

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 18.07.2016

+ **O.M.P. 532/2015**

SILVER RESORTS HOTEL INDIA PVT. LTD.

..... Petitioner

versus

WIMBERLY ALLISON TONG & GOO (UK)

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr B. B. Parsoon, Mr Tushar John, Mr Abhinav,
Mr Anchit Virmani and Ms Neha Mittal.

For the Respondents : Mr Shambhu Sharan and Mr Yaman Kumar,

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'Act'), *inter alia*, praying that the Arbitration Award dated 03.07.2015 (hereafter the 'impugned award') made by the Sole Arbitrator in relation to the Contract dated 08.12.2011, be set aside. According to the petitioner, the impugned award suffers from various patent illegalities and is against the public policy of India; consequently, the impugned award is liable to be set aside in terms of Section 34(2)(b)(ii) of the Act.

2. The petitioner and the respondent entered into an Agreement dated 08.12.2011 captioned as "Design Services Agreement" (hereafter 'the

Agreement') in terms of which the respondent agreed to prepare design development drawings - as specified in Appendix C to the Agreement - based on the schematic design document approved by the petitioner for the project, MGM Grand of Las Vegas, USA Hotel at Asset Area 3, Aerocity, Indira Gandhi International Airport, Delhi.

3. In terms of the Agreement, the petitioner agreed to pay a sum aggregating £250,000 in the manner as specified under the Agreement; £50,000 was to be paid as mobilization and the balance was agreed to be paid progressively in four tranches of £50,000 each. Admittedly, £150,000 was paid to the respondent which included £50,000 as mobilization and two tranches of £50,000 each upto 50% design development phase. The other invoices raised by the respondent were not paid, which included the balance two tranches aggregating £100,000; invoice for an amount of £35,000 for additional work beyond the scope of the Agreement; and £5,059.70 on account of reimbursable expenses. This resulted in the respondent stopping the work and invoking the Arbitration Clause by a notice dated 21.09.2012 claiming a sum of £140,059.70 along with interest.

4. Thereafter, the respondent filed a petition under Section 11 of the Act before the Supreme Court for appointment of an Arbitrator. The same was allowed and by an order dated 14.03.2014, the Supreme Court appointed Mr Ciccu Mukhopadhaya, Senior Advocate as the Sole Arbitrator to adjudicate the disputes in relation to the Agreement.

5. Before the Arbitrator, the respondent filed a Statement of Claims claiming a sum of £140,059.70 on account of the invoices raised; further

interest @ 12% p.a from the date of invoices till the date of payment; and costs.

6. The Arbitrator made the impugned award for a sum of £252,280 (approx) in favour of the respondent. This comprised of the following amounts:-

- i) £140,059.70 being the aggregate value of the four unpaid invoices.
- ii) £15,000 being the Arbitrator's fees paid by the respondent.
- iii) £50,421.50 being interest quantified at the rate of 12% p.a. from the date of the invoices till the date of the impugned award.
- iv) £46,150/- on account of legal costs and expenses.
- v) £650 being the amount awarded towards expenses for venue and transcription (equivalent to Rs. 63,443).

In addition, the Arbitrator also awarded that the stamp duty on the impugned award be reimbursed.

7. The present petition was listed for hearing on 13.01.2016. Although, no notice was issued to the respondent, its counsel were present at the said hearing. They raised an objection that the petition was beyond the period of limitation prescribed under Section 34 (3) of the Act. The petition was adjourned to 25.02.2016 to enable the counsel for the petitioners to address the issue of limitation but the parties were directed to be ready with their arguments on merits also. At a hearing held on 22.03.2016, this Court rejected the respondent's objection that the petition was beyond the period

prescribed as it was apparent from the report of the Registry that the petition had been filed within the prescribed period of 90 days from the date of receipt of the impugned award. The learned counsel for the parties were further directed to file their written synopsis of arguments with reference to the file as well as pagination in the Arbitral record. The matter was, thereafter, listed on 19.05.2016 and in the meanwhile, the Arbitral record was also summoned.

8. On the next date of hearing, 19.05.2016, the petition was directed to be listed on 13.07.2017 as neither the Arbitral record had been received nor the written submissions were filed.

9. The petition was taken up for hearing on 13.07.2016. At the outset, the learned counsel for the petitioner sought an adjournment on the ground that the Arbitral records had not been received. He submitted that in the absence of Arbitral record, he would be unable to effectively advance his submissions. On pointedly being asked to indicate the submissions that would necessitate reference to the original Arbitral record, the learned counsel for the petitioner submitted that he would be able to answer the same only once the Arbitral record was seen by him. He further stated that evidence was recorded by telepresence and therefore, the Arbitral record was necessary. However, the learned counsel submitted that insofar as the petition is concerned, he was ready with his arguments and although he had not filed the synopsis of his arguments, the same were available with him. In the circumstances, the learned counsel for the petitioner was called upon to advance his arguments.

Submissions

10. Mr B. B. Parsoon, the learned counsel appearing for the petitioner submitted that the impugned award was largely based on the evidence of the respondent's witness, Mr Stephen Albert - his affidavit as well as his cross-examination based on such affidavit - and such evidence was valueless. He submitted neither the affidavit nor the cross examination could be read into evidence as, according to him, the said witness was not present before the Notary Public to affirm the affidavit of evidence. Mr Parsoon referred to the transcript of the arbitration proceedings held on 06.02.2015 wherein in response to the question whether the witness (Mr Albert) had appeared before the Notary Public for swearing his affidavit, the witness had answered in the negative. On being further asked as to who had appeared before the Notary on his behalf, the witness had answered that his lawyer had. The transcript further indicates that his response to the question whether he could identify the signature of his lawyer, is recorded as [inaudible]. Mr Parsoon submitted that in view of the above, the entire evidence of Mr Stephen Albert was liable to be struck off and, therefore, the impugned award should be held to be based on no evidence.

11. He further contended that even Mr Albert's cross-examination could not be relied upon as he was not administered the oath. He stated that although the Arbitrator had administered oath to Mr Stephen at the time of commencement of his evidence, the recording of the said evidence was interrupted and no oath was administered to the said witness once the cross-examination was resumed. He submitted that the evidence was recorded by

telepresence, and apparently, there was some difficulty and the same was interrupted. The Arbitrator then commenced the evidence of the petitioner's witness, Mr Vipin Thakur, and after conclusion of his evidence, the cross examination of Mr. Albert was resumed. However, the Arbitrator did not re-administer the oath before resumption of cross-examination and this, according to Mr Parsoon, was a fatal flaw in recording of the evidence and, therefore, the impugned award is liable to be set aside. He further submitted that Mr Albert's mumbled the answers to questions that were inconvenient for him and the same were recorded as "[inaudible]".

12. Mr Parsoon further contended that the Arbitrator had followed a "strange procedure" of interrupting the respondent's evidence (claimant's evidence) and recording the evidence of the petitioner's witness in between. He submitted that evidence so recorded could not be relied upon.

13. Mr Parsoon submitted that the impugned award was flawed as the Arbitrator had failed to consider the email dated 23.04.2012 which confirmed that the petitioner had communicated that there were design discrepancies in the drawings submitted upto 75%/80% design development phase. He submitted that, in the circumstances, the Arbitrator had erred in holding that the petitioner had failed to discharge its onus to prove that there were discrepancies in 75%/80% design development drawings. He further submitted that the Arbitrator had erred in not considering the cross-examination of Mr Albert wherein he had confirmed that the invoices were wrongly issued.

14. He referred to the decision of the Supreme Court in **Oil & Natural**

Gas Corporation Ltd. v. Western Geco International Ltd.: (2014) 9 SCC 263 and on the strength of the said decision submitted that in cases where the Arbitrator does not draw the inference which he ought to, the award is liable to be set aside.

15. He further contended that it was an admitted case that the invoices were to be raised by the respondent after completing the respective design development phase. And, since it was not in dispute that the drawings for the 100% design development phase had not been submitted by the respondent, the Arbitrator had grossly erred in awarding the amount invoiced by the respondent for 100% design development phase. He submitted that this amounted to re-writing the Agreement which was impermissible.

16. Mr Parsoon further contended that the Arbitrator had failed to appreciate that the respondent had breached the Agreement by stopping the work on the project and had further failed to co-ordinate with the sub-contractors as agreed under the Agreement.

17. The arguments advanced by Mr. Parsoon were countered by Mr. Sharan, the learned counsel for the respondent. He referred to impugned award and drew the attention of this court to various passages which indicated that the Arbitrator had proceeded on the basis of admissions made by the petitioner in its Statement of Defence as well as in the emails exchanged between the parties.

Reasoning and Conclusion

18. I am unable to appreciate Mr Parsoon's insistence on production of the Arbitral record. It is seen that the documents running into almost 289 pages have been filed alongwith the petition. The same include copies of emails/ correspondence between the parties produced before the Arbitrator; pleadings filed before the Arbitrator; statement of certain witnesses; evidence by way of affidavit on behalf of the petitioner; statement of claimant's witness; and, transcripts of certain arbitration proceedings. It is not the petitioner's case that it does not have a copy of any of the records. On the contrary, the documents filed on behalf of the petitioner clearly indicates that the petitioner has filed all the documents, which the petitioner felt were necessary for the purposes of these proceedings. Mr Parsoon, learned counsel appearing on behalf of the petitioner also could not indicate as to how the petitioner would be handicapped in absence of Arbitral record. I have carefully examined the award as well as all the documents filed in these proceedings and in my view, it is not necessary to await the Arbitral record for consideration of this petition.

19. In my view, Mr Parsoon's contention that the affidavit of Mr Stephen Albert cannot be relied upon as he had not affirmed the affidavit in the presence of the Notary is wholly unmerited. It is seen from the transcript of the arbitration proceedings held on 06.02.2015 that the Arbitrator had administered the oath to Mr Stephen Albert and thereafter, Mr Albert had identified his signatures on his affidavit. He had after affirming that he had signed the affidavit, tendered the same as examination-in-chief. Thereafter, the counsel for the petitioner had cross-examined Mr Albert. In the

circumstances, even if it is accepted that the affidavit had been notarised in absence of Mr Albert, it would not be relevant as he had affirmed that he had signed the affidavit on oath before the Arbitrator and had tendered the same as his examination-in-chief.

20. I also find it difficult to accept Mr Parsoon's contention that the cross-examination of Mr Albert is of no value since he had not been administered the oath after his cross-examination was resumed. In my view, the aforesaid contention is wholly bereft of any merit, first of all, for the reason that it is not necessary that a witness who has been administered the oath once and has been cross-examined in part, be re-administered the oath if there is an interruption in recording of his evidence. Secondly, no such objection was taken on behalf of the petitioner at the material time; concededly, no such objection was taken by the counsel for the petitioner before the Arbitral Tribunal at the material time. Thirdly, I have also examined the present petition and although as many as 41 grounds have been pleaded by the petitioner for assailing the impugned award, there is no specific ground regarding non-administration of oath to the respondent's witness.

21. The contention that the evidence of Mr Albert cannot be relied upon as some of the words in his response to the questions put to him in cross examination are recorded as inaudible in the transcript, is also without merit. A perusal of the transcript indicates that in most places, the absence of certain words is not material and does not change the meaning of his testimony. Mr. Albert's testimony on the relevant aspects is clear and it is not possible to accept that it should be disregarded. Further, it appears that

the petitioner did not raise any such objection before the Arbitrator at the time of recording of the evidence. No such specific ground has been pleaded by the petitioner in the petition also.

22. Mr Parsoon had sought to make a grievance as to the procedure adopted by the Arbitrator inasmuch as the cross-examination of the respondent's witness (Mr Albert) had been stopped/ interrupted and in the meantime the petitioner's witness had been examined. The cross-examination of the respondent's witness had been resumed after recording the evidence of the petitioner's witness. A perusal of the transcript of the arbitration proceedings indicates that there was some difficulty in the petitioner continuing with the cross-examination of the respondent's witness, Mr Stephen Albert and, therefore, with the consent of the parties and the counsel, evidence of the petitioner's witness had been recorded. The Arbitrator had recorded the following for the record:-

"In view of the difficulty in respondent continuing with the cross examination of the claimant's witness Mr. Stephen Albert, with the consent of all parties and the counsels, evidence of Respondent's witness Mr. Vipin Thakur was recorded. Mr. Vipin was cross-examined by Mr. Shambhu Sharan. On completion of cross-examination, Mr. Anil Sharma was offered to put questions in re-examination. He had no question in re-examination. The evidence of Mr. Vipin Thakur is closed. Ordinarily I would have said the evidence of the Respondent is closed, but Mr. Sharma has just informed that he might wish to make an application to lead additional evidence of Mr. Suri. If and when that Application is filed, it would be taken up and decided....."

23. The aforesaid note indicates that the procedure adopted by the Arbitrator was with the consent of all the parties and, therefore, any grievance in this regard is wholly unjustified. It is also relevant to note that no such ground has been pleaded in the petition and for this reason too, this contention warrants rejection.

24. The next issue to be examined is whether the impugned award is contrary to the terms of the contract inasmuch as it is the petitioner's case that the Arbitrator has awarded payments for invoices raised in respect of drawings which had not been supplied by the respondent. It was earnestly contended on behalf of the petitioner that in terms of the Agreement, invoices were to be raised and payments were to be made after completion of the specified Design Development Phase; and, although, the invoices raised by the claimant covered 100% of the Design Development Phase, it was an admitted position that the respondent had not furnished the complete drawings for the last Design Development Phase. A plain reading of the award indicates that the above contention was considered by the Arbitrator.

25. In terms of the Agreement, fees was to be paid phase-wise and the following fee schedule was agreed to between the parties:-

Month timing for Guidance Purposes	Architecture Fee
Mobilization	£50,000
Month 1	25% Design Development - £50,000
Month 2	50% Design Development - £50,000
Month 3	75% Design Development - £50,000

Month 4	100% Design Development - £50,000
Total	£250,000

26. It was the respondent's case that they had completed 90% of the deliverable work by March 2012 and the balance work was also completed and ready to be uploaded. In addition, the respondent had raised two other invoices in the sum of £5,059.70 on account of expenses and £35,000 for additional work but since invoices raised earlier were overdue for more than 60 days, the respondent had not uploaded the balance drawings even though the same were ready. The Arbitrator had examined the material on record including the emails exchanged between the parties and had accepted the respondent's afore-stated case.

27. In the impugned award, the Arbitrator has set out the relevant terms of the contract which include the payment terms. In terms of clause 3.3.5 of the Agreement, payment of services would be due upon the receipt of invoice. A plain reading of the impugned award indicates that Arbitrator had carefully examined the material on record including the correspondence between the parties as well as the evidence led before the Arbitrator and had concluded that the petitioner had admitted the invoices raised by the claimant. It is not disputed that in paragraph 8 of the Statement of Defence filed by the petitioner before the Arbitrator, it had been unequivocally admitted that as per the accounts maintained by the petitioner, a sum of £90,059.70 was due to the claimant. This included invoices up till 75% of the Design Development Phase, invoice for

additional work for the sum of £35,000 and invoice for reimbursement of expenses of £5,059.70. Thus, the principal dispute related only to the invoice of £50,000 for the 100% Design Development Phase.

28. The Arbitrator found that even the liability in regard to this invoice had been acknowledged by the petitioner. In the impugned award, the Arbitrator has extensively quoted from the emails exchanged between the parties which support the above conclusion. He further noted that it was an admitted case of the parties that a meeting between the representatives of the parties had taken place in London on 04.05.2012 and the emails sent by Mr Albert (of the respondent) to Mr Suri (CEO of the petitioner) clearly indicates that at that meeting, the payments due on all invoices raised had been acknowledged. The email sent by Mr Suri on the very same day did not dispute the same. Further, Mr Albert was also cross-examined regarding the said meeting and the same was taken note of by the Arbitrator. After examining and appreciating the material on record, the Arbitrator held that:-

"5.33 It may be noted that in so far as the additional invoice for £ 35,000 and expenses reimbursement invoice are concerned, there is no dispute in this arbitration as to liability for those payments. As already noted above, even in the Statement of Defence (paragraph 8), when properly read the dispute appears to be only in respect of the last invoice representing 100% of the design development fee for £50,000. In respect of the last invoice, Mr. Albert's evidence in cross examination was that while they had not provided those drawings it was because the payments were outstanding. He further stated that Mr. Suri had seen the drawings when he visited his office on 4 May 2012. As noted, Silver Resorts has not produced Mr. Suri as a witness.

5.34 In the light of the evidence before the Tribunal, the Tribunal therefore holds that Silver Resorts has admitted its liability in respect of Wimberly's invoices which remained outstanding. It has failed to discharge its onus of proof to show that the admissions when made, were wrong and hence not binding. It is therefore bound to pay the amounts claimed in the sum of £140,059.70."

29. I find no infirmity with the aforesaid view. It is not disputed that in terms of the Agreement, the invoices were to be raised monthly and phase-wise. The Arbitrator has found that the claimant had completed drawings for 100% Design Phase but had withheld certain drawings since the earlier invoices had not been paid and in view of this finding, awarded the amount of the invoices raised by the claimant. The petitioner's contention that the aforesaid amounts to re-writing of the contract is not merited. Once the Arbitrator had found that the work for which invoices have been raised had been done by the respondent, the fact that last tranche of drawing was withheld on account of non-payment of earlier invoices would not disentitle the respondent from raising invoices for work done and claiming the amount due for the work completed. The petitioner was, plainly, in breach of the terms of the Agreement and had failed to pay the invoices raised for 75% of the Design Development Phase and additional work, it thus could not be heard to insist that the respondent forward the balance drawings before raising the invoice for the same.

30. It is seen that the interest awarded by the Arbitrator - at the rate of 12% per annum from the date of the invoices - is in terms of clause 3.7 of the Agreement.

31. The contention that Arbitrator has failed to appreciate that the claimant had breached the contract is also unpersuasive. There was no contemporaneous correspondence or material produced which would indicate that the claimant had breached any term of the Agreement. The petitioner had relied strongly on emails dated 18.04.2012 sent by Mr Thakur (of the Petitioner) to Mr Albert (of the respondent) which indicated that the drawings submitted by the claimant were not fairly coordinated with MEP structure and further indicating that Area Reconciliation Chart had not been received.

32. By another email dated 21.04.2012, Mr Thakur had complained that certain grids were displaced. Apart from the aforesaid emails, the petitioner also relies on an email dated 23.04.2012 which lists out drawings that were alleged to be missing from the 80% package. The learned counsel for the petitioner had earnestly submitted that Arbitrator had ignored the aforesaid emails and, therefore, the impugned award was liable to be set aside. Although, the impugned award does not refer to the email dated 23.04.2012, however, the Arbitrator has referred to the emails dated 18.04.2012 as well as 21.04.2012. Further, the Arbitrator has also referred to the cross-examination of Mr Albert in respect of these mails. In his cross-examination, Mr Albert had stated that the drawings had been fully corrected and the issues pointed out in the email were only minor refinement.

33. It is also relevant to note that the first email referred to by the petitioner is of 18.04.2012 which is two days prior to the respondent stopping work on account of overdue invoices. The email dated 20.04.2012

and 23.04.2012 had followed immediately thereafter. The Arbitrator considered all the relevant material and concluded that the defects pointed out by Mr Thakur were not material and if there were defects, the liability to pay the invoices would have been disputed on that count. This reasoning would also apply in respect of any allegation of missing drawings.

34. The Arbitrator found that the contemporaneous record did not show that the issue of defects was raised at any stage to dispute the liability for payment of fees. The Arbitrator further held that the petitioner had not produced the necessary drawings or demonstrated the deficiency in the work.

35. A plain reading of the emails/letters exchanged between the parties does not indicate that the liability to pay invoices was disputed by the petitioner on the ground of any alleged breach of the Agreement on the part of the respondent. The fact that the email dated 23.04.2012 was not specifically mentioned by the Arbitrator would be of little consequence, since the Arbitrator had considered the essence of the emails and had proceeded essentially on the basis of the admissions of liability contained in the contemporaneous correspondence between the parties.

36. In view of the above, this court finds no infirmity in the impugned award.

37. Although, the contentions advanced by the petitioner regarding the merits of the dispute have been examined, it must be stated that it was not necessary to do so in these proceedings. The contentions advanced on behalf of the petitioner related mainly to the merits of their defence before

the Arbitrator and a bare perusal of the impugned award indicates that the same had been considered. The Arbitrator had appreciated the material on record and had drawn his conclusions. The scope of judicial review of an award under Section 34 of the Act is restricted and an award made by an Arbitrator cannot be impugned except on the grounds specified in Section 34 of the Act. The petitioner has sought to sustain the present petition on the ground as specified under Section 34(2)(b)(ii), that is, the award is in conflict with the public policy of India.

38. At this stage it is relevant to refer to the relevant provisions of Section 34(2) of the Act. Prior to 23.10.2015, Section 34(2)(b) of the Act read as under:-

"34. Application for setting aside arbitral award:-

(1) xxxx xxxx xxxx xxxx

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

(a) xxxx xxxx xxxx xxxx

(b) the Court finds that-

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

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.-Without prejudice to the generality of sub-clause (ii) of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81."

39. By virtue of Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016), Explanation to Section 34(2)(b)(ii) was substituted by inserting Explanation 1 and 2. Further, Sub-sections (2A), (5) and (6) to Section 34 of the Act were introduced. Post amendment, Section 34(2)(b)(ii) and Section 34(2A) read as under:-

"34. Application for setting aside arbitral award.-

(1) XXXX XXXX XXXX XXXX
(2) An arbitral award may be set aside by the Court only if-

(a) XXXX XXXX XXXX XXXX

(b) the Court finds that-

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

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1. - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

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

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

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

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence."

40. Sub-section (2A) is not applicable in the present case as it does not apply to international commercial arbitrations; nonetheless it is relevant to note that even in domestic arbitrations, an award cannot be set aside by re-appreciation of evidence.

41. In *Oil & Natural Gas Corporation Ltd. v. Western Geco International Ltd.* (*supra*), the Supreme Court explained that the expression "fundamental policy of Indian law" would include three distinct fundamental jurisdiction principles. The first and foremost being that the authority concerned is bound to adopt a judicial approach and cannot act in an arbitrary, capricious or whimsical manner. Second being, the authority must act in accordance with principles of natural justice and the third being, that the decision must be reasonable on the touchstone of *Wednesbury's* principle; that is, the decision must not be perverse or so irrational that no reasonable person could have arrived at the said decision. In the present case, it cannot be accepted that the impugned award falls foul of any of the

aforesaid principles. Thus, even if it is assumed that another view is possible, the same would be clearly outside the scope of Section 34 of the Act.

42. The aforesaid decision does not assist the petitioner in any manner. It is difficult to accept the petitioner's contention that Arbitrator has failed to draw an inference which ought to have been drawn on the facts proved before the Arbitrator. On the contrary, the findings of facts arrived at by the Arbitrator would clearly entitle the claimant for the relief as awarded.

43. It is now well established that while examining a challenge laid on the ground of conflict with public policy of India, the Court does not sit in appeal over the decision of the Arbitral Tribunal and it is not open for the Court to supplant its views over that of the Arbitral Tribunal.

44. In **Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49**, the Supreme Court quoting from its earlier decision **P.R. Shah, Shares and Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.: (2012) 1 SCC 594**, has explained as under:-

"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 score¹. 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, this Court held:

"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."

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."

45. Even in the context of the Arbitration Act, 1940, where the scope of interference with an arbitration award was greater, the Courts had

consistently held that while examining a challenge to an arbitration award, the Court would not re-assess or re-appreciate the evidence. This was clearly stated by the Supreme Court in **Kwality Manufacturing Corporation v. Central Warehousing Corporation**: (2009) 5 SCC 142 in the following words:-

"7. At the outset, it should be noted that the scope of interference by courts in regard to arbitral awards is limited. A court considering an application under section 30 or 33 of the Act, does not sit in appeal over the findings and decision of the arbitrator. Nor can it re-assess or re-appreciate evidence or examine the sufficiency or otherwise of the evidence. The award of the arbitrator is final and the only grounds on which it can be challenged are those mentioned in sections 30 and 33 of the Act. Therefore, on the contentions urged, the only question that arose for consideration before the High Court was, whether there was any error apparent on the face of the award and whether the arbitrator misconducted himself or the proceedings."

46. In view of the aforesaid, the petition is dismissed with costs quantified at ₹50,000/-. The cost shall be paid to the Respondent within a period of two weeks from today.

VIBHU BAKHRU, J

JULY 18, 2016
MK/RK