

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

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Reserved on : March 17, 2017

Pronounced on: April 03, 2017

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FAO(OS) 242/2015

M/S NATIONAL HIGHWAYS AUTHORITY
OF INDIA

..... Appellant

Through Mr. Rohan Yadav, Advocate

versus

PROGRESSIVE CONSTRUCTIONS LTD Respondent

Through Dr. Amit George, Mr. Swaroop George and
Ms. Rajsree Ajay, Advocates.

CORAM:

HON'BLE MS. JUSTICE INDIRA BANERJEE

HON'BLE MR. JUSTICE ANIL KUMAR CHAWLA

JUDGEMENT

INDIRA BANERJEE, J

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the 1996 Act, for setting aside a unanimous award dated 12.03.2013 passed by the Arbitral Tribunal partly allowing the claims of the respondent, Progressive Constructions Ltd.

2. The appellant entered into a contract dated 12.08.1999 with the respondent whereby the appellant awarded to the respondent the contract work of four laning a section of National Highway No.31 at the Punia-Gaya-Kota section.
3. The contract in question was a unit rate contract and the bid documents contained a detailed document referred to as 'Bill of Quantities' which enumerated each item of work with the estimated quantities to be executed by the respondent. The respondent filled in rates against each item.
4. The appellant has pleaded that the tender conditions specifically provided that the bidder would have to satisfy itself regarding the site condition and no claim was to be entertained on the plea that the information supplied by the employer, National Highway Authorities of India (NHAI) was erroneous or insufficient.
5. According to the appellant, the purpose of such a condition was that a bidder would be able to incorporate all possible costs of work itemwise in its financial bid, taking into account the conditions prevailing at the site, so that the appellant was not unduly saddled with any claim in the future on the ground that such costs were not foreseeable by the contractor.
6. According to the appellant, the other purpose of requiring the bidder to fully acquaint itself with the geographical / climatic / soil and other conditions at the site of the construction was that it would be incumbent for the bidder to make a reasonable

assessment of the costs which would be incurred by him in execution of the work, by considering all relevant factors and the bidders would have to make honest and real assessment of the expenses likely to be incurred by it while calculating its financial bid.

7. According to the appellant, the object behind incorporating such a clause was to eschew practice amongst bidder of quoting lower bid to procure the contract and later raising its claims on account of an additional works. By the guise and subterfuge of underbid, the bidder manages to procure the work by deliberately under quoting but eventually the purchaser ends up paying much more.
8. The appellant contends that the respondent raised claims which were nothing but an afterthought and none of the claims were justified at all since everything had been accounted for in the itemwise rates quoted by the respondent itself.
9. Disputes arose between the parties with regard to execution of the contract. The respondent preferred claims to the Dispute Review Expert (DRE) for decision. The parties also agreed to extend the time for the DRE to give its decision.
10. In the meanwhile, the respondent invoked the arbitration clause Nos.25.2 and 25.3 of the Conditions of Contract vide its letter dated 19.03.2007 and the appellant issued letter dated 07.05.2007. The parties also agreed to extend the time of the

DRE to give its decision, since no decision had been given, within the time stipulated in clause 25.1.

11. An Arbitral Tribunal consisting of three members was constituted on 21.06.2007 to adjudicate the disputes between the two parties. The Respondent made seven claims before the arbitral tribunal, which are as follows:

Claim No.1- Cost compensation for increased cost borne for use of Pakur stone in structural concrete and bituminous work in place of crashed coarse aggregate obtained from the river Rakhti near Paina Kumari as source chosen by the claimant for Rs.7,38,09,806.54 which was subsequently modified to Rs.4,98,34,949.32, including escalation of cost.

Claim No.2- Cost compensation for well point system of dewatering required to be undertaken for laying foundation of 4 number bridges below the foundation of the existing ones amounting to Rs.60,61,221.50.

Claim No.3 Cost compensation for excessive cost of embankment and sub grade construction owing to adverse soil condition in Borrow area and site for amounting to Rs.61,94,440.72 subsequently modified to Rs.72,84,566.82 in the rejoinder.

Claim No.4- Cost compensation for premature recovery of mobilization and machinery advance for Rs.20.71 Lacs subsequently modified to Rs.16,27,284.00 in the rejoinder.

Claim No.5- Cost compensation for idling of resources for Rs.880.50 lakhs finally modified to Rs.8,30,64,451.00 in CH-30 submitted on 2.9.2011.

Claim No.6 Past interest on the amount held up @ 12.12 % per annum amounting to Rs.8,12,11,349.13 pendente lite interest on the amount withheld @ 18% p.a. from the date of reference of the dispute to the arbitration till date of award and future interest from the date of award till payment of the total awarded amounting @ 18% p.a.

Claim No.7- Cost of arbitration for Rs.10 lakhs.

12. The Appellant filed its Statement of Defence referring to Clauses of the agreement to demonstrate that all the claims raised by the Respondent were contrary to the contractual clauses which had been voluntarily and consciously agreed upon by the Respondent.
13. The Appellant had also filed an Application under Section 16 of the 1996 Act before the Arbitral Tribunal contending that the claims made by the Respondent were barred by limitation. The Arbitral Tribunal rejected the said Application by an order dated 17.01.2009.
14. The Arbitral Tribunal pronounced its Award on 12.03.2013 dismissing Claim Nos.1,4 and 7 of the Respondent and partly allowing Claim Nos.2,3,5 and 6.

15. The appellant submitted that the findings of Arbitral Tribunal which have been upheld by the Ld. Single Judge were contrary to the specific clauses of the agreement entered into between the parties and were therefore irrational and perverse and against the fundamental public policy of the land.
16. The claim-wise findings of the Ld. Arbitral Tribunal are as follows:
- (a) As regards Claim No.2 towards cost compensation for well point system for dewatering, the Arbitral Tribunal awarded an amount of Rs.58,61,222/- against the claimed amount of Rs.60,61,221.50. The Arbitral Tribunal found that while executing the work from the bridges, as the ground water table was high and the site of the work was situated within irrigated area with the founding strata consisting of silt and fine sand creating adverse subsoil condition, it could not be possible for the contractor to control seepage and ground water flow by conventional dewatering method of excavating a pit or trench deeper than the foundation level dug beyond the foundation pit and engaging pumps or adopting similar measures. As such conventional methods of dewatering could result in collapse of the foundation trench endangering the safety of the existing bridges, traffic, men, materials and machinery working in the site and therefore, the

contractor adopted the well point technique of dewatering for the laying of foundation of these bridges.

- (b) The Arbitral Tribunal found that the subsoil condition could not remain same and static permanently and it was quite likely that the changes might occur with variation in rainfall, lowering of groundwater level, minor irrigation and such other measures taken. A difficult situation with regard to pumping and dewatering in excavation of foundation might always arise and could not be foreseen beforehand with precision and more so with visual inspection of the site and the correct assessment could only be made after excavation of the foundation trench and the contractor could not ascertain the magnitude of the problem before doing this exercise.
- (c) The Arbitral Tribunal also held that in Clause 304.5, the Contract unit Rate for item of excavation of structure did not provide for particular and specific system of dewatering by well point system, which is a specialized kind of work requiring adequate compensation accordingly. The Arbitral Tribunal found that in this clause in contract unit rate, provision has been made towards compensation of operation for “dewatering including pumping” which is of general nature requiring no particular skill or expertise.

(d) The learned Single Judge has upheld these findings on the ground that the same cannot be said to be perverse, contrary to the provisions of the Act or contrary to the evidence placed on record.

17. The appellant submitted that the following provisions of the contract would show that the finding of the Arbitral Tribunal are completely in contravention of the contractual clauses. The appellant submitted:

(i) The Single Judge ignored the specific amended clauses 2104.1 in MOST specification for Road and Bridge work which provide that “Open foundation shall be constructed in dry conditions and the contractor shall provide for adequate dewatering arrangement to the satisfaction of the Engineer”.

It is further mentioned in Clause 2104.3 in MOST specifications for Road and Bridge work that “dewatering, where necessary for laying concrete, shall be carried out by adopting any one of the following procedures of any other method approved by the Engineer” and in this para as per point (iii) specify that “Water table is depressed by well point system or other methods”. As per MOST specifications para 2108, the unit rate for excavation includes all the works as given in respective sections 2101 to 2107.

- (ii) The learned Single Judge further ignored Clause 304.3.3 of the MOST, G.T.S. of the contract agreement wherein is clearly specified as follows:

“Dewatering and Protection – Normally open foundations shall be laid dry. Where water is met within excavation due to stream flow, seepage, springs, rain or other seasons, the contractor shall take adequate measures such as bailing, pumping, constructing diversion channels, drainage channels, Bunds, depression of water level by well point dewatering, coffer dams and other necessary works to keep the foundation trenches dry when so required and to protect the green concrete/masonry against damage by erosion or sudden rising of water level. The methods to be adopted in this regard and other details thereof shall be left to the choice of the contractor but subject to approval of the Engineer. Approval of the engineer shall, however, not relieve the contractor of the responsibility for the adequacy of dewatering the protection arrangements, and for the quality and safety of the works.”

- (iii) Another important clause, which was not considered by the learned Single Judge was Clause 304.5.1 (iv) and (v) of General Technical Specifications for Road and Bridges which provide that the contract unit rate for the items of excavation of structure shall be payment in full for carrying out the required operations including full compensation for ... (iv) foundation sealing, dewatering including pumping when no separate provision for it is made in the contract (v) All Labour,

materials, tools, equipment, safety measures, diversion of traffic and incidental necessary to complete the work to specifications.

- (iv) The learned Single Judge further overlooked provisions of Technical Specifications, Section 5, Clause 1.2 regarding site information which provided in clear terms that “The information given hereunder and provided elsewhere in these document is given in good faith by the Employer but the contractor shall satisfy himself regarding all aspects of site conditions and no claim will be entertained on the plea that the information supplied by the employer is erroneous or insufficient.”
- (v) In addition to above clause, clause 7.1 in Volume I, Section 1 of the Contract Agreement provided for site visit and states that “The bidder, at the bidder’s own responsibility and risk is encouraged to visit and examine the site of works and its surroundings and obtain all information that may be necessary for preparing the bid and entering into a contract for construction of the works. The cost of visiting the site shall be at the bidder’s own expense.”
- (vi) It is submitted that through contractual clauses quoted above, the Appellant had made it absolutely clear that all expenses including compensation for de-watering by employing well point system were all inclusive in the unit rate for the items as quoted by the bidder and therefore, no claim in this regard can

be entertained later on. Not only this, the bid document specifically instructed the prospective bidders to visit the site and familiarize themselves with the site conditions, including though not exhaustive, soil conditions, climate conditions prevailing in the site area, extent of rainfall, and other geo-climatic conditions which were necessary to be taken into account for the purpose of preparation of financial bid.

- (vii) The learned Single Judge failed to appreciate that the entire purpose of having a unit rate system is that a bidder is allowed to quote a particular rate for all items of work related to construction and the bidder is fully made aware about various construction activities which are needed to be undertaken by mentioning it item-wise so as to obviate any claim in future.
- (viii) As regards Claim No.3 for Cost compensation for excessive cost of embankment and sub grade construction, the Arbitral Tribunal awarded Rs.72,84,566/- to the Respondent. The tribunal found that since the site conditions at the time of execution of work had come out as more adverse than those appeared before issuance of the letter of acceptance, therefore it had become a compensation event. This finding has also been erroneously upheld by the learned single judge by relying upon in the earlier decision dated 28.2.2012 in OMP No.744 of 2010 in the case of N.H.A.I. versus M/s Somdutt Builders.

- (ix) The Single Judge as well as the Arbitral Tribunal completely ignored the provisions of Clause 305.2.2.2 of MOST specifications at GTS which reads as “where specific borrow areas are not designated by the Employer/Engineer, arrangement for locating the source of supply of material for embankment and sub grade as well as compliance to environmental requirements in respect of excavation and borrow areas as stipulated from time to time by Ministry of Environment and Forests, GOI and the local bodies as applicable, shall be the sole responsibility of the contractor.”
- (x) The Single Judge further did not take into account Clause 305.9.1 of GTS, contract agreement (MOST specifications) which provided that the rates agreed upon and those mentioned in the BOQ was inclusive of all the operations like :-
- (i) Cost of arrangement of land as a source of supply of material of required quantity for construction unless otherwise provided in the contract.
 - (ii) Excavation in all soils from borrow pits/designated borrow areas, including cleaning and grubbing and transporting the material to embankment and sub grade site with all lifts and leads unless otherwise provided for in the contract;

- (iii) All labour, material, tools, equipment and incidentals necessary to complete the work to the specifications;
- (iv) Dewatering and keeping the embankment/completed formation free of water as per Clause 311.
- (xi) The reading of above clause coupled with Clause 1.2 which provided for site information, clearly established that the work of constructing the embankment and sub grade construction was included in the unit rate method and no claim for excessive or additional cost, ought to have been entertained later on.
- (xii) As regards claim No.5 for compensation for idling of resources, the AT held that the Appellant, N.H.A.I. failed to handover possession of obstruction free construction site on time, thereby causing delay and idling of resources. The Ld. Single Judge as well as the Arbitral Tribunal failed to take notice that as per clause 110 of Technical Specifications, the Respondent contractor was responsible for removal of hindrances and this was also a paid item. Therefore, the Respondent cannot be allowed to raise a plea that the site had to be handed over encumbrance free. The Respondent had to make a bid after making due inspection of the site which makes it clear that the Respondent was fully aware of the nature of impediment and hindrances existing on the construction site.

- (xiii) The Single Judge as also the Arbitral Tribunal failed to appreciate that the Respondent had to prove actual losses suffered by it adducing necessary documentary and other evidences which it completely failed to do. The Arbitral Tribunal fell in error by awarding notional overhead Cost in a big organization dealing with a number of projects by applying internationally accepted formula for overhead costs which was not the actual costs/losses suffered by the respondent. Single Judge failed to appreciate that the said method was completely erroneous.
- (xiv) The award of pendent lite interest and future interest was also unsustainable since the original amount was not in consonance with the terms of the contract and suffered from legal infirmity. Apart from this, the rate of interest awarded was very high and ought to have been interfered with by the Ld. Single Judge.
18. There can be no dispute that an Arbitral Tribunal is required to decide a dispute strictly in accordance with the contract and in accordance with the substantive law for the time being in force. An Arbitral Tribunal is required to proceed fairly, and in accordance with law, giving equal opportunity of representation to all the parties.
19. In *Shin Satellite Public Co. Ltd. vs. M/s. Jain Studios Ltd.* reported in : AIR (2006) 2 SCC 628, the Supreme Court held that a Court of law would have to read the agreement as

it is. The Court cannot rewrite the agreement or create a new agreement.

20. In Polymat India P. Ltd. & Anr. vs. National Insurance Co. Ltd. & Ors. reported in AIR 2005 SC 286 : (2005) 9 SCC 176, the Supreme Court held that the terms of the contract have to be construed without altering the nature of the contract.
21. In Delhi Development Authority vs. M/S. U.S. Sharma & Co., New Delhi reported in (2008) 13 SCC 80, the Supreme Court held that an award which was contrary to substantive provisions of law or the provisions of the 1996 Act or against the terms of the respective contracts or patently illegal or prejudicial to the rights of the parties was open to interference by Court under section 34(2) of the 1996 Act.
22. An award could be set aside if it was contrary to the fundamental policy of law or the interest of India or justice or morality. An award could also be set aside if it were so unfair or unreasonable that it shocked the conscience of the Court.
23. It is open to the Court to consider whether the award was against the specific terms of the contract and if so interfere with it on the ground that it is patently illegal and opposed to the public policy of India.
24. Under the 1996 Act, the learned Arbitral Tribunal is obliged to pass a reasoned award. There can also be no

doubt that a mere statement of reasons does not satisfy the requirement of section 31(3) of the 1996 Act. The reasons must be based upon materials submitted before the Arbitral Tribunal. The Tribunal has to give its reasons upon consideration of the relevant materials, while irrelevant materials may be ignored.

25. In Oil & Natural Gas Corporation Ltd. vs. Western Geco international Ltd. reported in (2014) 6 SCC 321 : AIR 2015 SC 363, the Supreme Court reiterated that the phrase 'Public Policy' used in Section 34 was required to be given a wider meaning. It could 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 public good or public interest has varied from time to time. However, the award which was, on its face, patently in violation of statutory provisions, could not be said to be in public interest. Such an award was likely to be adversely affected the administration of justice. The award could thus be set aside, if it was patently illegal.
26. There can be no doubt that an award which is patently illegal can be set aside. It is too late in the day to contend to the contrary. However, the award in this case does not appear to be patently illegal.

27. In *Bannari Amman Sugars Ltd. vs. Commercial Tax Officer* reported in (2005)1 SCC 625, the Supreme Court held that where a particular mode was prescribed for doing an act and there was no impediment in adopting the mode, the deviation to act in a different manner, without disclosing any discernible principles which were reasonable, to be labelled as arbitrary. The Supreme Court reiterated that every state action had to be informed by reason.
28. In *Union Territory of Pondicherry and Ors. vs. P.V. Suresh* reported in (1994) 2 SCC 70, the Supreme Court held that the Court cannot alter the terms of the contract or rewrite the contract. The Court cannot also evolve formula for determining instalments payable under the contract in the absence of materials before it. The judgment was rendered in the context of proceedings under Article 226 of the Constitution of India. The proposition that the Court cannot alter the terms of the contract or rewrite the contract is well established.
29. In *Makram Barsoum Estafanous and London & Leeds Business Centres Limited* reported in 2011 EWCA Civ 1157, the Court of Appeal held that the general approach to the construction of documents was well settled. The Court could not rewrite contracts in the context of establishing what the parties had meant by the language

they had used. To quote the Appeal Court "that case is not a licence for the Courts to rewrite contracts." However, in this case the appellants have not been able to demonstrate that the learned Arbitral Tribunal has rewritten the contract.

30. Arbitrators are Judges appointed by the parties and, therefore, an award passed by an Arbitrator/Arbitral Tribunal is not to be interfered with lightly. It is well-settled that in proceedings under section 34 of the 1996 Act, the Court does not sit in appeal over the award.
31. It is well-settled that in proceedings under section 34 of the 1996 Act, the Court does not sit in appeal over an award by reanalysing the evidence.
32. In P.R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd. reported in : (2012) 1 SCC 594 the Supreme 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.....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."

Sections 34(1) and (2) of the 1996 Act, provides as follows:-

*"34. Application for setting aside arbitral award.--(1)
Recourse to a Court against an*

arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

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

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

(i) a party was under some incapacity;
or

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted,

only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

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

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

33. As observed by the Supreme Court in Associate Builders vs. Delhi Development Authority reported in (2015) 3 SCC 49, the 1996 Act was enacted to provide for an arbitral procedure,

which is fair, efficient and capable of meeting the needs of arbitration, to provide that the Arbitral Tribunal gives reasons for an arbitral award, to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction and to minimize the supervisory role of Courts.

34. Section 5 of the 1996 Act provides that notwithstanding anything contained in any other law for the time being enforce, in matters governed by Part 1, no judicial authority is to intervene, except where so provided in the said part.
35. Section 34, read in conjunction with section 5 makes it clear that an arbitral award that is governed by Part 1 of the 1996 Act, can only be set aside on grounds mentioned in section 34(2) and (3) and not otherwise,
36. None of the grounds contained in sub-section (2)(a) of section 34 permit the Court to adjudicate the merits of the decision rendered by an Arbitral Tribunal. The merits of an award might only be looked into under certain specified circumstances, when an award is found to be in conflict with the public policy of India, as held by the Supreme Court in Associate Builders (supra).
37. In Renusagar Power Co. Ltd. vs. General Electric Co. reported in 1994 Supp (1) SCC 644 the Supreme Court held that the expression 'Public Policy' in the context of a foreign award, would have to be construed to mean an award contrary to (i)

the fundamental policy of the Indian law; or (ii) the interest of India; or (iii) justice or morality. Such an award would have to be set aside as contrary to the public policy of India.

38. In ONGC Ltd. vs. Saw Pipes Ltd. reported in (2003) 5 SCC 705 the Supreme Court held:

"The phrase "Public Policy of India" is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression "public policy" does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept "public policy" is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and Constitutional provisions."

39. An award would be set aside if it was contrary to (a) the fundamental policy of Indian law; (b) the interest of India or (c) justice or morality or (d) if it was patently illegal. In ONGC Ltd. vs. Saw Pipes Ltd. (supra) the Supreme Court made it clear that it was open to the Court to interfere with an award on the ground that it was patently illegal and therefore, opposed to the public policy of India.
40. An award might be set aside as patently illegal, provided the illegality goes to the root of the award. If the illegality is of a

trivial nature it cannot be said that the award is against public policy. This proposition was reaffirmed by the Supreme Court in Hindustan Zinc Ltd, vs. Friends Coal Carbonization reported in : (2006) 4 SCC 445. In ONGC Vs. Saw Pipes Ltd. (supra) the Supreme Court held that an award could also be set aside, if it was so unfair and unreasonable, that it shocked the conscience of the Court.

41. In view of the judgment in ONGC Ltd. vs. Saw Pipes Ltd. (supra) it has to be held that the award could be set aside if it was in contravention of the provisions of 1996 Act or any other substantive law governing the parties or was against the terms of the contract. Of course the award could be set aside on the ground of patently illegality, subject to the condition that the illegality went to the root of the award. It is now also settled law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same, would be liable to interference under section 34 of the 1996 Act.
42. In Associate Builders vs. Delhi Development Authority (supra) the Supreme Court held that it must be clearly understood that when a Court is applying 'public policy' test to an arbitral award, it does not act as a Court of appeal and consequently the errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to be

accepted 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 no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators' approach is not arbitrary or capricious then he is the last word on facts.

43. Patent illegality may render an award to be in conflict with the public policy of India. Under the explanation to section 34(2)(b) an award may be 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.
44. In McDermott International Inc. vs. Burn Standard. Co. Ltd. reported in (2006) 11 SCC 181, the Supreme Court held:-

"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. vs. ONGC and D.D. Sharma vs. Union of India]."

45. In MSK Projects (I) (JV) Ltd. vs. State of Rajasthan reported in (2011) 10 SCC 573 the Supreme Court held that 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. Reference may in this context, also be made to the judgment of the Supreme Court in Gobardhan Das vs. Lachhmi Ram : AIR 1954 SC 689, Thawardas Pherumal vs. Union of India : AIR 1955 SC 468], Union of India vs. Kishorilal Gupta & Bros.: AIR 1959 SC 1362, Alop

Parshad & Sons Ltd. vs. Union of India : AIR 1960 SC 5881, Jivarajbhai Ujamshi Sheth vs. Chintamanrao Balaji: AIR 1965 SC 214 and Renusagar Power Co. Ltd. vs. General Electric Co.: (1984) 4 SCC 679 : [AIR 1985 SC 1156].

46. In Indu Engineering & Textiles Ltd. vs. Delhi Development Authority reported in (2001) 5 SCC 691, the Supreme Court held that the Arbitrator being a Judge appointed by the parties, the award passed by him is not to be interfered with lightly. When the view taken by the arbitrator was a possible or a plausible one, on his analysis of evidence and interpretation of contractual and/or statutory provisions and did not suffer from any manifest error, it was not open to the Court to interfere with the award.
47. Even though the judgment in Indu Engineering & Textiles Ltd. (supra) was rendered in the context of an application under section 30 of the Arbitration Act 1940, for setting aside of an award, the same principle would apply to an application for setting aside an award, under section 34 of the 1996 Act.
48. In Rashtriya Ispat Nigam Ltd. vs. Dewan Chand Ram Saran, reported in (2012) 5 SCC 306, the Supreme Court held that when a clause in a contract was capable of two interpretations and the view taken by the arbitrator was clearly a possible if not a plausible one, it was 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, Court could not interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

49. In *Sumitomo Heavy Industries Ltd. vs. ONGC Ltd.* reported in (2010) 11 SCC 296 the Supreme Court held:

*"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 silting in appeal. As held by this Court in *Kwality Mfg. Corpn. vs. Central Warehousing Corpn.* 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."*

50. As observed above, an award can only be interfered with grounds stipulated in Section 34(2) of the 1996 Act. In this case no grounds have been made out for interference with the impugned award.

51. It is well settled that the arbitral tribunal is competent to interpret the terms and conditions of a contract and the interpretation cannot be interfered with by Court in an application for setting aside only because some other interpretation might have been possible.
52. The learned Single Judge rightly rejected the application for setting aside of the award. We find no grounds to interfere with the judgment and order under appeal. The appeal is dismissed.
53. The amount deposited by the appellant in the Executing Court may be released to the respondent.



INDIRA BANERJEE, J

ANIL KUMAR CHAWLA, J

April 03, 2017