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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO (OS) 120/2017**

SHIAM COOPERATIVE GROUP Appellant
Through: Ms.Anusuya Salwan and
Ms.Renuka Arora, Advs.

versus

M/S. KAMAL CONSTRUCTION CO. LTD...Respondent
Through: Mr.Raman Kapur, Sr. Adv. with
Mr.F. Hasan, Mr.R.P. Singh
and Mr.Varun Kapur, Advs.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

10.08.2017

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C. HARI SHANKAR, J.

1. *Vide* order dated 10th August, 2017, we had dismissed the present appeal, for reasons to be recorded separately. We proceed, by this judgement, to record our reasons for the said order.
2. The appellant seeks, by the present appeal, to challenge the order, dated 15th February, 2017, of the learned Single Judge in OMP No.144/2010, whereby the objections, filed by the appellant under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Act"), against award dated 14th December, 2009, of the learned Arbitral Tribunal, have been dismissed.

3. The facts, relevant to adjudication of the issue in controversy, lie in a narrow compass.
4. Vide agreement dated 12th September, 2000, the respondent contracted to construct 120 dwelling units for the appellant, which is a co-operative Group Housing Society. The scheduled date of completion was 22nd January, 2004.
5. The controversy in the present case dealt with the item of “development work”, forming a core component of the work contracted, by the appellant to the respondent.
6. It was contended, by the appellant before the learned Single Judge, as the respondent could not complete the work in time, the appellant terminated the contract on 23rd February, 2006. Even prior thereto, the appellant would contend, development work was withdrawn, from the respondent, on 02nd December, 2003, and awarded to M/s. Veer Enterprises (hereinafter referred to as “Veer”) on 30th December, 2003. The communication, dated 02nd December 2003, read thus:

“Dear Sir,

This has the reference to the discussions held with you at site on 30.11.2003. The progress of your work is not satisfactory and you are not able to complete the work in stipulated time period. Therefore, the Managing Committee has decided to get the Development Work done through some other agency. This item of work is deleted from your scope of work.

Thanking you,

XXXX” (Emphasis supplied)

It was repeatedly emphasized, before us by Ms Anusuya Salwan, learned Counsel appearing for the appellant, that, in the face of the above unequivocal communication, there could be no question of any payment being claimed, by the respondent, for any development work done thereafter and that, therefore, the award of the learned Arbitral Tribunal, as well as the impugned judgement of the learned Single Judge, which allowed the said claim of the respondent, were fatally flawed.

7. The record which was before the learned Arbitral Tribunal and was, successively, before the learned Single Judge and is now before us, reveals, however, that the aforementioned communication dated 3rd December 2003 was merely the prologue, rather than the epilogue, of the tale. The following communications/events, subsequent to the above “withdrawal”, by the appellant, of the development work from the respondent, are significant:

(i) Following on the issuance, to the respondent, of the letter dated 3rd December, 2003, the appellant “awarded” development work, to Veer, *vide* letter dated 30th December 2003, in the following terms:

“Sub:- Award of work

Dear Sir,

This has the reference to your quotation dated 25/07/03 and further negotiation held on 11/08/03 regarding development works at our society. Management Committee of society has decided to award

this work to you on Lump sum Rs. 55 Lac. The terms and conditions shall be as under:-

1. Total Amount shall be Rs. 55.00 Lac and work wise break up shall be as per Annexure enclosed. Necessary TDS and 2% Works Contract Tax shall be deducted. Balance 2% Work Contract tax shall be deposited by you.

2. The rates are firm till completion of work. The time period shall be 9 months, w.e.f. 14/08/03.

3. The payment schedule shall be as under:-

<i>(a)</i>	<i>Advance on award of work</i>	<i>=</i>	<i>50%</i>
<i>(b)</i>	<i>On material at site</i>	<i>=</i>	<i>40%</i>
<i>(c)</i>	<i>On installation/Laying and Testing</i>	<i>=</i>	<i><u>10%</u></i>
			<i><u>100%</u></i>

4. All works shall be executed as per CPWD specification MCD Norms and drawings given to you.

5. You are requested to contact our Architect M/s Design 'N' Design for collection of any more drawings or for any discussion/clarifications.

6. In case, the above rates/terms and conditions are accepted, please give your acceptance on enclosed copy and start the work immediately."

This communication, juxtaposed with the communication dated 1st December 2003 from the appellant to the respondent, predictably form the backdrop of the appellant's defence. Payment of Rs 26,38,265/-, made by the appellant to Veer, apparently in furtherance of the above assignment of work to the latter, also stands documented at Annexure P-3 to the appeal.

(ii) In a startlingly contradictory vein, however, the appellant addressed the following communication, dated 2nd April 2004, to the respondent:

“Sub:- C/o 75 Dwelling units for Shiam C.G.H.S. Ltd., at Plot No. 5-D, Sector no. 11, Dwarka, Phase-I, New Delhi – 110045.”

Dear Sir,

This has the reference to discussions held at site on 27/03/04 in the presence of Architect. It was observed that the progress of work is very slow. You have to speed up the following works.

- 1. Development work – Water/Sewer Line*
- 2. Grit wash*
- 3. Construction of ESS building.*
- 4. Flooring*
- 5. Electrical work, window, ...*

As you have promised the project should be completed by 15/05/04 positively so that, the possession to the members may be handed over. In any circumstances, the possession should be completed and handed over by 15/05/04.

Thanking you,

Yours faithfully,

For SHIAM C.G.H.S. LTD.” (Emphasis supplied)

(iii) As a sequel to the above communication, the following letter was addressed, by the appellant to the respondent, on 5th April 2004:

**“Sub:- C/o 75 Dwelling units for Shiam
C.G.H.S. Ltd., at Plot No. 5-D, Sector no.
11, Dwarka, Phase-I, New Delhi – 110045.”**

Dear Sir,

Please refer to letter dated April 2, 2004 from the secretary of society. We feel that the progress of work is very slow and project may not be completed by 15/05/04 as promised by you. You have not started the fixing of door and window shutters also, in addition to the other works mentioned in secretary's letter.

You are requested to speed up the work so that project may be completed by 15/05/04 in all respect and flats may be handed over to members.

Thanking you,

Yours faithfully,

For DESIGN ‘N’ DESIGN”

The letters, dated 2nd April 2004 and 5th April 2004, as reproduced hereinabove, apparently give the lie to the notion that development work was entirely discontinued, by the respondent, consequent on the communication dated 2nd December 2003 *supra*. Ms Salwan candidly acknowledged the fact that these communications appeared to be prejudicial to her case; however, her submission was that they were a result of confusion arising out of changes, which had taken place at the managerial levels in the appellant's establishment. Evidence pointing contrariwise, she would assert, could not be wished away merely by relying on these communications. The submission merits consideration; ergo, a glance

at the sequence of events after these communications would be in order.

(iv) Two days after the dispatch of the above communication, dated 5th April 2004, by the appellant's architect (M/s Design N Design, hereinafter referred to as "the architect") to the respondent, a meeting took place in the office of the appellant, attended by the representative of the appellant, the architect and the Engineer. The minutes of the said meeting read thus:

"Following Points were discussed:

1. *No Pipe Encasing will be done as discussed.*
2. *Vertical Granite store for kitchen slab will be fixed up as agreed by Mr Kamal.*
3. *Water Proof Plaster for sunken areas will be done as agreed by Mr Kamal.*
4. *All the G.I. Pipe lying below terrace level will be brought upto parapet level/below 6" of parapet, and in the last the progress work were discussed and instruction given for expediting the work at all front with this the meeting was over.*
5. *Construction programme chart shall be submitted within two days.*
6. *Material for development work such as RCC Pipe, SW Pipe, Alley Pipe and other accessories will be brought within 10 days.*

Thanking you,

B.N.Mishra" (Emphasis supplied)

(v) That material, for carrying out development work, was sourced by the respondent, stands actually evidenced by

(a) invoice, dated 18th April 2004, and Supply Certificate dated 28th April 2004 issued by M/s Dinesh Sanitary Store, of which the latter read thus:

“Certificate

We hereby certify that we have supplied 100 mm dia L.A.C.I. Pipe ISI marked and fittings Calcutta make to M/s Kamal Construction Company at their project site of Shyam Society Plot No. – 5D, Sector-11, Dwarka vide our Bill No. 11889 Dt 16-04-2004. The material mentioned above have been purchased from main company dealer M/s Supra Enterprises, Nehru Place, New Delhi through their Bill Nos. 671 and 4541 dated 16.04.2004. (Photocopy of there (sic) bills enclosed.)”

(copies of the bills of M/s Supra Enterprises were, and are, also on record), and

(b) copy of the cement register maintained by the respondent, showing issuance and consumption of cement in carrying out the development works.

(vi) Consequent to receipt of the 10th RA Bill from the respondent, the architect addressed the following letter, on 14th May 2005, to it:

“Sub:- C/o 75 Dwelling units for Shyam C.G.H.S. Ltd., at Plot No. 5-D, Sector no. 11, Dwarka, Phase-I, New Delhi – 110045.”

Dear Sir,

Your Running Bill No. 10th dated 2.04.2005 has been received by us and Adhoc payment of approx. Rs 30 Lac has been made to you.

During the site inspection, it is noticed that lot of works are incomplete for which you have claimed 100% payment. The list of such works is enclosed and you are requested to complete all these works, so that the bill may be certified for payment.

Thanking you,

Yours faithfully,

For DESIGN 'N' DESIGN"

The list of “pending” works, attached to the said letter, clearly included items which classify as “development works”.

(vii) In the context of amounts remaining unpaid against the 10th RA Bill raised by it, the respondent wrote, on 30th November 2005, to the appellant, in which it was stated that the respondent had “*done lot of works on the above-mentioned site like development works, Sewer, water supply draining and road work etc. and have not raised bill for the same ...*” The appellant, vide its communications dated 13th December 2005 and 17th December 2005, rebutted the demand, *inter alia* on the ground that “development works” had been withdrawn, by the appellant, from the respondent, and handed over to Veer.

(viii) On 28th January 2007, the respondent handed over possession of the flats along with keys to the appellant.

(ix) On 2nd April 2007, the appellant wrote to Veer, as under:

“Sub:- Execution of Development work of the society.

Dear Sir,

This is in reference to your letter dtd. 9/3/07 vide which you have asked for balance payment of Rs 5500000/- (Rupees five lakh fifty thousand). In this context please recall Society's letter dtd. 29/8/06 whereby you were asked to contact the present Managing Committee of the Society to show the proof that the said work has been executed by you. You neither contacted the Managing Committee nor shown any proof regarding execution of the work i.e. Status of your firm, proof of your registration as a civil contractor, ITCC, Works contract registration. Purchase bills of material used at site and payment scrolls of labour. The Vice president of the society Mr Virender Kumar Deswal also contacted you on telephone on 9/3/07 and 10/3/07 when you assured that you are coming at the site of the society on 10/3/07 at 9 AM to meet the Managing Committee members and Managing Committee kept waiting till 1.30 p.m. wherein you kept on befooling the Managing Committee members and did not come even you have not contacted till date. Since the development work was already in the scope of work of main contractor and there was no reason to award the work to you by the previous Managing Committee without rescinding the work of main contractor with any valid reason therefore your claim for executing development work does not sustain.

During various General Body Meeting of society since 3/4/2005 it was seen that no development work was done at the site except part construction of boundary wall and there was no WBM and CC path during the said period. The GBM of the society verified at the site of the work that the part development work was carried out during the period between August 2005 to December 2005 and the balance work is still abandoned therefore your statement of construction of WBM road, laying water line and Pipe line during April-May 2004 does not tally with the physical verification of the site by the General Body members during its various meetings.

During the inspection of the Society's site on 19-6-2006 by the local commissioner appointed by Hon'ble High Court there is no mention of any other agency who carried out the development work. Mr. Dinesh Kumar the then secretary and Mr. SP Garg the architect of the society who were also present during the said inspection also did not mention of development work carried out by your firm to the local Commissioner when Shri Deshwal, Vice President of the Society and undersigned were also present.

A preliminary audit/inspection of the records for last 5 years by the present Managing Committee it was revealed that the payment of Rs. 49.50 Lacs have been made to you wherein in any of the General Body Meeting it was never been approved and intimated by the then Managing Committee that the development work has been awarded to you and this fact was brought in the notice of General Body in its meeting held on 27-8-06 by the present Managing Committee when we received records from outgoing Managing Committee.

In view of the facts and circumstances explained above, it has been established that the development work has not been carried out by you and merely making a fake payment by the previous Managing Committee does not justify the development works carried out by you. You are therefore once again requested to produce all such record to the present Managing committee of the society to establish your identity as a contractor for the development work within a weeks time failing which legal proceeding to recover the amount of Rs. 49.50 Lacs made by outgoing Managing Committee of the society in fraudulent connivance with other agencies shall be initiated against you.

Yours sincerely,

For Shiam CGHS Ltd" (Emphasis supplied)

8. As is noted hereinafter, appreciation of evidence, in the case of matters referred to arbitration under the Arbitration and Conciliation Act, 1996, is exclusively within the province of the arbitrator/arbitral tribunal. It is no part of the duty of a court, exercising jurisdiction under Section 34 of the Act, to re-assess or re-examine the evidence, far less to overturn the findings of the arbitrator/arbitral tribunal, as if it were a Court of Appeal. Still less, therefore, would such an exercise be warranted by the court, sitting in appeal over the decision on the application under Section 34 of the Act.

9. The province of jurisdiction of an appellate court, it is trite, can never be more expansive than that of the court exercising original jurisdiction. Albeit somewhat pre-emptively, we may observe, even at this juncture, that the gamut of correspondences and communications, between the parties, referred to hereinabove, shed, at the very least, a fairly nebulous cloud, over the emphatic insistence, by the appellant, that the respondent had not, in fact, carried out the development works against which its claim was awarded by the learned Arbitral Tribunal, and that all such works were carried out, instead, by Veer.

10. Disputes, relating to development work stated, by the respondent, to have performed by it, but not recompensed, arose between the appellant and respondent. These resulted in invocation, by the respondent, of the provision for arbitration, contained in the agreement dated 12th September, 2000, *vide* letter dated 24th March,

2006, and to the consequent constitution of a three member-Arbitral Tribunal, which entered upon the said reference on 28th April, 2006.

11. 13 claims were filed by the respondent, and 2 counter claims filed by the appellant.

12. Para 4 of the impugned judgment of the learned Single Judge enumerates the claims, of the respondent, which were awarded by the learned Arbitral Tribunal, by its Award dated 14th December 2009, thus:

“(i) The termination of the contract by the Society by the letter dated 23rd March 2006 was arbitrary, illegal and null and void. Development works were carried out by the Contractor and not VE.

(ii) Claim No.2 in the sum of Rs.29,47,621/- towards balance payment against the 10th Running Account (‘R/A’) bill was allowed in favour of the Contractor.

(iii) Claim no.3 in the sum of Rs.64,68,522/- towards balance payment against the 11th R/A bill submitted on 01st December 2005 was allowed in favour of the Contractor.

(iv) As against Claim No.4 in the sum of Rs.17,44,393/- towards the balance due for the work done after the 11th R/A bill, the AT awarded the Contractor a sum of Rs.7,78,000/-.

(v) Against the sum of Rs.93,387/- claimed under Claim No.5 labour escalation for the work done after the 11th R/A bill, the AT awarded Rs.46,000/-

(vi) As against the sum of Rs.8,06,195/- claimed under Claim No.6 on account of interest @ 12% per annum for

the delayed payment by the Society, the AT awarded the Contractor Rs. 4 lakhs.

(vii) The claim for Rs.2,40,000/- under Claim no.7 on account of loss of expected profit on the balance value of unexecuted work was rejected by the AT.

(viii) The entire Claim No.8 for Rs.3 lakhs towards refund of society deposit was allowed.

(ix) Claim no.9 for Rs.56,56,447/- on account of escalation due to increase in prices of material for work executed after the scheduled date of completion, in terms of Clause 10CC, was rejected.

(x) Claim Nos.10 and 11 for Rs.8,63,943/- for extra items of work and Rs.12 lakhs for losses/damages due to idle labour were rejected.

(xi) As against the Claim No.12 for pre-suit, pendent lite and future interest, the AT awarded 10% simple interest per annum on the awarded sum of Rs.97,71,621/- from the date of entering into reference i.e. 28th April, 2006 till the date of the Award i.e. 14th December 2009 which worked out to Rs.35,54,915/-.

(xii) Costs of Rs.10,000/- was allowed.

13. The counter claims of the appellant were rejected, and the said rejection was not contested, further by the appellant.

14. Before the learned Single Judge, the appellant contended that

(i) Clause 8, of the agreement dated 12th September, 2009, allowed the appellant to delete any development works, which it actually did *vide* letter dated 02nd December 2003 (*supra*),

(ii) the fact that development works were done by Veer, was established by the receipts, issued by Veer, in respect of the payments made to it by the appellant,

(iii) affidavit dated 31st January, 2009, of Mr.Tapan Nayak, Manager of Veer, unequivocally deposed that Veer had performed development work for which it was paid by the appellant from time to time; the cross-examination, by the respondent, of Mr.Nayak did not elicit anything to support its claim, and

(iv) though the appellant, had on 05th April, 2004, written to the respondent to continue the development work, the said letter was a “result of confusion”, as there was a change in management of the appellant in the interregnum.

15. Per contra, the respondent, predictably, placed strong reliance on the letters dated 2nd April 2004 and 05th April, 2004 (*supra*), written by the appellant, desiring the respondent to continue with the development work, as well as documents supporting execution of the development work by it. Additionally, the respondent contended, before the learned Single Judge, that the appellant had, in fact, written, on 2nd April, 2007, to Veer, alleging that no development work had been done by Veer, except part construction of the boundary wall, and that development work was awarded, by contract, to the respondent.

16. The learned Arbitral Tribunal, in its award dated 14th December 2009, examined, holistically, the facts as already set out in para 6 *ibid*,

and proceeded to hold in favour of the respondent. Among the salient features of its ratiocination, may be said to be the following:

- (i) Vide letter dated 02nd April, 2004, the appellant asked the respondent to speed up development works i.e. water/sewer lines.
- (ii) This was confirmed by the Architect vide letter dated 05th April, 2004.
- (iii) In support of its claim of having performed development work, against which it was seeking payment, the respondent filed the relevant invoices, along with certificate regarding procurement of material for performing such work, and also produced the cement register showing consumption of cement, during the period 24th May, 2005 to 25th December, 2005, for various development works.
- (iv) The payment, due to the respondent, for construction of boundary wall, was certified by the Architect in the second Running Account (R/A) bill itself.
- (v) On 02nd April, 2007, the appellant had written to Veer, stating that, as development work was already part of the scope of work of the main contractor, i.e. the respondent, there was no reason to award the said work to M/s. Veer Enterprises and, on that ground, alleged that the claim, of M/s. Veer Enterprises, for executing development work, was unsustainable.

(vi) The said communication pointed out, to Veer, that, in the GBMs held after 03rd April, 2005, it was seen that M/s. Veer Enterprises had not performed any development work at the site, except part construction of a boundary wall. Further, it was alleged that physical verification of the site, conducted between August and December, 2005, indicated that the remaining work had been abandoned. On this basis, M/s. Veer Enterprises was told that its claim, of having constructed WBM Road and having laid water line and pipeline during the period from April to May, 2004 did not tally with physical verification of the site, as recorded in various GBMs.

In the conspectus of these facts, the learned Arbitral Tribunal held the claim, of the respondent, for payment against the development works stated to have been carried out by it, to be justified, and proceeded, therefore, to allow the said claims.

17. The learned Single Judge has, in the impugned judgment, held that the above findings, of the learned Arbitral Tribunal, could not be characterized as perverse by any stretch of imagination, as they proceeded on the basis of a thorough analysis of the available evidence, and arrived at a conclusion which was, at the least, plausible.

18. The learned Single Judge also dealt with two other contentions, of the appellant, which have not been seriously contested before us, but are noted for the sake of completion of recital of the facts. The appellant had contended, before the learned Single Judge, that the

learned Arbitral Tribunal had failed to consider the report of the Local Commissioner appointed in the matter, and also contended, with respect to the 10th RA bill, that, though the said bill has been certified, by the Architect, on 30th June, 2005, for Rs.71,73,191/-, the bill had been re-certified on 01st August, 2005, pursuant to further site inspection, for Rs. 35,71,221/-.

19. Regarding these two contentions, the learned Single Judge found, in the first instance, that the learned Arbitral Tribunal had, in fact, considered the report of the Local Commissioner and, regarding the second contention, that the Arbitral Tribunal had rejected the same by holding that there was no justification for re-certification, by the Architect, of a bill which already stood certified. These findings too, were not perverse, in the opinion of the learned Single Judge.

20. Ms. Anusuya Salwan, appearing for the appellant, limited her contentions to the issue of whether development work, against which the claim of respondent stood allowed, had in fact, been performed by the respondent or by Veer. She insisted that the learned Arbitral Tribunal, as also the learned Single Judge, had omitted to consider, holistically, the evidence which went to establish that the said work had in fact, been performed by Veer. She drew our particular attention to the letter dated 02nd December, 2003 (*supra*), whereby the item of development work was deleted from the scope of the work of the respondent.

21. Per contra, Mr. Raman Kapur, Sr. Adv. appearing for the respondent, supported the findings of the learned Arbitral Tribunal and the impugned judgment of the learned Single Judge.

22. Having considered the facts in the impugned judgment, comprehensively we are convinced that no case can be said to be made out, justifying our interference, with the impugned judgment of the learned Single Judge.

23. The reliance, by the learned Single Judge, on the judgments in *Rashtriya Ispat Nigam Ltd (supra)*, *Sumitomo Heavy Inds Ltd. (supra)*, *NHAI (supra)* and *Associate Builders (supra)* is both apt and apposite. *Associate Builders (supra)*, may in fact, be justifiably regarded as the omega on the subject, distilling and digesting, as it does, all earlier decisions on the point. In the said decision, R.F. Nariman, J., speaking for the Bench, enunciated the legal position, in a manner in which leaves no room whatsoever for ambiguity or uncertainty, thus:

"16. It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimise the supervisory roles of courts in the arbitral process.

17. It will be seen that none of the grounds contained in sub-section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the

public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.

18. In *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644 , the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:

“7. Conditions for enforcement of foreign awards.—(1) A foreign award may not be enforced under this Act—

(b) if the Court dealing with the case is satisfied that—

(ii) the enforcement of the award will be contrary to the public policy.”

In construing the expression “public policy” in the context of a foreign award, the Court held that an award contrary to

- (i) the fundamental policy of Indian law,*
- (ii) the interest of India,*
- (iii) justice or morality,*

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute

only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).

*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.

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;*
- (iii) *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;*
- (iv) *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;*
- (v) *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.”*

20. *The judgment in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] has been consistently followed till date.*

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., (2006) 11 SCC 181 , this Court held: (SCC pp. 209-10, paras 58-60)*

“58. In 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 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’.”

Fundamental Policy of Indian Law

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.

28. In a recent judgment, **ONGC Ltd. v. Western Geco International Ltd. [(2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12]** this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held: (SCC pp. 278-80, paras 35 & 38-40)

“35. What then would constitute the ‘fundamental policy of Indian law’ is the question. The decision in ONGC [(2003) 5 SCC 705 : AIR 2003 SC 2629] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression ‘fundamental policy of Indian law’, we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a ‘judicial approach’ in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a

court, tribunal or authority vulnerable to challenge.

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

39. *No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of **Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)]** principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ*

jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. *It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.”*

(emphasis in original)

29. *It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.*

30. *The audi alteram partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:*

“18. Equal treatment of parties.—*The parties shall be treated with equality and each party shall be given a full opportunity to present his case.*

34. Application for setting aside arbitral award.—(1)***

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

(a) the party making the application furnishes proof that—

(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;”

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
- (iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In **Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312**, it was held: (SCC p. 317, para 7)

“7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality

incurring the blame of being perverse, then, the finding is rendered infirm in law.”

In Kuldeep Singh v. Commr. of Police, [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held: (SCC p. 14, para 10)

“10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows: “General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best

*manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong".It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In **P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.**[(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)*

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator

must have a judicial approach and that he must not act perversely) are to be understood.

Interest of India

35. The next ground on which an award may be set aside is that it is contrary to the interest of India. Obviously, this concerns itself with India as a member of the world community in its relations with foreign powers. As at present advised, we need not dilate on this aspect as this ground may need to evolve on a case-by-case basis.

Justice

36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to “justice”.

Morality

37. The other ground is of “morality”. Just as the expression “public policy” also occurs in Section 23 of the Contract Act, 1872 so does the expression “morality”. Two illustrations to the said section are interesting for they explain to us the scope of the expression “morality”:

“(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with Bin favour of C, and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code (45 of 1860).”

38. *In Gherulal Parakh v. Mahadeodas Maiya [1959 Supp (2) SCR 406 : AIR 1959 SC 781] , this Court explained the concept of “morality” thus: (SCR pp. 445-46 : AIR pp. 797-98)*

“Re. Point 3 — Immorality: The argument under this head is rather broadly stated by the learned counsel for the appellant. The learned counsel attempts to draw an analogy from the Hindu law relating to the doctrine of pious obligation of sons to discharge their father's debts and contends that what the Hindu law considers to be immoral in that context may appropriately be applied to a case under Section 23 of the Contract Act. Neither any authority is cited nor any legal basis is suggested for importing the doctrine of Hindu law into the domain of contracts. Section 23 of the Contract Act is inspired by the common law of England and it would be more useful to refer to the English law than to the Hindu law texts dealing with a different matter. Anson in his Law of Contracts states at p. 222 thus:

‘The only aspect of immorality with which courts of law have dealt is sexual immorality....’

Halsbury in his Laws of England, 3rd Edn., Vol. 8, makes a similar statement, at p. 138:

‘A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable, and there is no distinction in this respect between immoral and illegal contracts. The immorality here alluded to is sexual immorality.’

In the Law of Contract by Cheshire and Fifoot, 3rd Edn., it is stated at p. 279:

‘Although Lord Mansfield laid it down that a contract contra bonos mores is illegal, the law in this connection gives no extended meaning to morality, but concerns itself only with what is sexually reprehensible.’

In the book on the Indian Contract Act by Pollock and Mulla it is stated at p. 157:

‘The epithet “immoral” points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment.’

The learned authors confined its operation to acts which are considered to be immoral according to the standards of immorality approved by courts. The case law both in England and India confines the operation of the doctrine to sexual immorality. To cite only some instances: settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit

cohabitation, promises in regard to marriage for consideration, or contracts facilitating divorce are all held to be void on the ground that the object is immoral.

The word 'immoral' is a very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilisation of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of Section 23 of the Contract Act indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and authoritative textbook writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, 'the court regards it as immoral', brings out the idea that it is also a branch of the common law like the doctrine of public policy, and, therefore, should be confined to the principles recognised and settled by courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot evolve a new head so as to bring in wagers within its fold."

39. *This Court has confined morality to sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience.*

Patent Illegality

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.'

*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.*, (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 [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] , Alop 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.’”

(Emphasis supplied)

24. The following principles, regarding amenability, to judicial review under Section 34 of the Act, of awards passed thereunder, stand clearly enunciated in **Associate Builders (supra)**:

- (i) The four reasons motivating the legislation of the Act, in 1996, were
 - (a) to provide for a fair and efficient arbitral procedure,

- (b) to provide for the passing of reasoned awards,
 - (c) to ensure that the arbitrator does not transgress his jurisdiction, and
 - (d) *to minimize supervision, by courts, in the arbitral process.*
- (ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.
- (iii) An award would be regarded as conflicting with the public policy of India if
 - (a) it is contrary to the fundamental policy of Indian law, or
 - (b) it is contrary to the interests of India,
 - (c) it is contrary to justice or morality,
 - (d) it is patently illegal, or
 - (e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.
- (iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if
 - (a) it disregards orders passed by superior courts, or the binding effect thereof, or
 - (b) it is patently violative of statutory provisions, or
 - (c) it is not in public interest, or
 - (d) the arbitrator has not adopted a “judicial approach”, i.e. has not acted in a fair, reasonable and

- objective approach, or has acted arbitrarily, capriciously or whimsically, or
- (e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or
 - (f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or
 - (g) the principles of natural justice have been violated.
- (v) The “patent illegality” had to go to the root of the matter. Trivial illegalities were inconsequential. Neither would the possibility of a different view being taken on the material before the arbitrator, constitute a legitimate ground to interfere with the award.
- (vi) Apart from the above contingencies, an award could, additionally, be set aside if
- (a) either party was under some incapacity, or
 - (b) the arbitration agreement is invalid under the law, or
 - (c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or
 - (d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

(e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(g) the award contravenes the Act, or

(h) the award is contrary to the contract between the parties.

Condition (h) would, however, apply subject to the pre-eminent right of the arbitrator to construe the terms of the contract, and it is only if such construction is such as no fair-minded or reasonable person would do, that interference would be warranted.

(vii) “Perversity”, as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which

(a) the findings, in the award, are based on no evidence, or

(b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or

(c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) At the same time,

- (a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as “perverse”,
- (b) if the view adopted by the arbitrator is a possible view, it has to pass muster,
- (c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.
- (ix) “Morality” would imply enforceability, of the agreement, given the prevailing mores of the day. “Immorality”, however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.
- (x) The court cannot sit in appeal over an arbitration award. Errors of fact cannot be corrected under Section 34. The arbitrator is the last word on facts.
- (xi) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.

25. In the above discussed circumstances, the learned Single Judge held - and, in our opinion, rightly - that Section 34 of the Act did not permit this Court to re-appreciate the evidence, and sit, thereby, as a Court of Appeal over the findings of the learned Single Judge. Reliance was placed, by the learned Single Judge, for this purpose, on ***Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 506, *Sumitomo Heavy Inds Ltd. v ONGC*, (2010) 11 SCC 296, *NHAI v. ITD Cementation India Ltd.*, (2015) 5 Scale 554 and *Associate Builders v. DDA*, (2015) 3 SCC 49.**

26. Applying the above principles in the present case, we find no reason to differ with the finding of the learned Single Judge that the award of the learned Arbitral Tribunal, considered the evidence comprehensively, and arrived at a finding that the respondent had, indeed, performed the development work against which it was claiming payment, which cannot, in any which way be characterized as perverse. One swallow does not make a summer, and the isolated reliance, by Ms Salwan, on the communications dated 2nd December 2003 and 30th December 2003, or even on the fact that some payments had, in fact, been made to Veer, cannot wish away the wealth of material which buttresses the claim of the respondent, and on which the learned Arbitral Tribunal rightly relied. It is no part of the function of this court to sift through the evidence to seek to arrive at a conclusion contrary to that arrived at by the Arbitral Tribunal; for that matter, even if such a second view were possible, that would not constitute a legitimate justification for a *certiorari* interfering with such conclusion, as is settled by a plethora of pronouncements of the Supreme Court.

27. Without burdening this judgement, which is already more than sufficiently prolix, with a reiteration of the findings of the learned Arbitral Tribunal, we do not feel that the said finding deserve interference by this Court, applying any one, or more, of the indicia set out in para 24 (*supra*).

28. Resultantly, the present appeal fails and is dismissed without any order as to costs, as already ordered by us on 10th August, 2017.

C.HARI SHANKAR, J.

ACTING CHIEF JUSTICE

August 10, 2017
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