

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

Judgment reserved on: 24.02.2011

% **Judgment delivered on: 23.05.2011**

+ **O.M.P. 706/2009 & I.A. Nos. 15344/09 & 44/2010**

INDRAPRASTHA POWER GENERATION CO. LTD Petitioner
Through: Mr. A.R. Dateer, Advocate.

versus

M/S HARVINDER SINGH & CO. & ANR. Respondent
Through: Mr. Sandeep Sharma, Advocate.

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

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|----|---|---|------------|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | : | NO |
| 2. | To be referred to the Reporters or not? | : | YES |
| 3. | Whether the judgment should be reported in the Digest? | : | YES |

J U D G M E N T

VIPIN SANGHI, J.

1. These are the objections under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) preferred to assail the award dated 10.8.2009 passed by the learned Sole Arbitrator Shri S.M. Chopra, Former Additional District and Sessions Judge in relation to the claims made by the respondent contractor-claimant M/s Harvinder Singh & Co. against the petitioner-Indraprastha Power Generation Co. Ltd.

2. The petitioner issued an NIT for removal of 3,00,000 cum of ash deposit. The respondent submitted its bid. The petitioner vide the letter dated 20.01.2003 (Exhibit C-1) conveyed the intention of the petitioner to offer a quantity of 1,80,000 cubic metres of fly ash to the respondent at the negotiated rate of Rs.55.50 cubic metre to be completed in seven months, subject to the condition that the respondent extends the validity of its offer for the balance quantity, i.e., 1,20,000 cubic metres for seven months from the date of start of work of initial offer (i.e. pertaining to 1,80,000 cum). The respondent was required to submit its acceptance, if the terms were acceptable to it, before a formal letter of intent was issued.

3. Vide letter dated 21.01.2003 (Exhibit C-2), the respondent gave its acceptance of the conditions imposed by the petitioner. A letter of intent dated 21.01.2003 was consequently issued by the petitioner, awarding the contract for a quantity of 1,80,000 cubic metres of ash disposal work. The date of commencement of the work was to be reckoned from the 15th day of issue of the letter of intent and the entire work was to be completed within a period of seven months. Accordingly, the date of the commencement was reckoned as 04.02.2003 and the date of completion was stipulated as 03.09.2003.

4. The parties entered into a formal contract on 28.01.2003 in pursuance of the aforesaid letter of intent.

5. Even though the stipulated time for completion of the work under the contract was seven months, the same was not completed within that period. The work was completed by 22.10.2003 for which

necessary extension was granted by the petitioner without imposing any penalty.

6. The petitioner issued a letter of intent dated 28.11.2003 in respect of 1,20,000 cubic metres of ash in favour of the respondent. The date of commencement was to be reckoned from the third day of issue of letter of intent and the entire work was to be completed within a period of four months. Consequent, the date of commencement was fixed 30.11.2003 and the date of completion was stipulated as 29.03.2004.

7. This letter of intent, inter alia, provided that the respondent shall make, at its own costs, arrangements for execution of the contract. This letter of intent also contained special conditions and it specifically provided that *“all the terms and conditions of tender documents including special conditions are applicable in addition to the important terms and conditions specified in this letter of intent”*. The special conditions, inter alia, provided *“these special conditions shall be applicable to those work in addition to those already specified in General Terms and Conditions of the tender. However, whenever there is a conflict between the two, the special conditions shall prevail”*. Clause 3 of the special conditions stipulated *“the accepted rates of the successful bidder/tenderor shall be applicable and remain in force for a period of one year from the date of commencement of the work which shall be reckoned from the seventh day after the date of issue of letter of intents/order to commence the work, whichever is earlier”*.

8. The formal contract was entered into between the parties on 02.12.2003. This contract also, inter alia, made a reference to the special conditions of contract. The actual date of completion of the work under the second work order dated 28.11.2003 was 01.05.2004 for which necessary extensions were granted by the petitioner.

9. The respondent demanded escalation under clause 10CC of the General Conditions of Contract vide a letter dated 14.01.2004 (Exhibit C-10). The said claim was reiterated on 28.03.2004 vide Exhibit C-14 and letter dated 25.05.2005 (Exhibits C-15 & C-16). As the petitioner did not agreed to make payment of the amount claimed by the respondent, the respondent invoked the arbitration agreement and consequently this court appointed the learned Arbitrator vide order dated 09.04.2008 passed in Arbitration Petition No.97/2007.

10. The respondent raised its claims towards escalation in price of diesel under clause 10CC of the general conditions of the contract, and interest thereon. The claims were opposed by the petitioner on the ground that each of the two work orders constitute separate contracts for which the period of completion was separately stipulated and the two contracts could not be clubbed together for the purposes of applicability of clause 10CC of the general conditions of contract. It was further contended by the petitioner that the clause 10CC of the General Conditions of Contract stood superseded by clause 3 of the Special Conditions of the Contract, whereby the accepted rates were to remain in force for a period of one year.

11. The arbitrator considered whether the two work orders constitute a single contract or two separate contracts. The said aspect is discussed in Para 13 of the award. The Ld. Arbitrator has returned the finding that both the work orders are part of the same transaction and constituted one contract for the purposes of computing its duration. On this basis, the learned arbitrator determined the applicability of the general conditions over the special conditions of the contract, and upheld the entitlement of the respondent to claim escalation on account of the increase in the price of diesel. This finding is sought to be challenged in this petition.

12. The arbitrator then considered the aspect of escalation on account of increase in diesel prices as per clause 10CC. The Ld. Arbitrator has recorded the finding that execution of the work was extended beyond one year and extension was duly granted without any penalty. He noted that claimant had agreed to freeze the agreed rate for 7 months, hence they cannot ask for an escalation for the first work order, more so, when, for the major portion of the extended tenure of the work order the rate of diesel was very close to what was envisaged at the time of submission of tender as well as at the time of negotiations. In case of the first work order, the claimant is not considered entitled to any escalation.

13. However, the arbitrator allowed the escalation charges for the second work order and interest thereon. The reasoning adopted by the learned arbitrator for allowing the said claim reads as follows:

“16. For the work of 1,20,000 cum of the second work order, since the same was part of the same contract, the claimant is legitimately entitled in law, within the four corners of the agreement between the parties including the general and special conditions of contract, to be reasonably compensated for the increase in the administered price of diesel in Delhi. In the absence of any cogent material as to the quality of diesel actually consumed by the claimant in carrying out the work of the second work order, taking notice of the material available in the public domain, namely, from the website of Indian Oil Corporation referred to earlier, it is established that there has in fact been, on an average, 13.1% increase in the administered price of diesel in Delhi between December, 2002 i.e. the time period of negotiation of the accepted rates and the freezing of such negotiated/accepted price and the date of completion of the work of the second work order i.e. 1.5.2004. Thus, qua the work of the second work order, I am of the considered view that the claimant is entitled to a compensation of Rs.4,45,595/- which appears to be fair, just and proper and the same has been assessed on the basis of the probable quantity of diesel that must have been used in the execution of the work of the second work order. In taking the aforesaid view, I have also taken note of the variation in the rate allowed by the respondent for the first and the second work order in the case of IP Station, between the same parties, where the distance between the place of excavation and loading of the fly ash to the place of its dumping has substantially affected the rate given and accepted between the parties (Rs.55.50 for the larger distance and Rs.38.80 for the nearer dumping site) suggesting the consumption of diesel did affect the cost, both for the respondent as well as for the claimant, reflected in the rate for the second work order. The amount being awarded to the claimant comes to less than 7% of the total value of Rs.66,60,000/- of the second work order and the same is considered to be just, fair and quite reasonable. Thus, the claim No.1 is partly allowed only to the extent of Rs.4,55,595/- only”.

14. The submission of the learned counsel for the petitioner is that the arbitrator failed to appreciate that the parties entered into two separate agreements and two separate LOIs were issued for different quantities of ash which was to be lifted, at different points of time, which prescribed different time schedules for completion, i.e. seven months and four months respectively. These two periods cannot be clubbed together to apply clause 10CC in present case.

15. Petitioner further submits that respondent cannot take benefit of its own inefficiency. It is the admitted fact that respondent was not able to complete the work within stipulated time, and extension was granted on his request. He cannot take the benefit by clubbing the two contracts and the period of extension of these contracts to circumvent special condition under clause 3 which read as follows:

"3. The accepted rates of the successful bidder/tenderer shall be applicable and remain in force for a period of one year from the date of commencement of the work which shall be reckoned from 7th day after the date of issue of letter of intent/order to commence the work whichever is earlier. At the time of finalization of contract for this work, the work shall be awarded on lowest acceptable bidder and option would lie with the Deptt. to watch his performance for a period of one month and if during this period, the contractor fails to maintain the progress of work as per targets stipulated in the contract, the award of work on them shall be rescinded by giving a notice period of 7 days. On the expiry of this notice period, the work shall be automatically stand rescinded unless the department is satisfied that delay is not attributable to contractor. In event of rescinding the contract, the E/Money and Security deposit of the defaulting contractor shall stand forfeited". (emphasis supplied)

16. Petitioner submits that arbitrator grossly and patently erred in holding that it is not necessary that the percentage of various components, such as materials, labour, POL etc should be predetermined as to attract the provisions of clause 10CC. When the contracts were for periods of less than one year, and predetermined fixed rates were agreed, such observation does not hold good. He submits that the percentage of various components such as materials, POL etc. had not been fixed because it was clearly understood that clause 10CC has no application. It is urged that the award suffers from patent illegality and is opposed to public policy of Indian law, and the

illegality goes to the root of the matter. It is also submitted that the award is so unfair and unreasonable that it would shock the conscience of the Court.

17. The respondent opposes the petition. Learned counsel for the respondent submits that special condition No.3 is not in conflict with, or a bar to allowance of claim under clause 10CC. Clause 10CC provides that if period of completion is only 6 months, then escalation would not be payable. However, in this case the contract period is over one year if the two work orders are considered as part of the same contract, as held by the learned arbitrator.

18. Reliance is placed on **General Manager, Northern Railways v. Sarvesh Chopra**, 2002 (1) Arb. LR 506 (SC) to contend that *"under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms."*

19. It is argued that the aforesaid observations were followed in **NTPC Ltd. v. Deconar Services Pvt. Ltd**, 2010 (116) DRJ 648 (DB). Reliance is also placed on **Asian Tech Limited v. Union of India**, (2009) 10 SCC 354 to contend that the bar contained in special condition No.3 binds the petitioner, but it does not bind the arbitral tribunal, and the tribunal has the jurisdiction to award the claim founded on clause 10CC.

20. Mr. Sharma, counsel for the respondent, submits that section 34 of the Act has limited scope. Disputes adjudicated by the arbitrator were within the terms of reference, and it cannot be said that the arbitrator has exceeded his jurisdiction. He further submits that arbitrator is the sole judge of quality and quantity of the evidence.

21. Mr. Sharma has placed reliance on **Sudarshan Trading Co. v. Government of Kerala**, AIR 1989 SC 890 to submit that the jurisdiction of the Court while examining the award is to enquire whether the award falls within the jurisdiction of the arbitrator, or outside his jurisdiction. There is a distinction between an error within jurisdiction and an error of jurisdiction, i.e. an error beyond jurisdiction. The Court cannot interfere with an award made within jurisdiction by the arbitrator. The Supreme Court held:

"31. But, in the instant case the court had examined the different claims not to find out whether these claims were within the disputes referable to the arbitrator, but to find out whether in arriving at the decision, the arbitrator had acted correctly or incorrectly. This, in our opinion, the court had no jurisdiction to do, namely, substitution of its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount; was liable to be paid or damages liable to be sustained was a decision within the

competency of the arbitrator in this case. By purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. It has to be determined that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised... ..”.

22. Further reliance is placed on **G. Ramachandra Reddy & Co. v. Union of India**, AIR 2009 SC 2629, to submit that “interpretation of a contract may fall within the realm of the Arbitrator. The Court while dealing with an award would not reappreciate the evidence. An award containing reasons also may not be interfered with unless they are found to be perverse or based on a wrong Proposition of law. If two views are possible, it is trite, the Court will refrain itself from interfering”.

23. Having heard learned counsel for the parties, perused the impugned award and the documents placed on record, I am of the view that the impugned award is patently erroneous and illegal and the same is wholly unsustainable. The finding of the learned Arbitrator that there was only one contract is, ex facie, illegal and contrary to the record. The learned Arbitrator has fallen in patent error in concluding that the first work order/letter of intent dated 21.01.2003 pertaining to the lifting of 1,80,000 cum. of ash, and the second work order/letter of intent dated 28.11.2003 pertaining to lifting of 1,20,000 cum. of ash constitute one contract. This finding of the learned arbitrator demonstrates complete lack of application of mind by the Arbitrator to the facts of the case and understanding of basic and fundamental principles of Contract law.

24. Ex.C-1 dated 20.01.2003, i.e. the letter of the petitioner recorded that the petitioner intended to offer to the respondent 1,80,000 cum. of fly ash disposal work, subject to the condition that the respondent extends *"the validity of your offer for the balance quantity for the total period of work for which the department intends to offer you the initial quantity of 1,80,000 cum. of fly ash i.e upto seven months from the date of start of work of initial offer."* Therefore, what was initially on offer was only 1,80,000 cum. of fly ash. For the remaining quantity of 1,20,000/- cum., the respondent was required to keep its offer open for a period of *"seven months from the date of start of work of initial offer"*. The aforesaid facts show that the petitioner made a conditional offer to enter into a contract, initially only for 1,80,000 cum of fly ash. In relation to 1,20,000 cum. of fly ash, there was no offer made by the petitioner. Therefore, it was not obligatory on the petitioner to award the contract for the balance quantity of 1,20,000 cum. of ash to the respondent. Vide Ex.C-2, the respondent extended *" the validity of our offer upto seven months from the date of start of initial offer of removal of 1,80,000 cum. of fly ash from Kanchanpuri, RPH ashponds"*. Therefore, the respondent only extended the validity of its "offer". It was clearly understood between the parties that there was no concluded contract even on the date of issuance of Ex.C-2 i.e. 21.02.2003 in relation to the balance quantity i.e. 1,20,000 cum. of fly ash. The letter of intent/work order, Ex.C-3 dated 21.01.2003 pertained only of 1,80,000 cum. fly ash and not to the balance quantity of 1,20,000 cum. of fly ash.

25. The stipulated date of start of work under the first letter of intent/work order dated 21.01.2003 was 04.02.2003 and the stipulated date of completion was 03.09.2003 i.e after a lapse of seven months. Admittedly the petitioner did not issue any letter of intent/work order in respect of any part of the balance quantity of 1,20,000 cum. on or before 03.09.2003. Therefore, the offer made by the respondent to keep its offer initially open upto 03.09.2003 (i.e. for a period of seven months from the date of start of the initially awarded work) lapsed on 03.09.2003, and the respondent was no longer bound to accept any further letter of intent/work order from the petitioner at the same rate as had been negotiated and agreed between the parties in relation to the first work order. It is for this reason that on 22.10.2003 (Ex.C-8), the respondent wrote to the petitioner, inter alia, stating as follows"-

"The scope of work awarded to us has been successfully executed and we submit in case the balance work is awarded on us by 15.11.2003, we will accept the offer at our negotiated rate and terms and conditions of our original offer."

26. From the aforesaid, it is clear that the respondent, on its own extended the validity of its earlier offer upto 15.11.2003. The petitioner issued its acceptance of the respondents extended offer vide phonogram dated 14.11.2003 and thereafter on 28.11.2003, the petitioner issued the second letter of intent/work order dated 28.11.2003 in relation to the quantity of 1,20,000 cum of ash at the same negotiated rate of Rs.55.50 per cum. Reference may be made to paras 19 and 20 of the respondents statement of claim. The same read as follows:

*"19. The claimant by the letter dated 22.10.2003 informed the respondent that the work awarded by the letter of intent dated 21.01.2003 has been completed. The claimant also reminded the respondent of extending the validity of their offer for 7 months and so requested the respondent to award the balance quantity of the same. **The claimant in this letter also made it clear that if the balance work is awarded by 15.11.2003 the claimant would accept the same at their negotiated rates and terms and conditions of the original offer.***

20. The claimant states that after the receipt of the aforesaid letter dated 22.10.2003, a phonogram dated 14.11.2003 regarding award of the balance quantity of 1,20,000 cum to the claimant. This was followed by the letter of intent dated 28.11.2003. By this letter of intent the order for executing the balance quantity of 1,20,000 cum of ash @ Rs.55.50 per cum for the value of Rs.66,60,000/- awarded to the claimant."

27. The respondent was not bound to extend its offer to remove 1,20,000 cum of ash at the earlier negotiated rate of Rs.55.50 per cum. The respondent voluntarily made the said offer. Pertinently, its earlier offer had already lapsed on 03.09.2003. The respondent made the said offer without any reservations or conditions with regard to the rate, and the only condition was that it was valid till 15.11.2003. Pertinently, the respondent did not claim any enhancement of rates on account of rise in the cost of diesel, POL etc. before making the said offer to the petitioner on 22.10.2003.

28. Merely because both the work orders were issued in pursuance of the same tender enquiry, it does not follow that the two work orders are a part of the same contract. It is open to the parties to incorporate the terms of an earlier existing contract, in a latter contract, and such incorporation would also not make the second contract a part of the first contract. The finding of the Arbitrator that for purposes of

quantum of work, the entire quantity of 3,00,000 cum. – comprising of 1,80,000 cum. of the work order and 1,20,000 cum. of the subsequent work order has to be treated as one contract is wholly perverse and a view that cannot be accepted by any stretch of reasoning.

29. There is absolutely no reason given by the learned Arbitrator as to on what basis he has concluded that *“it is not necessary that the various components such as material, labour, POL etc (as in building contracts) should be pre determined so as to attract the provisions of clause 10 CC of the general conditions of contract because the same would depend upon the nature of the work under any given contract and pre determination of the various components cannot be held to be a sine qua non for the entitlement or otherwise to the escalation benefit, if the circumstances of the case may otherwise justify.”*

30. The relevant portion of Clause 10CC of the Contract reads as follows:-

“If the prices of materials (not being materials supplied or services reduced at fixed prices by the department in accordance with clause 10 and 33 thereof) and/or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract shall accordingly be varied subject to the condition that such compensation for escalation in prices shall be available only for work done during the stipulated period of the contract including such period for which the contract is validly extended under the provisions of clause 5 of the contract without any action under clause 2 and also subject to the condition that no such compensation shall be payable for a work which the stipulated period of completion is six months or less. Such compensation for escalation in the prices of materials and labour when due, shall be worked out based on the following provisions.

- 1. The base date or working out such escalation shall be the last date on which tenders were stipulated to be received.*
- 2. The cost of work on which escalation will be payable shall be reckoned as 85% of the cost of work as per the bills running*

or final and from this amount the value of materials supplied under clause 10 of this contract or services rendered at fixed charges as per clause 33 of this contract, and proposed to be recovered in the particular bill shall be deducted before the amount of compensation for escalation is worked out. In the case of materials brought to site for which the secured advance is included in the bill the full value of such materials as assessed by the Engineer-in-charge (and not the reduced amount for which secured advance has been paid) shall be included in the cost of work done or incorporated in the work and the secured advance is deducted from the bill the full assessed value of the materials original considered for operation of this clause should be deducted from the cost of the work shown in the bill, running or final. Further the cost of the work shall not include any work for which payment is made under clause 12 or 12(a) at prevailing market rates.

3. The components of materials, labour, P.O.L. etc shall be pre-determined for every work and incorporated in the conditions of contract attached to the tender papers and the decision of the Engineer-in-charge in working out such percentages shall be binding on the contractor.

4. The compensation for escalation for materials and P.O.L shall be worked out as per the formula given below:-

$$i. \quad VM = W = X \frac{X}{100} \times \frac{(MI - MI^o)}{MI}$$

- VM - Variation in material cost i.e increase or decrease in the amount in Rupees to be paid or recovered.
- W - Cost of work done worked out as indicated in sub-para 2 above.
- X - Component of materials expressed as percent of the total value of work.
- MI & MI^o All India whole sale index for all commodities for the period under reckoning as published by the Economic Advisor to Govt. of India, Ministry of Industry and that valid at the time of receipt of tenders.

$$ii. \quad VF = W = X \frac{Z}{100} \times \frac{(FI - FI^o)}{FI} \text{ OIL}$$

- VF - Variation in cost of fuel, oil and lubricant increase or decrease in rupees to be paid or recovered.
- W - Value of work done, worked out indicated in sub para 2 above.

- Z - *Component of P.O.L expressed as percent of total value of work as indicated under special conditions of contract.*
- FI & FI°- *Average index of whole sale price for group (fuel power light and lubricants) as published weekly by the Economic Advisor to Govt. Of India, Ministry of Industry for the period under reckoning and that valid at the time of receipt of tenders respectively."*

31. Clause 10 CC itself provides that *"the components of materials, labour, POL etc shall be pre determined for every work and incorporated in the conditions of contract attached to the tender papers and the decision of the Engineer-Incharge in working out such percentages shall be binding on the contractor"*. Moreover, the formula prescribed in sub-clause (4) extracted above shows that to calculate the escalation under Clause 10 CC, the variation in cost of fuel, oil and lubricant (increase or decrease) can be computed only when the component of POL is *"expressed as percentage of total value of work"*. This percentage was not indicated in the conditions of contract, precisely, for the reason that clause 10CC was specifically excluded from its application in relation to the first work order, and the same was not applicable, in any event, in relation to the second work order as clause 10CC itself provides *"that no such compensation shall be payable for a work for which the stipulated period of completion is six months or less."* Pertinently in relation to the second work order, the stipulated period of completion was only four months.

32. The learned Arbitrator has completely ignored Clause 3 of the Special Conditions of Contract which binds the parties. Clause 3 of the Special Conditions clearly stipulated that *" the accepted rates of the*

successful bidder/tenderer shall be applicable and remain in force for a period of one year from the date of commencement of the work which shall be reckoned from 7th day after the date of issue of letter of intent/order to commence the work whichever is earlier....." The learned Arbitrator has gone against the grain of the contract between the parties by adopting a completely perverse process of reasoning, to find a justification to award escalation to the respondent under Clause 10CC of the General conditions of Contract, which had no application in the facts of this case. I find it equally shocking that the learned Arbitrator has been swayed by the language found in a certificate dated 07.07.2004 issued by the petitioner to the claimant certifying the work done under the aforesaid two contracts. Merely because the same certificate certifies the work done under the two contracts, the same has been construed to mean that, even according to the petitioner, the work under the two contracts form a part of the same contract. In my view, the approach of the learned Arbitrator in relying upon the said certificate dated 07.07.2004 for construing that the two works constituted a single contract is completely misdirected.

33. I am not at all impressed by the submission of learned counsel for the respondent that the impugned award cannot be interfered with in these proceedings. In my view the impugned award is patently illegal and perverse. None of the cases cited by the respondent holds that the Court is powerless to interfere with, and set aside a patently erroneous and perverse award. The award in question goes contrary to the plain language of the contractual terms. The learned Arbitrator

has committed misconduct in disregarding the contract between the parties while making the impugned award. It is settled law that where there are errors apparent on the face of the award, it can be set aside. If, in the award, there is any erroneous proposition of law which is apparent on the face of the award, namely, in the award itself, or any document incorporated in the award it can be set aside by the Court. In the present case, the learned Arbitrator has propounded a proposition of law which goes contrary to the established law. If the impugned award is accepted it would mean that a party is not bound by its offer, and can seek to resile from it, as has been done by the respondent.

34. In **Ramachandra Reddy** (supra), the Supreme Court quoted the following extract from **State of Rajasthan V. Pure Construction Company Limited & Ors**, (1994) 6 SCC 485:-

"As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of "legal misconduct" of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid."

It was furthermore stated:

"Error apparent on the face of the record does not mean that on closer scrutiny of the import of documents and materials on record, the finding made by the arbitrator may be held to be erroneous. Judicial decisions over the decades have indicated that an error of law or fact committed by an arbitrator by itself

does not constitute misconduct warranting interference with the award."

35. The Supreme Court also quoted the following extract from ***Trustees of the Port of Madras V. Engineering Constructions Corporation Ltd.***, AIR 1995 SC 2423 :-

"14. ...A note of clarification may be appended, viz., where the parties choose to refer a question of law as a separate and distinct matter, then the Court cannot interfere with the award even if the award lays down a wrong proposition of law or decides the question of law referred to it in an erroneous fashion. Otherwise, the well-settled position is that an arbitrator "cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. [See Thawardas Pherumal v. Union of India , AIR 1955 SC 468.]

It was clarified:

20. The proposition that emerges from the above decisions is this: in the case of a reasoned award, the court can interfere if the award is based upon a proposition of law which is unsound in law. The erroneous proposition of law must be established to have vitiated the decision. The error of law must appear from the award itself or from any document or note incorporated in it or appended to it. It is not permissible to travel beyond and consider material not incorporated in or appended to the award."

36. Reliance placed on ***Sarvesh Chopra*** (supra) appears to be wholly misplaced. The Arbitrator has not even found, as a matter of fact, that it was the petitioner who was responsible for the delay in completion of the contractual work by the respondent. Merely because the extension of time had been granted to the respondent, without levy of liquidated damages, it cannot be inferred that the delay was on account of the petitioner.

37. The Supreme Court in ***New India Civil Erectors (P) Ltd. V. Oil and Natural Gas Corporation***, (1997) 11 SCC 75, upheld the order of the Division Bench of the High Court in relation to claim No.9 which

had been made to claim escalation. Paragraph 10 of this decision reads as follows:-

"10. Claim No. 9: The appellant claimed an amount of Rs. 32,21,099.89p. under this head, against which the arbitrators have awarded a sum of Rs. 16,31,425. The above claim was made on account of escalation in the cost of construction during the period subsequent to the expiry of the original contract period. The appellant's claim on this account was resisted by the respondent-corporation with reference to and on the basis of the stipulation in the corporations' acceptance letter dated 10th January, 1985 which stated clearly that "the above price is firm and is not subject to any escalation under whatsoever ground till the completion of the work". The Division Bench has held, and in our opinion rightly, that in the face of the said express stipulation between the parties, the appellant could not have claimed any amount on account of escalation in the cost of construction carried on by him after the expiry of the original contract period. The aforesaid stipulation provides clearly that there shall be no escalation on any ground whatsoever and the said prohibition is effective till the completion of the work. The learned arbitrators, could not therefore have awarded any amount on the ground that the appellant must have incurred extra expense in carrying out the construction after the expiry of the original contract period. The aforesaid stipulation between the parties is binding upon them both and the arbitrators. We are of the opinion that the learned single Judge was not right in holding that the said prohibition is confined to the original contract period and does not operate thereafter. Merely because the time was made the essence of the contract and the work was contemplated to be completed within 15 months, it does not follow that the, aforesaid stipulation was confined to the original contract period. This is not a case of the arbitrators construing the agreement. It is a clear case of the arbitrators acting contrary to the specific stipulation/condition contained in the agreement between the parties. We, therefore, affirm the decision of the Division Bench on this Court as well (Claim No. 9)."

38. In ***Oil and Natural Gas Corporation Ltd. V. Saw Pipes Ltd.***, AIR 2003 SC 2629, the Supreme Court held that the decision of the arbitral tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the arbitral tribunal cannot act in breach of some provision of substantial law or in

breach of the Arbitration and Conciliation Act. The Supreme Court in its decision further held as follows:-

"12. The question, therefore, which requires consideration is-- whether the award could be set aside, if the arbitral tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties" Under Sub-section (1)(a) of Section 28 there is a mandate to the arbitral tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would -- whether such award could be set aside? Similarly, under Sub-section (3), arbitral tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If arbitral tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered? Similarly, if the award is non-speaking one and is in violation of Section 31(3), can such award be set aside? IN our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it would be contrary to basic concept of justice. If the arbitral tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.

*13. The aforesaid interpretation of the Clause (v) would be in conformity with the settled principle of law that the procedural law cannot fail to provide relief when substantive law gives the right. Principle is -- there cannot be any wrong without a remedy. In **M.V. Elisabeth and Ors. Harwan Investment & Trading Pvt. Ltd.**, 1993 Supp(2) SCC 433, this Court observed that where substantive law demands justice for the party aggrieved and the statute has not provided the remedy, it is the duty of the Court to devise procedure by drawing analogy from other systems of law and practice. Similarly, in **Dhanna Lal v. Kalawatibi and Ors.** (2002) 6 SCC 16, this Court observed that wrong must not be left unredeemed and right not left unenforced.*

14. Result is -- if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties."

39. In **Saw Pipes** (supra), the Supreme Court also considered the meaning of the expression “public policy of India” used in Section 34 of the Act and gave it a broader meaning. The Supreme Court, in this behalf held as follows:-

“20. Mr. Desai submitted that the narrow meaning given to the term 'public policy' in Renusagar's case in context of the fact that the question involved in the said matter was with regard to the execution of the award which had attained finality. It was not a case where validity of the Award is challenged before a forum prescribed under the Act. He submitted that the scheme of Section 34 which deals with setting aside the domestic arbitral award and Section 48 which deals with enforcement of foreign award are not identical. A foreign award by definition is subject to double exequatur. This is recognized inter alia by Section 48(1) and there is no parallel provision to this clause in Section 34. For this, he referred to Lord Mustill & Stewart C. Boyd QC's "Commercial Arbitration" 2001 wherein [at page 90] it is stated as under:--

"Mutual recognition of awards is the glue which holds the international arbitrating community together, and this will only be strong if the enforcing court is willing to trust, as the convention assumes that they will trust, the supervising authorities of the chosen venue. It follows that if, and to the extent that the award has been struck down in the local court it should be a matter of theory and practice be treated when enforcement is sought as if to the extent it did not exist."

21. He further submitted that in foreign arbitration, the award would be subject to being set aside or suspended by the competent authority under the relevant law of that country whereas in the domestic arbitration the only recourse is to Section 34.

22. The aforesaid submission of the learned senior counsel requires to be accepted. From the judgments discussed above, it can be held that the term 'public policy of India' is required to be interpreted in the context of the jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the Court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under Code of civil Procedure that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or nullity. But in a case where the judgment and decree is challenged before the Appellate Court or the Court exercising

revisional jurisdiction, the jurisdiction of such Court would be wider. Therefore, in a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term 'public policy of India'. On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the arbitral tribunal could be set aside. If narrow meaning as contended by the learned senior counsel Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the Arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "arbitral tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that arbitrator shall decide *ex aequo et bono* [according to what is just and good] only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of 'patent illegality'."

40. It was further held as follows:-

"30.....Further, for achieving the object of speedier disposal of dispute, justice in accordance with law cannot be sacrificed. In our view, giving limited jurisdiction to the Court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice.

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's case (supra)** it is required to be held that the award could be set aside if it is patently illegal. 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."

41. Reliance placed on **Asian Techs Ltd.** (supra) appears to be misplaced. That judgment came to be passed in its own special facts. The appellant-contractor, vide its letter dated 24.11.1998 had required the respondent employer "**to settle accounts of the value of work already carried out, to make payment in terms of the agreement and to close the agreement due to continued suspension of works and increased cost of construction due to efflux of time so as to arrange the remaining works through separate work order**". The employer had "**sent a letter dated 11.08.1989 assuring the petitioner to settle rates across the table and directed to carry out such items, agreeing to take up objections as to rates, for settlement by the appropriate authority**". The respondent-employer also required the appellant to forward vouchers for items to take up its objections as to rates before

its accepting authority. In the light of the aforesaid, the Supreme Court concluded as follows:-

"17. The letter dated 24.11.1988 makes it clear that the appellant was not ready to carry out the work beyond the contracted period otherwise than on separate work orders, and the subsequent correspondence like the letter dated 11.10.1989 makes it clear that it was on the specific assurance given by the respondent to the appellant to continue the work and that the rates would be decided across the table that the appellant went ahead with the work. Hence, in our opinion it is now not open to the respondent to contend that no claim for further amount can be made due to Clause 11(C) and that the arbitrator would have no jurisdiction to award the same."

42. It is in these circumstances that the Supreme Court did not permit the respondents to place reliance on Clause 11(c) which prohibited the contractor to claim further amounts at higher rates than those agreed under the contract, during the extended period of contract.

43. In a recent decision reported as **ONGC V. Wig Brothers Builders and Engineers Private Limited**, (2010) 13 SCC 377, the Supreme Court has once again reiterated the position that an Arbitrator is bound by the contractual terms such as clause 11(c) of the General Conditions of Contract and he cannot award any amount in contravention of the said clause. If he does so, he would be exceeding his jurisdiction. In this case, compensation was claimed by the Contractor for loss on account of prolongation of the completion period on account of the employer's failure to perform its contractual obligations. The arbitrator held that the delay in completion was due to fault of both the contractor and the employer and that both were equally liable for delay. On this basis the Arbitrator held that the contractor was entitled to be compensated for half of the period of

delay. Even though clause 5(A) of the contract, which pertained to extension of time for completion of work, specifically barred any claim for damages and was similar to clause 11(c) of the General Conditions of Contract, the learned Arbitrator observed that there was no provision in the contract by which the contractor could be estopped from raising a claim for compensation for delay in completion of the work. The relevant extract from this decision of the Supreme Court reads as follows:-

“7. In view of the above, in the event of the work being delayed for whatsoever reason, that is even delay which is attributable to ONGC, the contractor will only be entitled to extension of time for completion of work but will not be entitled to any compensation or damages. The arbitrator exceeded his jurisdiction in ignoring the said express bar contained in the contract and in awarding the compensation of Rs. 9.5 lakhs. This aspect is covered by several decisions of this Court. We may refer to some of them.

8. *In Associated Engineering Co. v. Government of A.P., 1991 (4) SCC 93, this Court observed:*

“24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction....”

9. ***In Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises: 1999 (9) SCC 283, this Court held:***

“22.....The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute

because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may be tantamount to mala fide action.

23.It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose, agreement is required to be considered.....

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44. (h) He cannot award an amount which is ruled out or prohibited by the terms of the agreement."

10. In **Ramnath International Construction (P) Ltd. v. Union of India : 2007 (2) SCC 453**, a similar issue was considered. This Court held that Clause 11(C) of the General Conditions of Contract (similar to Clause 5A under consideration in this case) was a clear bar to any claim for compensation for delays, in respect of which extensions had been sought and obtained. This Court further held that such a clause amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of claims for delay and not to claim any compensation; and that in view of such a bar contained in the contract in regard to award of damages on account of delay, if an arbitrator awards compensation, he would be exceeding his jurisdiction.
11. In view of the above, the award of the arbitrator in violation of the bar contained in the contract has to be held as one beyond his jurisdiction requiring interference."(emphasis supplied)

44. In the light of the aforesaid discussion, it is evident that the impugned award is opposed to the public policy of India as it is opposed to fundamental policy of Indian Law. The Ld. Arbitrator has

misconducted himself and the proceedings. He has exceeded his jurisdiction by acting contrary to the express contractual terms. For the aforesaid reasons, I set aside the impugned award. The petitioner shall be entitled to costs quantified at Rs.50,000/-.

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In view of the award being set aside, as aforesaid, these applications have become infructuous and are disposed of as such.

**(VIPIN SANGHI)
JUDGE**

MAY 23, 2011
AS/BSR