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

Date of decision: 24th MARCH, 2026

IN THE MATTER OF:

\+ **O.M.P. (COMM) 341/2020**

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA

.....Petitioner

Through: Mr. A. P. Singh and Mr. Varnit Vashistha, Advocates

versus

M/S BEL-ACC(JV) .....Respondent

Through: Dr. Swaroop George, Mr. Sunny Thomas, Mr. Abhinandan Jain, Mr. Shivam Prajapati, Mr. Abhigyan Dwivedi, Mr. Kartikey, Advocates

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The present Petition under Section 34 of the Arbitration & Conciliation Act, 1996, has been filed by the Petitioner herein against the Arbitral Award dated 27.05.2010 passed by a three-Member Arbitral Tribunal.

2. Brief facts of the case as discernible from the material on record are stated as under:-

i. The Petitioner invited bids from pre-qualified contractors for the project of strengthening and four-laning of existing two lane sections between Km. 307.500-Km. 231.00 of Etawah Bypass on NH-2 in Uttar Pradesh (*hereinafter referred to as the* **'Project'**).

ii. On the basis of the evaluation of the bids, the Respondent was

awarded the contract dated 01.02.2001 bearing No. 11025/2/99/TECH/GM(WB)/ETAWAH (01.02.2001) for contract price of Rs.69,44,17,782/- (*hereinafter referred to as the* '**Contract**').

iii. The Contract was an item rate contract wherein the Respondent quoted its rates for various items of activities as per the details given in the bill of quantities conforming to the relevant technical specifications and other provisions of the contract.

iv. The Contract involved two separate phases. In Phase-I, the works to be undertaken by the Respondent was to provide two additional lanes by widening in the left hand side of the existing 7.3 Km. long two lanes, which was later changed to placing one lane on either side of the existing two lanes within the same land. The Phase-II involved entirely new construction of four lanes of 6.7 Km., scope of which remain unchanged. The percentage of the works involved in these two phases of the Project is stated to be in the proportion of 28% for Phase-I and 72% in Phase-II.

v. It is stated that the Respondent accepted the variation in Phase-I, thereby committing itself to execute the varied works within the provisions of the Contract without any reservations. However, the Respondent *inter alia* raised disputes with respect to the rates approved by the Petitioner for the varied items of work which were involved mainly in Phase-I of the Project.

vi. These disputes and differences between the parties were referred to the Engineer in the first instance as per Clause 67.1 of the General Conditions of Contract (*hereinafter referred to as the* '**GCC**').

vii. The Engineer rejected the claims of the Respondent and communicated his decision in writing to both the parties. Aggrieved by the decision of the Engineer, the Respondent gave notice to the Petitioner of its intention to commence arbitration for resolution of disputes by way of a letter dated 24.06.2004.

viii. A three-Member Arbitral Tribunal was constituted and the Respondent came to file its Statement of Claim on 25.10.2004 raising the following Claims:-

> *"Claim No.1: Payment at revised rate for items of work under Clause 51 & 52 GCC in respect of the work executed upto 3.10.2003, the original date of completion -Rs. 1,63,85,553.60*
>
> *Claim No.2: Compensation by way of revision of rate for the work executed during the extended period i.e. for the period between 3.10.2003 to 31.8.2004 with escalation-Rs. 2,85,68,783*
>
> *Claim No.3:Extension of time sought upto 31.10.2006 for the alleged breach by the Employer.*
>
> *Claim No.4: Compensation for loss of overheads profit and reduce productivity from the machinery and equipment deployed and loss of bonus upto 3.10.2003-Rs. 17,49,10,739.70*
>
> *Claim No.5: Cost of deployment of additional resources for executing additional work from 1.1.2003 till date-Rs. 1,80,000,00*
>
> *Claim No.6: Refund of royalty for ordinary earth deducted upto 31.8.2004-Rs. 25,62,622/-*
>
> *Claim No.7: Interest: To past, pendente lite and future interest for delayed payment of amount certified by the Engineer upto 28.6.2004, the date of commencement of arbitration proceedings."*

ix. In response the above claims of the Respondent, the Petitioner

came to file its Statement of Defence on 13.12.2004.

x. On the basis of the pleadings and the evidence produced by the parties, the learned Arbitral Tribunal passed the impugned Arbitral Award and by way of a majority, awarded an amount of Rs.1,93,19,530/- towards Claims No.1, 4 and 5 in favour of the Respondent, along with pendente lite and future interest @ 10% from 24.06.2004 till the date of the impugned Award and from the date of the Award till the date of payment respectively. The Claims No.2, 3 and 6 were rejected by the learned Arbitral Tribunal.

xi. It is this Arbitral Award rendered by the majority of the Arbitral Tribunal, that is under challenge in the present Petition.

3. Learned Counsel for the Petitioner has submitted as under:-

i. It is the case of the Petitioner that the Respondent was handed over the Project Site as per the work programme which was submitted by the Respondent itself in consonance with Clause 42.1 of the GCC as the Contract nowhere provided that the entire land is to be handed over on the date of commencement of the work.

ii. It is submitted that the handing over of the Project Site was admittedly done in phases, however, enough land was handed over to the Respondent to carry out the works without any delay or hindrances.

iii. It is stated that all the construction drawings were timely issued to the Respondent on 26.05.2001, that is much before the acceptance of the work programme by the Petitioner.

iv. It is submitted that the Respondent was itself responsible for the

slow progress of work due to its poor resources and work management.

v. It is stated that the changes which were made by the Petitioner in the provisions of the Contract were mainly for Phase-I of the Project which only constituted for 28% of the total contract price, as opposed to Phase-II of the project which was for 72% of the total contract price.

vi. Since the Respondent itself agreed to execute the variations brought in by the Petitioner in the Contract, it cannot be said that any novation of the Contract took place. Moreover, since it is an admitted case that the Respondent itself wanted the new rates to be fixed as per Clauses 51 & 52 of the GCC, there can be no question of there being a new agreement or novation of contract.

vii. Even after agreeing to the variations, the Respondent itself disputed the rates and on 08.04.2003, sent a proposal of rates for varied items to the Petitioner, for which approval was communicated by the Petitioner's engineer without the work of service road, however, the Respondent did not agree to the same.

viii. It was subsequently observed that the Respondent itself could not adhere to its own work programme and as such the Petitioner was constrained to issue show cause notices on 02.01.2004, 12.02.2004 and 06.03.2004. Despite these notices, there was no improvement in the progress of work by the Respondent.

ix. In respect of Claim No.1 which has been awarded by the learned Arbitral Tribunal by majority in favour of the Respondent, it is submitted that no details regarding how the rates have been worked out and what components have been taken into

consideration while arriving at the rates of variation have been discussed in the impugned Award. Rather, a reading of the impugned Award clearly shows that the rates awarded are based simply on the experience of the learned Members of the learned Arbitral Tribunal.

x. It is submitted that despite rejecting variation on many of the items claimed by the Respondent, the learned Arbitral Tribunal still awarded nearly 80% of the amount demanded by the Respondent. For instance, for some items like BOQ Item 7.3 "Earthwork in excavation for PCC" the rate worked out by the learned Arbitral Tribunal (i.e., Rs.55/- per cubic metre) was more than what was claimed by the Respondent (i.e. Rs.49.79/- per cubic metre).

xi. As regards Claim No.4 which was awarded in favour of the Respondent, it is submitted that though the Respondent had quoted 28% below the estimated cost put in response to the tender, it still claimed loss of profit and compensation on account of overheads and machinery.

xii. It is submitted that findings in the impugned Award are completely contradictory. On a reading of the impugned Award it can be noted that while the learned Arbitral Tribunal gives a finding that the Respondent was also responsible for delay in completion of works, overhead charges are still allowed in favour of the Respondent. This is in clear ignorance of the fact that accrual of overhead charges emanates from the quality of work executed and is not payable when the delay is attributable to the contractor itself.

xiii. In awarding compensation for overhead charges, the learned Arbitral Tribunal ignores the principle that merely spending time without any actual execution of works involved in the project will not entitle a contractor to the overhead charges.

xiv. It is submitted that the amounts claimed towards compensation under Claim No.4 are hypothetical, imaginary and without any basis as the Respondent failed to achieve the target set by themselves in the various work programme, which led to the termination of the contract.

xv. Insofar as awarding of amounts under Claim No.5 is concerned, it is submitted that the findings of the learned Arbitral Tribunal are based on no evidence whatsoever, since no log books were supplied by the Respondent for machinery and equipment, and as such it appears that the learned Arbitral Tribunal has awarded the amount allegedly on the basis of equity.

4. *Per contra*, learned Counsel for the Respondent submits that the entire case brought by the Petitioner before this Court requires a re-appreciation of the merits of the dispute before the Arbitral Tribunal as well as the evidence produced by the parties. He further states that the Petitioner has failed to carve out exactly which parameter under Section 34 of the Arbitration & Conciliation Act is attracted to the facts of the present case, which would warrant interference by this Court. He submits that since the impugned Arbitral Award is comprehensive and well-reasoned, the instant Petition warrants dismissal by this Court.

5. The scope of adjudication before this Court has been delineated only to the award of amounts by the learned Arbitral Tribunal under Claims No.1, 4 and 5 in favour of the Respondent. Therefore, this Court shall restrict its

analysis only within these parameters.

6. This Court reminds itself that the Impugned Award herein was passed in the year 2010, and in the same year, the present Petition was filed. Keeping the same in mind, it is apposite to recall the law under Section 34 of the Arbitration & Conciliation Act as it existed prior to the 2015 Amendment. This Court refers to the Judgment passed by the Apex Court in Associate Builders v. DDA, **(2015) 3 SCC 49** wherein the Apex Court has observed as under:

> **"14.** *Section 34 of the Arbitration and Conciliation Act reads as follows:*
>
> *"**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 sub-section (3).*
>
> *(2) An arbitral award may be set aside by the court only if—*
>
> *(a) the party making the application furnishes proof 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.—Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the Arbitral Tribunal:

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral

proceedings or to take such other action as in the opinion of Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award."

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19. *When it came to construing the expression "the public policy of India" contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] held : (SCC pp. 727-28 & 744-45, paras 31 & 74)*

"31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar *case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:*

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also

be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

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74. In the result, it is held that:

(A)(1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof 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.

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the

bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable;

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract."

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***21.** In Hindustan Zinc Ltd. v. Friends Coal Carbonisation [(2006) 4 SCC 445] , this Court held : (SCC p. 451, para 14)*

"14. The High Court did not have the benefit of the principles laid down in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] , and had proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] has made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

***22.** In McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held : (SCC pp. 209-10, paras 58-60)*

"58. In Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General

Electric Co., 1994 Supp (1) SCC 644] this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression 'public policy' was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] (for short 'ONGC'). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] wherein the applicability of the expression 'public policy' on the touchstone of Section 23 of the Contract Act, 1872 and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Contract Act, 1872. In ONGC [(2003) 5 SCC 705 : AIR 2003 SC 2629] this Court, apart from the three grounds stated in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would

consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See State of Rajasthan v. Basant Nahata [(2005) 12 SCC 77] .)"

23. *In Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd. [(2006) 11 SCC 245] , Sinha, J., held : (SCC p. 284, paras 103-04)*

"103. Such patent illegality, however, must go to the root of the matter. The public policy, indisputably, should be unfair and unreasonable so as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act.

104. What would be a public policy would be a matter which would again depend upon the nature of transaction and the nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept of what was a public good or public interest or what would otherwise be injurious to the public good at the relevant point as contradistinguished by the policy of a particular Government. (See State of Rajasthan v. Basant Nahata [(2005) 12 SCC 77] .)"

24. *In DDA v. R.S. Sharma and Co. [(2008) 13 SCC 80] , the Court summarised the law thus : (SCC pp. 91-92, para 21)*

"21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

25.*J.G. Engineers (P) Ltd. v. Union of India [(2011) 5 SCC 758 : (2011) 3 SCC (Civ) 128] held : (SCC p. 775, para 27)*

"27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy."

26.*Union of India v. Col. L.S.N. Murthy [(2012) 1 SCC 718 : (2012) 1 SCC (Civ) 368] held : (SCC p. 724, para 22)*

"22. In ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] this Court after examining the grounds on which an award of the arbitrator can be set aside under Section 34 of the Act has said : (SCC p. 727, para 31)

'31. ... However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC

644] it is required to be held that the award could be set aside if it is patently illegal'."

27. *Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.*

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40. *We now come to the fourth head of public policy, namely, patent illegality. It must be remembered that under the Explanation to Section 34(2)(b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator. This is explained by Denning, L.J. in R. v. Northumberland Compensation Appeal Tribunal, ex p Shaw [(1952) 1 All ER 122 : (1952) 1 KB 338 (CA)] : (All ER p. 130 D-E : KB p. 351)*

"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 Statutes 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 : 102 ER 502] , 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 CB (NS) 189 : 140 ER 712] , but is now well established."

41. *This, in turn, led to the famous principle laid down in Champsey Bhara Co. v. Jivraj Balloo Spg. and Wvg. Co. Ltd. [AIR 1923 PC 66 : (1922-23) 50 IA 324 : 1923 AC 480 : 1923 All ER Rep 235 (PC)] , where the Privy Council referred to Hodgkinson [(1857) 3 CB (NS) 189 : 140 ER 712] and then laid down : (IA pp. 330-32)*

"The law on the subject has never been more clearly stated than by Williams, J. in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] : [CB(NS) p. 202 : ER p. 717]

'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, whether 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 [(1857) 3 CB (NS) 189 : 140 ER 712] 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 the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Rule 52.' But they were entitled to give their own interpretation to Rule 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 [Jivraj Baloo Spg. and Wvg. Co. Ltd. v. Champsey Bhara and Co., ILR (1920) 44 Bom 780. The judgment of Pratt, J. may be referred to at ILR p. 787.] erroneous."

This judgment has been consistently followed in India to test awards under Section 30 of the Arbitration Act, 1940.

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 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 subhead 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***.—(1)-(2)****

(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.

43. *In McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held as under : (SCC pp. 225-26, paras 112-13)*

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission [(2003) 8 SCC 593 : 2003 Supp (4) SCR 561] and D.D. Sharma v. Union of India [(2004) 5 SCC 325] .]

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

44. *In MSK Projects (I) (JV) Ltd. v. State of Rajasthan [(2011) 10 SCC 573 : (2012) 3 SCC (Civ) 818] , the Court held : (SCC pp. 581-82, para 17)*

"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram [(1954) 1 SCC 566 : AIR 1954 SC 689] , Thawardas Pherumal v. Union of India [AIR 1955 SC 468] , Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362] , Alopi Parshad & Sons Ltd. v. Union of India [AIR 1960 SC 588] , Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji [AIR 1965 SC 214] and Renusagar Power Co. Ltd. v. General Electric Co. [(1984) 4 SCC 679 : AIR 1985 SC 1156])"

45. *In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [(2012) 5 SCC 306] , the Court held : (SCC pp. 320-21, paras 43-45)*

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows : (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

'43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwality Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High

Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.'"

7. Material on record indicates that amounts claimed under Claim No.1 by the Respondent was on account of drastic and belated variations which were ordered by the Petitioner herein, including a shift from LHS widening to concentric widening as well the addition of three overpasses in a 7 km. stretch which substantially altered the scope of work under the Contract.

8. Before the learned Arbitral Tribunal, the Respondent's grievance was that the alterations brought about by the Petitioner led to a construction of nearly 14 km. of RCC road retaining walls involving over 33,000 cubic meters of concrete which also resulted in the change of nature and character of the Contract. It was on this basis that the Respondent had claimed revision of rates for items where quantities varied beyond 25% and constituted more than 5% of the contract price which classified the claim into BOQ items, derived BOQ items and entirely new extra items.

9. Before the learned Arbitral Tribunal the Petitioner opposed Claim No.1 by stating that the variations in question were neither drastic nor belated as being completely covered under Clauses 51 & 52 of the GCC, as such there was no alteration in the fundamental nature of the Contract. It was further contended that by executing the variations without protest, the Respondent had impliedly accepted the changes and relaxed the variation limits.

10. The learned Arbitral Tribunal under Claim No.1 held that the revision of rates under Clause 52 of the GCC was permissible where both the

conditions were satisfied, i.e., the item constituted more than 5% of the contract price and that the executed quantity varied by more than 25% from the BOQ. It was further observed that the Respondent remained bound to execute the original quantities as per the BOQ at the quoted rates and accordingly the revised rates could only apply to the quantities in excess of the BOQ.

11. While the learned Arbitral Tribunal rejected the Respondent's revised rate analysis, it carried out rate revision on the basis of experience the learned Members of the Arbitral Tribunal, thereby awarding a total of Rs.1,32,14,407/- in favour of the Respondent.

12. In the opinion of this Court although detailed calculation or precise methodology for awarding of the amount under Claim No.1 in favour of the Respondent is not visible, this Court does not find the ultimate grant of the sum of Rs.1,32,14,407/- to be arbitrary or perverse. Admittedly, the difference between the revised rates already paid by the Respondent and those ultimately awarded by the learned Arbitral Tribunal is only marginal which means that the learned Arbitral Tribunal did not depart substantially from the contractual or contemporaneous pricing framework. Rather, with respect to the items related to the construction of diversions near the overpass the learned Arbitral Tribunal has in fact reduced the claimed revised rate from Rs.3,40,003/- to Rs.2,58,995/-. In the opinion of this Court this demonstrates the exercise of independent judicial discretion of the Arbitral Tribunal rather than a mechanical acceptance of the Respondent's case. As such, this Court does not see any reason to interfere with the findings returned by the learned Arbitral Tribunal under Claim No.1.

13. Dealing next with Claim No.4 under which the Respondent claimed compensation for loss of overheads, profits, reduced productivity from

deployed machinery and equipment, and loss of bonus to the tune of Rs.17,49,10,739.70/- . In support of its claim, the Respondent argued before the learned Arbitral Tribunal that although complete mobilization was carried out, breach of the contractual terms by the Petitioner prevented the Respondent from progressing according to the schedule. The Respondent contended that their tendered rates accounted for 10% profits, 10% overheads, as well as 10% deployment costs which would enable them to be placed in the same financial situation had there been no breach on part of the Petitioner.

14. Opposing Claim No.4 the Petitioner submitted that it was the Respondent who failed to timely mobilize key personnel and equipment, and the machinery provided by the Respondent was old and prone to breakdown. The Petitioner further pointed out that the Respondent's overall progress was only 22% and their bid was 28% below the estimated costs making their claims for high profits and overheads completely baseless.

15. As per the learned Arbitral Tribunal, the Respondent was in fact responsible for the overall slow progress of work which was evident for merely 22% progress achieved by them. At the same time the learned Arbitral Tribunal also notes that specific delays under Phase-I occurring on account of hindrances on the site were also attributable to the Petitioner. On the basis of these findings the learned Arbitral Tribunal considered overhead charges at 8% of the contract price and calculated the additional overheads for Phase-I as well as ROB works during the 16.5 months extension period. After applying a 20% reduction for mitigation of losses, the learned Arbitral Tribunal by way of majority awarded an amount of Rs.56,95,123/- in favour of the Respondent.

16. It is pertinent to note that against the findings on Claim No.4 a

dissenting opinion was also given by the Sh. H. P. Jamdar, learned Arbitrator, who was of the opinion that since overheads are built into item rates and accrue only upon actual execution of works, awarding of any amount to the Respondent was unjustified. He therefore opined that the entire claim of the Respondent should have been rejected.

17. This Court is of the opinion that the primary reason given by the majority of the learned Arbitral Tribunal was on the basis of their observation that hindrances were caused by the Respondent on the Project Site, especially after the scope of work was changed from LHS widening to concentric widening. It can be noted from a reading of the impugned Award that the learned Arbitral Tribunal has observed delay on both sides and carefully awarded the amount only for the actual works carried out by the Respondent under Phase-I. For this reason, this Court finds itself in agreement with the award of amount under Claim No.4 in favour of the Respondent.

18. The last claim challenged by the Petitioner is Claim No.5 under which the learned Arbitral Tribunal has awarded Rs.4.10 lakhs in favour of the Respondent.

19. Material on record indicates that the basis of Claim No.5 was the cost of deployment of additional resources for execution of additional works from January, 2003 onwards. In support of its claim, the Respondent had argued before the learned Arbitral Tribunal that it was at the instance of the Petitioner that additional resources had to be deployed to ensure completion of the Project by 30.10.2003. The Respondent's case was that the Petitioner's decision to suspend the service road works constituted a breach of the Contract leaving these additional resources idle at the Project Site.

20. Against Claim No.5, the Petitioner argued that the Respondent's case

was not supported by any evidence, stating that there were no log books or any other document produced to prove the loss as claimed by the Respondent. The Petitioner also argued that 90% of the resources which the Respondent labels to be additional were actually necessary for the Respondent to catch up on the slow progress of works being carried out by it.

21. This Court is of the opinion that considering the findings returned by the learned Arbitral Tribunal on other claims as discussed above, the Award of Rs.4.10 lakhs under Claim No.5 to meet the ends of justice does not warrant any interference.

22. From the discussion above, it is evident that the learned Arbitral Tribunal meticulously evaluated the material presented before it and thoroughly examined the documents filed by the parties. Each claim was addressed with due regard to the terms of the Contract between the parties as well as the applicable legal principles.

23. This Court believes that the findings of the learned Arbitral Tribunal demonstrate that a careful balance between the contractual provisions, the conduct of the parties, and the principles of fairness were maintained.

24. In view of the above, this Court does not find any merit in the instant Petition and the challenge laid by the Petitioner against the Impugned Award.

25. Resultantly, the Petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

MARCH 24, 2026
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