

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: November 08, 2017

Judgment delivered on: December 12, 2017

+ FAO(OS) (COMM) 83/2017
 M/S CWHEC-HCIL (JV)

..... Appellant

Through: Mr. Sanath Kumar, Sr. Adv. with
 Mr. Arvind Minocha, Adv.

versus

M/S CHPRCL

..... Respondent

Through: Mr. Ramesh Kumar, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The challenge in this Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 13 of the Commercial Court Act, is to the judgment dated February 20, 2017 of the learned Single Judge in OMP (COMM) 559/2016 passed in a petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 (for short 'A and C Act') whereby the learned Single Judge allowed the petition and set aside the Arbitral Award dated April 27, 2007.

2. By way of the Award dated April 27, 2007, the Arbitral Tribunal has accepted the claim of the appellant herein with regard to its claim that it was entitled to be paid for the work related to sub grade and has granted the same at the rate of ₹ 382/- per cubic meter. It further directed that the said rate would be subject to price adjustment in terms of Clause 47 of the Agreement between the parties. The respondent herein was directed to pay, as per Contract Clause 43.1 and 43.2 of the Contract Agreement.

3. Some of the relevant facts are, the respondent herein floated a tender for execution of the project of “Four laning of Km 0/500 to Km 52/700 of Kolaghat-Haldia section of NH-41. The appellant bid for the project and was awarded the Contract by a letter of acceptance dated November 22, 2001. It was the case of the appellant herein that earth with CBR value of 07 was suitable for the work of sub grade was only available at 14 places but the same could not be exploited due to availability of small quantity; same being inaccessible for construction machinery and transport vehicles and also the owner i.e Forest Department were not ready to lease the areas for extraction of soil. It was the case of the appellant that the efforts to get dredged soil through the effort of Project Director of the respondent from deposition pond, through Deputy Chairman Haldia Dock Complex did not mature as the material was not found suitable for sub grade construction. It is their case that they approached the Consultant and a Joint Survey was carried out from April to June, 2003 in 82 areas, out of which 14 areas, which were already found in February 2003 but could not be exploited for the reasons already stated above. It is their case, a meeting held on June 09, 2003, the position about non availability of suitable materials for sub grade work was put forth and explained with test results and photographs of the area. The Engineer for the project, Ms/ CES, brought out a proposal during discussions of using fly ash blended with sand in suitable proportion as fill material for sub grade work.

4. It may be stated here that, as noted by the learned Single Judge the respondent had disputed and stated that the proposal to use fly ash with sand was made by the appellant herein. In any case, on October 06, 2003 the approval was given by the Engineer for use of fly ash and sand mix in the sub grade in the proportion of 80:20 with a stipulation that no extra cost shall be paid to the appellant herein. It is noted that the appellant relied upon a communication dated October 14, 2003 reiterating its stand. The receipt of this letter was disputed by the respondent.

5. Suffice to state, the appellant executed the work of sub grade by using the mixture of fly ash and sand in the ratio of 80:20. Subsequent thereto, the appellant

raised a dispute regarding payment of additional amount for use of fly ash and sand for sub grade work and made a claim before the Tribunal seeking approval of a rate of ₹ 545/- per cubic meter for the said work with price escalation and interest, which is clear from the claims as made before the Tribunal, which are as under:-

“Claim No.1 The work of sub-grade, being actually executed at site with the approval of the Engineer, with the combination of fly ash and sand in the ratio of 80:20 and with a side capping of moorum is not covered under BOQ Item 2.05 or any other item of BOQ and is also not covered under Clause 305 of technical specifications. The Contractor therefore requests the AT to approve and award a non scheduled rate of Rs. 545 per CUM for the actual quantum of work of sub-grade so far executed and to be executed in future.

Claim No.2 Since the rate pertains to the year 2003, the rates should be subjected to price escalation Clause under the Contract. Kindly award the same.

Claim No.3 Kindly award interest @ 18% per annum on payments withheld for the works done so far from the date the payment became due.

Claim No.4 The claimant request the AT to award Rs.30/- lakhs as cost of litigation forced on the Claimants by the unjust conduct of the respondents.”

6. The case of the respondent herein before the Arbitral Tribunal was that the use of fly ash for the work of sub grade was included in the Technical Specifications forming part of the Agreement and, therefore, the appellant could not claim any amount in excess of the contractual rate agreed to for the said item of work.

7. Briefly stated, the Arbitral Tribunal in its conclusion in the award was of the following view; (i) the Technical Specifications does not specify usage of fly ash and sand for the construction of the sub grade in lieu of earth; (ii) Clause 305.2.2.2 only casts responsibility on the appellant to arrange the materials for sub

grade work and does not deal with the rates payable to the appellant; (iii) on the basis of rates of various materials used in the sub grade as ascertained by the Arbitral Tribunal during site visit in December, 2006, and keeping in view other norms as given in the Data Book for analysis of rates published by IRC and all the provisions of Clause 40 of the Contract assessed the rate of ₹ 497/- per cubic meter but granted ₹ 382/- per cubic meter, the rate as claimed by the appellant in its communication dated April 25/28, 2005.

8. The case of the respondent as canvassed by the learned counsel before the learned Single Judge was that the impugned award was perverse and contrary to the terms of the Agreement. It was also his submission that; (i) the use of fly ash for sub grade work was included in the Technical Specifications by virtue of clause 305.1.2 as introduced by the Additional Technical Specifications and in view of the express inclusion of fly ash as a material for the work of embankments and the Arbitral Tribunal's conclusion that the appellant was entitled to additional payment ran contrary to the express terms of the Agreement; (ii) the appellant was responsible for arranging the specified material for sub grades and, therefore, could not charge any additional amount on account of its inability to find the requisite material; (iii) the Arbitral Tribunal had no material or evidence to assess the rate payable for sub grade work at ₹ 497/- per cubic meter and even the award of ₹ 382/- per cubic meter was only on the basis of the claim made by the appellant and there was no material on record which established the said claim.

9. The learned Single Judge, on the first submission made on behalf of the respondent, did not concur with the Arbitral Tribunal's interpretation as according to him sub-clause 305.1.1 of the Technical Specifications clearly specifies, the specifications provided therein would apply to "construction of embankments" including sub grades, earthen shoulders and miscellaneous backfills as, according to him, sub-clause 305.1.2, which enables the appellant to use fly ash for "construction of embankments" must be read in conjunction with 305.1.1. In other words, according to him, the said provisions cannot be interpreted differently. It was his conclusion that the appellant was well within its right to use fly ash for sub

grade work. At the same time, the learned Single Judge noting the scope of judicial review under Section 34 of the A and C Act, as highly restricted, held that the Arbitral Tribunal's interpretation is a plausible one and cannot be stated to be perverse or a view that no reasonable person could hold. He had referred to the judgments of the Supreme Court in the cases of *Mcdermott International Inc. v. Burn Standard Co. Ltd and Others: (2006) 11 SCC 181*, *Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.: (2009) 10 SCC 63* and *Sumitomo Heavy Industries Limited v. Oil and Natural Gas Commission of India: (2010) 11 SCC 296*).

10. On the second submission made by the learned counsel for the respondent herein, whether the appellant was entitled to additional payment for execution of sub grade work, the learned Single Judge referred to Clause 305.2.2.2, which refers to Borrow materials and which reads as under:-

"Clause 305.2.2.2 Borrow Materials

No borrow area shall be made available by the Employer for this work. The arrangement for the source of supply of the material for embankment and subgrade as well as compliance to the different environmental requirements in respect of excavation and borrow areas as stipulated, from time to time, by the Ministry of Environment and Forest, Government of India and the local bodies, as applicable shall be the sole responsibility of the Contractor."

11. He was also of the view that the Agreement between the parties was an item rate contract. The appellant was to be paid for the item of work executed at the rate agreed for that item of work. The appellant clearly admitted before the Arbitral Tribunal that arrangement of the source of material for sub grade and all other items of BOQ was its responsibility and the appellant was required to apprise itself of the site and other conditions before bidding for the project. The failure of the appellant to locate the source of material within the vicinity of the site cannot be the ground to burden the employer with additional costs. The failure on the part

of the appellant to arrange the material as per the Agreement cannot entitle it to payment of additional amount. According to him, it is not anybody's case that the material as specified under the Technical Specifications was non-existent. He held that the areas located being not feasible for exploitation would not make the appellant's claim of additional amount on account of its commercial difficulties. He held that this aspect was not considered by the Arbitral Tribunal, which proceeded on the basis that since the mixture of fly ash and sand was used and that was not included in the Technical Specifications, the appellant would be entitled to additional payment. He also observed that the respondent had agreed that mixture of fly ash and sand could be used as sub grade material, it had denied the payment of any extra cost on that count. The learned Single Judge was also of the view that even in the meeting held with the Member (Finance) on September 12, 2003, it was made clear that the alternate proposal of using fly ash and sand shall be at no extra cost to the employer. In its final conclusion, the learned Single Judge gave finding that the respondent never agreed for payment of additional amount over and above the agreed rate for execution of sub grade work.

12. Insofar as the third submission is concerned, the learned Single Judge was of the view that there was no indication as to how the Arbitral Tribunal had assessed the rate payable at ₹ 497/- per cubic meter. According to him, the conclusion of the Tribunal that the said figure was ascertained during the site visit in 2006 keeping in view, the data book for analysis of rates published by IRC was not tenable as there was no indication as to what was found at site during the visit, which would throw light on the assessment made by the Arbitral Tribunal. The learned Single Judge had also held despite opportunity given to the appellant's counsel, he could not able to show any material collected by the Arbitral Tribunal during the site visit which would justify the rate of at ₹ 497/- per cubic meter. He held that the Arbitral Tribunal has, merely accepted the claim made by the appellant in its letter dated April 25/28, 2005, without the appellant establishing the same, and has awarded a sum of ₹382/- per cubic meter for use of fly-ash and sand for sub grade work. Accordingly, he found that any award of damages on no

evidence falls foul of the public policy test under Section 34(2)(b)(ii) of the Act and set aside the Award.

SUBMISSIONS:-

13. Mr. Sanath Kumar, learned Senior Counsel for the appellant contends that as per the Technical Specifications applicable vide Clause 305 and the BOQ item No. 2.05 it was required to execute the work of sub-grade with earth of CBR value 7. However, after extensive sampling of various borrow areas around the project site, earth having the required CBR value (strength) could not be found. He stated, the appellant brought out the alternate solution to execute the said work with certain extra cost implication vide its letter dated July 01, 2003. He stated, the respondent's Engineer vide its letter dated July 18, 2003 though admitting that the proposal was a departure from Contract Specifications yet he stated that nothing extra shall be payable to the appellant for executing the said work with the proposed material. The appellant protested vide its letter dated July 31, 2003 and stated that the proposed material was decided by a consensual decision of the respondent and his Engineer during the meeting held on July 09, 2003 and therefore the extra cost which incurred was to be borne by the respondent. He stated, respondent's Engineer finally gave its approval vide its letter dated October 06, 2003 but at the same time denied any extra payment over the BOQ rates to the appellant. Since as per the contract the appellant obliged to continue with the work and take on the disputed matter separately (clause 24), the appellant had no option but to continue with the work and also invoke arbitration simultaneously. Accordingly, the dispute reached the Arbitral Tribunal which upheld the contention of the appellant after giving various Technical findings and observations.

14. He stated, the learned Single Judge having found that the Arbitral Tribunal view was a plausible one, was not justified in interfering with the Arbitral award. He also stated, the learned Single Judge has gone into the merits of the case which was not permissible and would amount to interference by the Court beyond the scope under Section 34 of the A and C Act. He stated, even though under Clause

305.2.2.2, the responsibility for arranging of material was on the appellant, it does not debar the appellant from its entitlement of rates of a variation item. He would state, the Arbitral Tribunal on inspection as requested by both the parties found that the originally envisaged material for the work was not available and hence the material to be used had to be changed. He stated, the learned Single Judge failed to appreciate the finding of the Arbitral Tribunal that there was no controversy with regard to the fact that the appellant executed a work which was not included in the contract specifications and was liable to be paid its dues towards the same. He would also submit, the detailed analysis of the extra cost incurred given to the respondent as well as to the Tribunal remained unchallenged by the respondent and hence the same must be taken as admission of the extra cost being incurred and the learned Single Judge thus erred in setting aside the findings of fact by wrongly treating it to be a case of no evidence, when unchallenged evidence was available on record.

15. He stated, respondent did not produce any evidence to the contrary; the determination of the rate is by experts in the field and in any case as per Section 19 of the Act the power to determine the evidence is with the Arbitral Tribunal and the Court cannot sit in judgment over the evidence before the Tribunal. He would state, even though a higher rate was found justified by the Tribunal, still a lesser rate was paid which was limited to the unchallenged analysis submitted by the appellant to the respondent at the time of originally raising the dispute. According to him, the relevant judgments cited in support of the submissions by the appellant have been completely ignored by the learned Single Judge in its impugned order. He would rely upon the following judgments:-

- (i) ***Harish Chandra & Company v. State of U.P. thr. Superintending Engineer Civil Appeal No. 8829/2016 decided on September 08, 2016;***
- (ii) ***Associate Builders v. Delhi Development Authority (2015) 3 SCC 49.***

16. On the other hand, Mr. Ramesh Kumar, learned counsel for the respondent would submit that the appellant is a Joint Venture Company consisting of CWHEC (a Chinese Company) and HCIL (an Indian Company) vide JV (Joint Venture)

Agreement dated March 02, 2001 submitted bid to the respondent (an SPV of NHAI) four laning of Km 0/500 to Km 52/700 of Kolaghat-Haldia section of NH-41 in the State of West Bengal. He stated, the project was of national importance to link NH to Haldia Port for free movement of natural resources from mineral rich Eastern/North Eastern States to Haldia Sea Port, for export purpose. He would state, the appellant issued Letter of Award dated November 22, 2001 for a contract price of ₹ 2,19,98,91,379/- followed by Contract Agreement dated July 24, 2002. The contract was on item rate basis, and the appellant had quoted their rates for the various items of activities as per the details given in the BOQ conforming to the relevant Technical Specifications and other provisions of the contract which also formed part of the Contract Agreement. He stated, dispute No.2 arose between the parties pertaining to the sub grade works performed by the appellant, pursuant to which the said dispute was referred to the Arbitrate Tribunal. The work fell within the nomenclature of BOQ item 2.05, and was also within the scope of C1.305 of TS. He stated, Engineer vide letter dated October 06, 2003 gave conditional approval, of the materials for sub grade construction (mixture of fly ash and sand/ 80:20) as conforming to Clause 305 of Technical Specifications on condition that no extra payments would be made, and based on the approval, respondent proceeded with construction of sub grade work and executed substantial quantity (3,07,847 CuM) under BOQ item 2.05 and accepted payment without any protest or demur upto Interim Payment Certificate 32 i.e. for 18 months, and thereafter raised disputes (Dispute No.2) that fly ash was not a BOQ item and sought to treat it as a variation item.

17. He would state, in the 4th hearing of Arbitral Tribunal on September 13, 2006, the appellant produced a letter dated October 14, 2003, by way of reply to letter dated October 06, 2003 of the Engineer in evidence to refute that the respondent's stand that the appellant had not objected to treat the fly ash as a BOQ item. He stated, the receipt of the said letter dated October 14, 2003 was disputed by the respondent. No other communication referring to the said letter was produced by the appellant. He would state, with the aforesaid conditional

approval, the appellant proceeded with construction of sub-grade and executed substantial quantity (i.e. 3,07,847 CuM) under BoQ item 2.05 and accepted payments without protest upto IPC No.32 (i.e. for 18 months). He stated, even otherwise, the issue of sub-grade material as variation item was never included in updated programs as required under Clause 39.1 of the Contract. Hence, it was not considered a variation item and there was no question of applying any revised rates. He would state, it was mandatory on the part of the appellant as per item no.22 of Contract Data and Clause 27.3 of the Conditions of Contract to submit to Engineer, the Appellant's programme updates within stipulated period of 180 days wherein all variation items were to be produced. The appellant had not included fly ash/sand mixture as a variation item in the programme which also wholly belied the belated stand taken by the appellant to the contrary. He would submit, the appellant claimed price escalation on the rate to be awarded by Arbitral Tribunal as per Clause 40.2 of the contract. He stated, the Arbitral Tribunal in the award fixed a rate of ₹ 382/- per CuM on the basis of alleged rates prevalent at that time as claimed by the Appellant (for which there was no basis) and also ordered price escalation as per Clause 47 of the contract. He would state, that such market rate could not have been escalated under the provisions of the contract, as there is no provision for the same. The escalation as per the formula according to Clause 47.1 of the contract is applicable only for contract price i.e. what has been quoted by the appellant against different BOQ items and not on any rates subsequently arrived at on the basis of market rate prevalent at a particular point of time. It is his submission, the Tribunal in a biased, partisan and mechanical manner accepted the contentions of the appellant and allowed the claim in a pre-determined manner. He stated, learned Single Judge vide judgment dated February 20, 2017 did not concur with the Arbitral Tribunal's interpretation that use of fly ash for sub grade work was variation item, however, the interpretation was treated as plausible one and upheld the same.

18. Learned counsel for the respondent would justify the finding of the learned Single Judge, who held that the appellant was not entitled to additional payment

for execution of sub grade work. This is in spite of the fact that the Arbitral Tribunal had treated the use of fly ash for sub grade work as variation item.

19. Mr. Kumar, on the issue as to whether there is any material on record which would sustain the award for quantification of additional payment of ₹ 382 per CuM for sub grade work, has justified the conclusion of the learned Single Judge, who has stated there was no indication as to what was found at the site during the visit in December 2006 which would throw light on the assessment made by the Arbitral Tribunal. Mr. Kumar stated, the learned Single Judge observed even counsel for the appellant could not throw any light on the said query. Mr. Kumar also relied on the observations of the learned Single Judge that much reliance has been placed by the appellant on the judgments of the Supreme Court of India to justify the quantification of the additional payment amount but in the absence of any clear cut evidence, the said judgments are applicable only for interpretation of the terms, or quantification done as per the experience of the expert Members of the Tribunal in their field, whereas, such expertise can be used for calculations purposes, but not for fixing prices for any particular items which requires a market survey or some kind of estimates of rates produced before the Arbitral Tribunal. In the end, it is his submission that the judgment passed by the learned Single Judge was a reasoned one, and cannot be set aside.

20. Having heard the learned counsel for the parties, before we deal with the respective contentions of the learned counsel for the parties, it is necessary to delineate the position of law with regard to the scope of judicial review under Section 34 of the Arbitration and Conciliation Act, 1996. The law is well settled by the Supreme Court. The reliance placed by Mr. Sanath Kumar, learned Senior Counsel for the appellant on the judgment of the Supreme Court in *Associate Builders v. DDA, (2015) 3 SCC 49* is apt and justified. In the said judgment, R.F. Nariman, J., speaking for the Bench, enunciated the legal position after referring to various judgments. The relevant paras of the judgment with which we will be concerned in view of the finding of the Ld. Single Judge that the award is perverse, are reproduced as under:-

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

35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in **ONGC [ONGC Ltd. v. Saw Pipes Ltd.]** MANU/SC/0314/2003 : (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the 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 principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation MANU/UKWA/0001/1947 :

(1948) 1 KB 223 : MANU/UKWA/0001/1947 : (1947) 2 All ER 680 (CA)] 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-

1. a finding is based on no evidence, or

2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or

3. ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

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

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 MANU/SC/0793/1998 : (1999) 2 SCC 10 at para 10, it was held:

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 score¹. [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 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 and 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.

21. We may also state here, that a Coordinate Bench of this Court in the case of *Shiam Cooperative Group v. M/s Kamal Construction Co. Ltd* FAO(O) No. 120/2017 decided on August 10, 2017 has culled out the following principles enunciated in *Associate Builder (supra)* regarding judicial review under Section

“(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 preeminent 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.”

22. We may reiterate here that the learned Single Judge has set aside the impugned award primarily on two findings, (i.e. on second and third submission) which were based on the submissions made by the learned counsel for the respondent before him. The first finding, which was primarily related to the second submission advanced before him, the learned Single Judge was of the view; (i) the appellant shall be paid for the item of work executed at the rate agreed for that item of work; (ii) the appellant clearly admitted before the Tribunal that

arrangement of the source of material for sub grade was its responsibility; (iii) all other items of BOQ was its responsibility; (iv) the appellant was required to apprise itself of the site and other conditions before bidding for the project; (v) the failure of the appellant to locate the source of material within the vicinity of the site cannot be the ground to burden the employer with additional costs; (vi) the failure on the part of the appellant to arrange the material as per the Agreement cannot entitle it to payment of additional amount; (vii) it is not the case of anybody that the material as specified under the Technical Specifications was non-existent; (viii) the areas located being not feasible for exploitation would not make the appellant claim additional amounts on account of its commercial difficulties; (ix) the respondent did not agree for payment of additional amount over and above the agreed rate for execution of sub grade work.

23. Insofar as the second finding relatable to the third submission before him, the learned Single Judge was of the view (i) there was no indication as to how the Arbitral Tribunal had assessed the rate payable at ₹ 497/- per cubic meter; (ii) the conclusion of the Tribunal that the said figure was ascertained during the site visit in 2006 keeping in view the data book for analysis of rates published by IRC but there was no indication as to what was found at site during the visit, which would throw light as to the assessment made by the Arbitral Tribunal, the appellant's counsel despite opportunity could not show any material collected by the Arbitral Tribunal during the site visit justifying the rate of ₹ 497/- per cubic meter. The Tribunal merely accepted the claim of the appellant in its letter dated April 25, 2005 without the appellant establishing the same. The award falls foul of the public policy test under Section 34(2)(b)(ii) of the Act.

24. Having noted the conclusion arrived at by the learned Single Judge and the position of law with regard to judicial review under Section 34 of the A and C Act as laid down by the Supreme Court we shall now examine the conclusion arrived at by the Learned Single Judge in the impugned order. At the outset we may state that on the issue of the material to be used for the construction of sub-grade it has been held by the Arbitral Tribunal that fly ash and sand were not part of the

Technical Specifications, vide sub-clause 305, and supplementary technical specifications for sub grade and hence the work of sub grade is not covered by BOQ item No. 2.05. The learned Single Judge even though did not concur the view of the Arbitral Tribunal but held that the same was plausible view which cannot be stated as perverse or a view that no reasonable person could hold. In view of this conclusion of the learned Single Judge this Court must proceed on the premise that the fly ash and sand used for the construction of the sub grade was outside the Technical Specifications / BOQ and were variation items.

25. Insofar as the finding of the learned Single Judge that the appellant is not entitled to additional payment for usage of fly ash and sand for the construction of sub grade is concerned, there is no dispute that that Engineer of the project had vide his letter dated 6th October, 2003 given approval for the usage of fly ash and sand, even though with no extra cost. This approval was given as fly ash and sand were not part of BOQ as per the finding of Arbitral Tribunal as upheld by the learned Single Judge. There is a conclusion of the Arbitral Tribunal that clause 305.2.2.2 only casts responsibility on the appellant to arrange for the material but does not deal with the rates payable. So it follows, the fly ash and sand which were not BOQ materials had to be arranged by the appellant for which the rates have not been prescribed.

26. No doubt the appellant was required to apprise itself of the site and other conditions before bidding for the project but failure to locate the source of material or failure to exploit for commercial difficulties, the earth with CBR value of 7% (not fly ash and sand) could at the most be construed as the inability of the appellant to discharge its obligation under the contract which could have been a ground for terminating the same but having agreed to permit the appellant the usage of fly ash and sand which were not part of BOQ and also its conclusion that the usage of fly ash and sand as variation items under clause 40 of the contract and the Arbitral Tribunal interpreting the clause 305.2.2.2 only to mean the obligation on the appellant to arrange for the material, and thereby granting additional amount, the same is on a plausible interpretation of contractual terms and keeping

in view the position of law as also noted by the learned Single Judge in the impugned order which includes *Mcdermott International Inc. v. Burn Standard Co. Ltd and Others: (2006) 11 SCC 181*, *Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.: (2009) 10 SCC 63* and *Sumitomo Heavy Industries Limited v. Oil and Natural Gas Commission of India: (2010) 11 SCC 296*. In *Steel Authority of India Ltd. (supra)*, it was held “an error relatable to interpretation of the Contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts, as such an error is not an error on the facts of the award.” It must be held, the learned Single Judge has erred in interfering with award by holding that the appellant was not entitled to additional payment.

27. On the issue of award of additional amount of ₹ 382/- per cubic meter for sub grade work as awarded by the Arbitral Tribunal which has been set aside by the learned Single Judge is concerned, the Arbitral Tribunal had based its conclusion to the visit to the site made in the month of December 2006; on the norms as given in the data books for analyzing the rates published by IRC and all the provisions of clause 40 of the contract to arrive at a rate of ₹ 497 per cubic meter but awarded an amount of ₹ 382/- per cubic meter as claimed by the appellant in communication dated April 25/28, 2005. No doubt, the Arbitral Tribunal did not give any analysis for arriving the rate of ₹ 497/- per cubic meter but the Arbitral Tribunal has limited the payment at ₹ 382/- per cubic meter by relying on the letter dated April 25/28, 2005 of the appellant. There is no dispute and also pointed out by Mr. Sanath Kumar, learned Senior Counsel for the appellant that the appellant had in its letter dated July 31, 2003, (which was filed as Annexure-C-5 before the Arbitral Tribunal), also gave the analysis for determining the rate as ₹ 382 per cubic meter. There is nothing on record to show that the respondent had disputed the analysis given by the appellant for seeking additional payment at the rate of ₹ 382/- per cubic meter. We find the objection of the respondent with regard to rate of ₹ 382/- per cubic meter was that the rate so arrived at by the appellant was as per the market rate of different types of material

involved in the work i.e. materials, labour, machinery and other components as prevalent at that point of time. In other words such rate was arrived at as an escalation which is not permissible under Clause 47 of the conditions of contract. From the stand of the respondent, it is clear that it was not their case the said rates were not prevalent. Further, on a perusal of letter dated July 31, 2003, the appellant has justified the rates of ₹ 382/- per cubic meter as per the analysis made therein. So it is not case of no evidence to make the finding perverse, as held by the learned Single Judge.

28. Insofar as the issue of receipt of the communication dated October 14, 2003 disputed by the respondent, which is a letter addressed to the Team leader by the appellant in response to letter dated October 06, 2003 informing him, about non acceptance by the appellant the terms and conditions therein, there is a conclusion of the Arbitral Tribunal, that the letter appears to have been received by the respondent. Based on such a conclusion, the Arbitral Tribunal rejected the plea of the respondent that, there was an implied consent of the appellant to do the work on those terms. In view of a finding on fact, the learned Single Judge erred, in holding there is a serious dispute about the receipt of the same by the respondent. It is a settled position of law, that finding of fact of the Arbitrator cannot be disturbed in proceedings under Section 34 of the Arbitration & Conciliation Act. Insofar as the judgment relied by Mr. Kumar between the same parties in FAO (OS) (COMM) 84/2017 decided on July 13, 2017 is concerned, the same is an appeal filed by the appellant herein challenging the order of the learned Single Judge in objections filed by the respondent herein under Section 34 of the Arbitration & Conciliation Act whereby the learned Single Judge had partially allowed the petition by setting aside the award to a limited extent is concerned, the challenge also relates to the same arbitration proceedings, with which we are concerned in these proceedings. The challenge was limited to claim 5 and 6. Against claim No. 5 a sum of ₹ 13,03,690/- was allowed as against a sum of ₹ 13,03,694/- preferred by the appellant. Against claim No.6, a sum of ₹ 13,00,495/- was allowed against a sum of ₹ 19,60,167/- preferred by the appellant. The

challenge to claim No.5 was rejected. On claim No.6, it was held by the learned Single Judge, the award is conspicuously silent as to the basis on which the rate of ₹ 345/- per cubic meter was worked out for arriving at a conclusion that the appellant under claim No.6, was not based on any evidence and therefore could not be sustained and that part of the award was set aside. The Division Bench agreed with the view of the learned Single Judge. It had referred to the judgment of the Supreme Court in *Associate Builder (supra)*. While agreeing with the learned Single Judge, the Appellate Court has noted that the appellant had submitted only a calculation sheet of the extra expenditure allegedly incurred by it for filter media, the material used. It was of the view that it did not lead any evidence to prove the said computation. The said judgment is distinguishable for the reason, in the case in the hand, the communications of the appellant dated July 31, 2003 / April 24/25, 2003, which were sent to the respondent, were part of the record of the Arbitral Tribunal as Annexures and the Arbitral Tribunal had relied upon the letter dated April 24/25, 2003. The said document and contents therein were not disputed. This we say because, as noted above, the stand of the respondent was that, the rate of ₹ 382/- per cubic meter was on the basis of rates prevalent at the time the same was claimed by the appellant. In other words, it was not the case of the respondent, the said rates were not prevalent.

29. In view of our discussion above, we are of the view the impugned judgment is liable to be set aside. Ordered accordingly. The appeal is allowed. No costs.

V. KAMESWAR RAO, J

G.S.SISTANI, J

DECEMBER 12, 2017/ak