value of the same. However, the Department had recovered the said advances through various RA Bills and had also illegally confiscated the said tools, plant and machinery.

It is further contended on behalf of the Claimant that after repudiation of the contract by the Claimant, the said tools, plant and machinery were not allowed to be removed from the site by the Respondent Department. It is submitted further that for taking the same out of the possession /site of the Department, a gate pass was required from Engineer in Charge or from the office of the University itself.

The Claimant further contends that admittedly the entire campus and the project site was guarded by the security guards who were deployed by the University/Respondent Department. No material or tool, plant or machinery was

allowed to be taken out of the campus without the issuance of appropriate gate-pass for the same.

The Claimant also contends that even today it can be verified from a simple visit to the project site, that guards don't allow anything out of the site without the issuance of a proper gate-pass for the same.

Per contra, the Respondent Department has negated the version of the Claimant and has argued that tools, plant and machinery advance was given under hypothecation deed signed between the Claimant and the Respondent. The tools, plant and machinery brought under these advances belong to the Claimant only. As per the terms of the agreement, the watch and ward of the entire tools, plant and machinery and material was to be of the Claimant itself.

It has further been contended on behalf of the Respondent Department that there is no requirement for issuance of any gate pass for the Claimant to remove and tools, plant and machinery from the site and therefore the Respondent Department is not responsible for the reimbursement if any such loss.

Decision of Tribunal:

It is seen from the record that the tools, plant and machinery were to remain under custody of Claimant, as is also recorded in the hypothecation deed execution against tools, plant and machinery advance. Security of all tools, plants and machinery is the responsibility of the Claimants.

Claimants could not prove that any point of time tools, plant and machinery was handed over to Respondents. If Respondents have taken any illegal and unlawful action to remove the machines under custody of Claimants without their permission, immediate action under law should have been taken by them. There is no record of any action taken against Respondents. Therefore, Respondents are not responsible for any missing tools, plants and machinery.

Accordingly, I award the Claimant an amount of Rs. NIL against Claim No.5.

CLAIM NO.6:

CONTRACTOR CLAIMS ON ACCOUNT OF BANK CHARGES, INSURANCE CHARGES, TESTING CHARGES & OTHER CHARGES IN VARIOUS SUB HEADS PAID BY US ALONG WITH 12% INTEREST PER ANNUM ON ALL OUR PAYMENTS DUE FROM THE DATE OF PAYMENT DUE TO TILL DATE OF PAYMENT DUE TO PROLONGATION OF CONTRACT UNILATERALLY BY THE RESPONDENT, NON-AVAILABILITY OF FUNDS WITH THE RESPONDENT, BREACH OF CONTRACT ON THE PART OF RESPONDENT, HINDRANCE ON THE PART OF RESPONDENT.

Claim No. 6 of the claimant is divided in two parts. First, Part 1 deals with the charges incurred on maintaining the bank guarantees for amount in excess of the actual work executed at the site. In this regard, the claimant has stated that the work of tendered amount could not be executed at the site since the respondent department created an atmosphere which left the claimant with no other option but to repudiate the contract. It is the case of the claimant that the claimant had submitted the bank guarantees with respect to the total tender amount. However, on account of default on part of the department, the claimant was prevented from executing the work of the complete amount. As such, the claimant claims that the claimant ought not to have been burdened for maintaining bank guarantee in respect of complete tender amount. Accordingly, the claimant seeks payment of bank charges incurred towards the excess value of bank guarantee that were being maintained by the claimant in terms of calculations filed as 6.1 in ANNEXURE C-66.

In response to the aforesaid, the Respondent has contended that it was the default on part of the claimant as a result' of which the claimant did not execute the complete work under the agreement. The balance work was very much required by the department; however, the Claimant abandoned the work thereby causing loss to the department. Thus, it has been claimed that there is no question of the Respondents reimbursing any such bank charges.

Decision of Tribunal:

After going through above arguments tribunal is of the view that Claimants have submitted Bank Guarantees at the time of start of work as per tendered value. In claim no 2 it is seen that Claimants have executed work around tendered value. After expiry of initial bank guarantee, Claimants never got them renewed. Due to breaches on the part of Respondents, Claimants themselves decided to repudiate the agreement of their own sweet will. So, in entire process Claimants have not incurred any extra amount on bank guarantees. Therefore, contention of Claimants in this regard is not acceptable.

Further the second part of this claim pertains to reimburse the charges incurred in testing of materials by the claimant. The claimant contends that the testing of materials was the duty of the department, and the claimant was only meant to provide the sample for testing. However, on several occasions, the claimant has claimed that although the testing charges were paid by the claimant, amounting to Rs. 48,756/- , the department only reimbursed only Rs. 29,500/- and thus the claimant has sought reimbursement of the balance amount. On the contrary, the department has sought to rely upon additional conditions, point number 52.7, which makes it clear that the cost for testing with respect to steel was to be borne by the contractor and has thus contended that it is only the testing charges with respect to material of steel, that was not paid by the department and rest amount has already been paid to the claimant.

That the tribunal finds force in the above contentions of the respondent that the contractor is not entitled for reimbursement for testing charges with respect to steel. However, it is an admitted fact by the department that for other materials, reimbursement needs to be done to the contractor. A perusal of the present claim shows that the claimant has failed to provide the necessary details for bifurcation with respect to the testing charges claimed herein. Accordingly, this tribunal is of the opinion that in case the claimant is not able to provide the necessary proof regarding non-payment of any testing charges incurred for materials other than steel, nothing is payable to them. No proof provided by Claimants, so nothing is payable to them in this regard.

The above claim is decided accordingly.

Therefore, I award the Claimant an amount of Rs. NIL against Claim No. 6."

46. A clear reading of the precedents cited proves that under the limited scope of Section 34, the present case does not warrant the interference of this Court, as the grounds stated by the Petitioner in the instant petition do not meet the scope of this section. The petitioner claimed that the learned Arbitrator failed to consider the Agreement but a careful reading of the Award proves that the Arbitrator has rightly relied on relevant evidence and the Agreement to adjudicate.

47. A relevant portion of the Impugned Arbitral Award has been reproduced below, to adjudicate whether the learned Arbitrator has accurately considered the provisions in the Agreement.

CLAIM NO.7:

WE CLAIM 7.5% OVERHEAD ON ACCOUNT OF T&P, STAFF, ESTABLISHMENT, HEAD OFFICE EXPENSES

SHUTTERING MATERIAL LYING IDLE AT SITE IN EXTENDED PERIOD AS WELL AS UNDERUTILISED WITHIN STIPULATED DATE OF COMPLETION DUE TO PROLONGATION OF CONTRACT UNILATERALLY BY THE RESPONDENT, ON-AVAILABILITY OF FUNDS WITH THE RESPONDENT, BREACH OF CONTRACT ON THE PART OF RESPONDENT, HINDRANCE ON THE PART OF RESPONDENT.

The said claim pertains to the loss incurred by the claimant on account of overheads like T&P, staff, establishment, etc. incurred during the extended period of the contract on account of delays on part of the department. It is the contentions of the claimant that the claimant was to execute agreement work of Rs. 2, 84, 97,777/- within a period of 180 days. As per the calculations submitted by the claimant, per day work executed was to the tune of Rs. 58,320/- wherein the accepted cost of overheads per day, as per Schedule-F @ 7.5% came out to be Rs.11,874.07/-.

The claimant contends that at the time of entering into the agreement with the department, the tender amount was determined by the claimant keeping in view the stipulated period and overhead costs. However, once the contract got extended, for reasons not attributable to the claimant, the overhead costs of the claimant ought to be reimbursed by the department. Accordingly, the claimant has stated that due to various breaches and defaults solely attributable to the respondent, the claimant had to repudiate the work vide its notice dated 18.01.2019. The said notice was kept in abeyance in view of the decisions taken in the meeting dated 12.02.2019. On the specific assurance that the department shall process the 7th RA Bill and make the payment against the same. It is a matter of record that the 7th RA Bill was not processed in a timely manner and was only finalized unilaterally by the department on 22.10.2019 that too for Rs. 1/-, which was also not paid to the claimant till further 5-6 months. Aggrieved by the aforesaid breaches, the claimant

removed all its labour, machinery etc., from the site w.e.f. 16.11.2019. Since this extended period i.e., from 08.12.2018 till 16.11.2019 was not to be accounted for in the overhead costs of the claimant, the claimant has thus sought payment on account of the overhead costs for this period of 343 days which comes to Rs. 40,72,807/-. The respondent has contended that the claimant had abandoned the work after issuance of its repudiation notice dated 18.01.2019 and thereafter no work was executed by the claimant at the project site.

It is further contended that the claimant had in fact not deputed any staff or maintained any establishment or TNP at the site after its repudiation notice issued on 18.01.2019 and thus the claimant has neither incurred any overhead loss nor is it entitled for any such overhead costs during the alleged extended period.

Decision of Tribunal:

The tribunal, after going through above facts, is of the view that Claimants have given a legal notice of repudiation on 18.01.19 after coming to conclusion that work cannot proceed further due to breaches by Respondents. There was no point in maintaining over heads after issue of notice. Various developments after considered decision of issue of notice. by Claimants have no effect on withdrawal of overheads. During arguments Claimants have accepted repudiation date as 18. 01. 19. Therefore, it can be safely presumed that the overheads were being maintained by the claimant during the extended period from 09. 12.18 to 18.01. 19 i.e. 41 days.

*It is clear from various submissions by Claimants that work has slowed down due to breaches on part of Respondents. So, it was the duty of Claimants to mitigate losses due to overheads. End of justice will be met if 4% overheads are allowed during extended period. Calculation is as below:
 $28497777 \times .04 \times 41 / 183 = \text{Rs. } 255390/-$*

Therefore, I award the Claimant an amount of Rs. 2, 55,390/- against Claim No. 7.

48. Reiterating as previously observed, “patent illegality” is an illegality that goes to the root of the matter but excludes the erroneous application of the law by an arbitral tribunal or re-appreciation of evidence by an appellate court. In this instant case, the Arbitral Award was a well-reasoned award, with the findings being clearly arrived at based on all the documents/evidence on record.

49. Further in *Ssangyong Engineering & Construction Co. Ltd. (Supra)*, the Hon’ble Supreme Court went on to say that reappreciation of evidence cannot be permitted under the ground of patent illegality in a Section 34 petition under Act, 1996. The relevant portion has been reiterated below:-

38. “Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality on the face of award.”

50. This is so because the decision of the Arbitral Tribunal is final and this Court is not required to carry out an exercise of re-adjudicating the disputes. An arbitral award may be impeached on the ground of patent illegality but as explained by the Hon’ble Supreme Court in *Delhi Airport Metro Express Pvt Ltd vs. Delhi Metro Rail Corporation (2022) 1 SCC 131:-*

"28. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds.

However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the courts. There is a disturbing tendency of Courts of setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award.

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappraise evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality"."

51. This was earlier enunciated in *State of Jharkhand v. HSS Integrated SDN*, (2019) 9 SCC 798. The relevant paragraph of the judgment is reiterated below:

"6.2. This Court has observed and held that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of the evidence on record are not to be scrutinised as if the Court was sitting in appeal."

52. The Petitioner had raised a ground that the learned Arbitrator's interpretation of the Agreement was wrongful. The petitioner claims that the learned Arbitrator in complete derogation of the contemporaneous conduct of the parties to the Contract has arrived at perverse findings. The Court relies on *Foo Jong Peng and others v Phua Kiah Mai and another* [2012] 4 SLR 1267, where the Hon'ble Supreme Court of Singapore delved into the interpretation of contracts by the Learned Arbitrator during the Arbitral process. The relevant portion of the judgment is reiterated below:-

"36. In summary, although the process of the implication of terms does involve the concept of interpretation, it entails a specific form or conception of interpretation which is separate and distinct from the more general process of interpretation (in particular, interpretation of the express terms of a particular document). Indeed, the process of the implication of terms necessarily involves a situation where it is precisely because the express term(s) are missing that the court is compelled to ascertain the presumed intention of the parties via the "business efficacy" and the "officious bystander" tests (both of which are premised on the concept of necessity). In this context, terms will not be implied easily or lightly. Neither does the court

imply terms based on its idea of what it thinks ought to be the contractual relationship between the contracting parties. The court is concerned only with the presumed intention of the contracting parties because it can ascertain the subjective intention of the contracting parties only through the objective evidence which is available before it in the case concerned. In our view, therefore, although the Belize test is helpful in reminding us of the importance of the general concept of interpretation (and its accompanying emphasis on the need for objective evidence), we would respectfully reject that test in so far as it suggests that the traditional “business efficacy” and “officious bystander” tests are not central to the implication of terms. On the contrary, both these tests (premised as they are on the concept of necessity) are an integral as well as indispensable part of the law relating to implied terms in Singapore.”

53. Further, in the case of ***Ssangyong Engineering & Construction Co. Ltd. (Supra)***, the Hon’ble Supreme Court made the following pertinent observations:

"40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

xxxxxx

76. However, when it comes to the public policy of India, argument based upon “most basic notions of justice”, it is clear that this ground can be attracted only in very

exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.”

54. The principle is that if arbitrators use the contract itself to determine a dispute, clauses should, in principle, be construed *contra proferentem*, meaning that they should be interpreted against the party that drafted it.

55. The rule of *contra proferentem* can be regarded as a 'general canon' of interpretation that exists independently of national legal systems. In *ICC Case No. 7110, (1999) 10 ICC Bulletin 39, 44*, the Arbitral Tribunal made it clear that it is a 'general principle of interpretation' widely accepted by national legal systems and by the practice of International Arbitral Tribunals, including ICC Arbitral Tribunals, that in case of doubt or ambiguity, contractual provisions, terms or clauses should be interpreted against the drafting party.

56. In the instant case, the petitioner had drafted the Agreements in which the respondent was a signatory. The Learned Arbitrator having observed various interpretations of the contract, chose to endorse the interpretation that is favorable to the respondent. The application of the rule of *contra proferentem* validates the learned Arbitrator's findings and observations regarding the interpretation of the contract so as to decide the question of breach of the contract.

57. It is, thus, clear that a reading of the Impugned Arbitral Award proves that where a multiplicity of views regarding the interpretation of the Contract exists, the Learned Arbitrator chose one view that falls within the principles of jurisprudence and gave ample reasoning for the same.

58. Therefore, as discussed in the foregoing paragraphs, in the present petition, the Learned Arbitrator had clearly referred to the evidence on record, as reproduced above, and made his observations within the ambit of the contract.

CONCLUSION

59. In light of the facts, submissions and contentions in the pleadings, this Court finds that the Petitioner has failed to corroborate with evidence how the Learned Arbitrator's findings are contrary to the Public Policy of India. Even if the submissions of the Petitioner *qua* patent illegality in the Impugned Arbitral Award is accepted, then also no ground has been made out to set aside the Award inasmuch as the threshold to interfere and set aside an Arbitral Award has not been met.

60. It is settled law that the ground of patent illegality gives way to setting aside an Arbitral Award with a very minimal scope of intervention. A party cannot simply raise an objection on the ground of patent illegality if the Award is simply against them. Patent illegality requires a distinct transgression of law, the clear lack of which thereof makes the petition simply a pointless effort of objection towards an Award made by a competent Arbitral Tribunal.

61. The Court is unable to subscribe to the submissions made by the learned counsel for the Petitioner. The Petitioner has failed to show that the arbitral award has been passed by the Learned Arbitrator without considering the evidence on record. Further, the petitioner has not been able to prove that the impugned Arbitral Award is patently illegal, and

contrary to the fundamental policy of Indian Law, and hence, is liable to be set aside.

62. The Court is of the view that on the application of the rule of *contra proferentem*, the Agreements were fittingly interpreted by the Learned Arbitrator, leaving no scope for the interference of this Court on the Award.

63. In view of the above discussion of facts and law, this Court finds that the petitioner has failed to establish a *prima facie* case for setting aside the Impugned Arbitral Award and has failed to make out a case warranting interference from this Court.

64. The petition is, accordingly, dismissed.

65. Pending applications, if any, also stand dismissed.

66. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

MARCH 3, 2023

gs/as

[Click here to check corrigendum, if any](#)