

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

+ **OMP (COMM) 71/2018**

*Reserved on: 13<sup>th</sup> February, 2018*

*Date of decision: 20<sup>th</sup> March, 2018*

ERNST AND YOUNG PRIVATE LIMITED ..... Petitioner

Through: Mr.A.K.Thakur, Mr.R.K.Mishra,  
Mr.Rishi Raj, Ms.Kavita Singh, Advs.

versus

MINISTRY OF YOUTH AFFAIRS AND SPORTS,  
GOVERNMENT OF INDIA & ANR. .... Respondents

Through: Mr. Neeraj Choudhary, Adv. for R-1

**CORAM:**

**HON'BLE MR. JUSTICE NAVIN CHAWLA**

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 11<sup>th</sup> December, 2017 passed by the Arbitral Tribunal allowing the claims of the respondent no.1.

2. The Organizing Committee Common Wealth Games 2010 (OC CWG), was a society registered under the Societies Registration Act, 1860 and was entrusted by the Indian Olympic Association (IOA) to organize the Common Wealth Games, 2010 in the National Capital Region of Delhi. OC CWG stands dissolved and all the assets and liabilities thereof stand transferred to the Ministry of Youth Affairs and Sports, Government of India (MYAS), respondent no.1 herein.

3. On 4<sup>th</sup> and 5<sup>th</sup> May 2007, the OC CWG issued a global notice inviting Expression of Interest (EOI) from experienced global consultancy firms with proven track record for games planning and project management and for work-force services.
4. Pursuant to the said notice, vendors including the petitioner herein, submitted their respective EOI. On 8<sup>th</sup> November, 2007, OC CWG issued the Request for Proposal (RFP), clause 17.2 whereof permitted the tenderer to form a consortium to enhance its work experience and expertise. In view of the said clause, the petitioner and M/s Event Knowledge Services, Switzerland formed a consortium, with the petitioner as prime/lead tenderer.
5. Pursuant to the selection of the consortium, an agreement dated 24<sup>th</sup> March, 2008 was executed between OC CWG and the consortium comprising of the petitioner and EKS Switzerland collectively called the 'Consultant'.
6. On 1<sup>st</sup> June, 2009, EKS, Switzerland by a Deed of Assignment transferred all its rights, duties and obligations in the aforesaid agreement to EKS, Mauritius, which was incorporated under the laws of Republic of Mauritius with its registered office at Port Louis (hereinafter referred to as 'EKS').
7. The respondent No.1, *inter alia* claiming that it had paid/deposited tax on behalf of EKS, filed its claim before the Arbitral Tribunal seeking reimbursement of the same. The Arbitral Tribunal by its Impugned Award has held that the petitioner and EKS are liable to pay such amount to the respondent no.1.

8. At the outset, it may be noticed that EKS did not choose to appear before the Arbitral Tribunal and only transmitted its reply to the Statement of Claim and Counter Claim to the Arbitral Tribunal.

9. Counsel for the petitioner submits that the Impugned Award contains contradictory findings and is liable to be set aside on this ground. He submits that the Arbitral Tribunal, in para 73 of the Impugned Award, has held that the assessment of tax is within the exclusive domain of the Income Tax Authorities and beyond the jurisdiction of the Arbitral Tribunal, however, at the same time has gone ahead to hold that EKS was indeed liable to pay the tax.

10. I am unable to appreciate the above argument of the counsel for the petitioner. Though on one hand, the petitioner has contended that the question whether EKS was liable to pay tax is outside the jurisdiction of the Arbitral Tribunal, on the other hand, extensive arguments were advanced not only before the Arbitral Tribunal but also before me to contend that EKS was not liable to pay any tax in India. I find that even the Arbitral Tribunal was faced with similar arguments and, therefore, *perforce* had to go into the question whether EKS was liable to pay any tax in India or not. Having forced the Arbitral Tribunal to go into this question, the Award cannot now be challenged on the ground that the Arbitral Tribunal has gone beyond its jurisdiction in considering the said arguments and rendering its findings on the same in the Impugned Award. I may in this regard refer to para 85 of the Impugned Award, which is reproduced herein below:-

*“85. Though Respondent No. 2 contends that the instant dispute relating to Advance-tax is not arbitrable,*

*nevertheless by totally incongruous submissions based on facts as perceived by it, we are asked to rule that Respondent No. 2 was not liable to pay advance tax. Similarly Respondent No. 1 also contends that Respondent No. 2 had no liability to pay the Advance-tax for reasons advanced by it that we will presently advert to. Before we do that, we may point out that we have already held that the question relating to determination of Advance-tax by the OC CWG is not arbitrable. But nonetheless, we will deal with the contentions of the learned counsel relating to validity of determination of Advance-tax by the OC CWG on merits but we are doing it reluctantly and in doing so we may have to again refer to some of the contentions of the parties already dealt with and our observations with regard thereto."*

11. The next contention raised by the counsel for the petitioner is that the respondent No.1 should have deducted only 10% of the amount paid to EKS as tax deducted at source. For this purpose, he has drawn my attention to Section 195 of the Income Tax Act, which casts an obligation on the person responsible for making payment to a foreign company to deduct income tax thereon 'at the rates in force' at the time of credit of such income or at the time of payment thereof. Relying on Section 2 (37A) (iii) read with the Finance Act, 2009, he submits that as the payment was being made by the Central Government, the tax to be deducted by OC CWG was only 10% and not 42.23 % as was claimed by OC CWG.

12. I am unable to agree with the said submission of the counsel for the petitioner.

13. The agreement in question was not between the Government of India and EKS. The agreement was between OC CWG, which as noted above, was a society registered under the Societies Registration Act,

1860 and the consortium of the petitioner and EKS. Merely because, the agreement to host the Common Wealth Games i.e. the Host City Contract was executed between the Common Wealth Games Federation, Indian Olympic Association, Government of India and the Government of National Capital Territory of Delhi, the agreement between the OC CWG and the consortium of the petitioner and EKS would not become an agreement between the consortium of petitioner and EKS with the Government of India. The Arbitral Tribunal has also dealt with the above issue, and the findings are reproduced hereinbelow:-

*93. The assumption on the part of the learned counsel for Respondent No.1 that Clause 2(b)(vi)(D) of part II of the First Schedule to the Finance Act, 2009 applies and as such the tax, if at all payable by Respondent No. 2, was leviable @ 10%, is not well founded. Clause 2(b)(vi)(D) of part II of the First Schedule to the Finance Act, 2009 is not applicable. The OC CWG was a society registered under the Societies Registration Act and the technical fee was not being paid by the Government of India. There is nothing to show that the agreement between the OC CWG and the consortium was approved by the Central Government. The fact is that pursuant to an agreement between the Central government, the OC CWG was given a loan of Rs.4,31,40,00,000 by the Government of India for incurring expenditure on overlays for completion of venues for the Commonwealth Games 2010 and for training. The mere fact that loan was given by the Government of India to the OC CWG does not show that the consortium had executed the contract with the Government of India or with a person acting on behalf of the Government of India. The technical fee to the Respondents was not payable by the Government of India and was payable only by the OC CWG. This being so, the reliance of the learned counsel for Respondent No. 1 on part II, Clause 2(b)(vi)(D) of the Finance Act, 2009 is misplaced.*



94. *The payments of fee falls in the category of 'other income' under the mischief of section 2(b) (ix) of the Finance Act, 2009, which prescribe a tax rate of 40% on the income/fee. Besides, there is the liability to pay surcharge of 2.5% in addition to the aforesaid tax. In view of the aforesaid discussion we reject the contention that the Second Respondent was liable to pay tax at a rate of only 10%."*

14. I agree with the above quoted findings of the Arbitral Tribunal.

15. It is further contended by the counsel for the petitioner that EKS would not be liable to make payment of any tax because it did not have a 'permanent establishment' in India and, therefore, in terms of Article 5 of the India-Mauritius DTAA its profit was non-taxable in India.

16. The Arbitral Tribunal has elaborately discussed this issue and given its findings in para 87 of the Impugned Award, which is quoted hereinbelow:

*The next question raised by Respondents No. 1 and 2 that arises for our determination is whether the India-Mauritius DTAA permits the Indian tax authorities to tax the fee earned by Respondent No. 2 in India or is Respondent No.1 exempt from paying the tax. According to Article 7 of the India-Mauritius DTAA, the profits of an enterprise of the contracting state are taxable in that state unless the enterprise carries on business in the other contracting state through a 'permanent establishment' situated therein, in which case the profit of the enterprise derived therefrom is taxable in the other state. It is not in dispute that the work was executed in New Delhi and not in Mauritius. What is disputed is that Respondent No. 2 did not have a permanent establishment in India. 'Permanent establishment' has been defined by Article 5 of the India-Mauritius DTAA as a fixed place of business through which the business of the*

*enterprise is wholly or partly carried on, which includes, inter-alia, a place of management. Submission of Respondent No. 2 is to the effect that it was not provided any place/office space by the OC CWG. The argument is flawed. Clause 37 of the Agreement between the parties read with appendix D thereto makes provision for providing functional office space to the consultant and its personnel by the OC CWG failing which as per the Agreement, the lead partner was to arrange the facility at the expense of the OC CWG. Only the lead member has adduced evidence but there is nothing in its evidence to show that the obligation cast on the OC CWG under Clause 37 read with appendix D was not fulfilled. In case the OC CWG had failed to arrange the facility contemplated by Clause 37 of the Agreement read with appendix D, surely there would have been a counterclaim for the expense incurred for arranging the facilities. But no such monetary claim has been raised nor any allegation of violation of Clause 37 read with appendix D has been made by Respondent No. 1 nor has any evidence been led in this regard by it. Respondent No. 2 has raised the plea that no such facility was provided but it has not appeared in these proceedings and consequently did not produce any witness in support of the allegation. Therefore, there is no reason to hold that during the period the contract by and between the OC CWG and the consortium was in operation, the consultant/ consortium was not provided any facility of a permanent establishment in India for its operation in connection with the business of execution of the said agreement. The words 'permanent establishment' do not imply an establishment for all times to come. It would suffice if an enterprise is established in a particular location for working out a contract. The interpretation placed by the Respondents on the meaning of the words 'permanent establishment' would allow a foreign entity executing a contract in India to evade tax even when it makes a huge profit out of the same. Such an interpretation cannot be sustained. Since the stand is that Respondent No. 2 was not liable to pay tax in India, in that event, according to the*

*interpretation of the Respondents, the fee received by Respondent No. 2 from the OC CWG in India was taxable in Mauritius. It is not claimed that tax on the said income was paid in Mauritius nor any evidence has been placed on record to show that Respondent No. 2 paid the tax in Mauritius instead of India on the income accrued to it in India through the execution of the contract in question. In case tax was paid in Mauritius surely proof of the same would have been placed on record. India-Mauritius DTAA cannot be read as granting a tax holiday to Respondent No.2 or exempting it from paying the tax. No other provision has been brought to our notice that grants exemption to Respondent no.2 from payment of Income-tax on the income accrued to it in India from its aforesaid business.*

17. The Arbitral Tribunal has, therefore, discussed the provisions of the agreement in detail to arrive at a finding that there is no reason to hold that during the period of the contract, the consultant/consortium was not provided any facility of a 'permanent establishment' in India for its operation in connection with the business of execution of the said agreement. It could not be shown by the counsel for the petitioner as to how this finding of the Arbitral Tribunal is incorrect, leave alone perverse in any manner.

18. It was further contended by the counsel for the petitioner that the OC CWG had deposited the tax on behalf of EKS on its own accord without there being a demand for the same from the Income Tax authorities, leave alone any assessment being made by the Income Tax authorities in this regard. It is contended that the OC CWG, having paid the said amount on its own accord, cannot claim the same from the petitioner or EKS, as in this manner the petitioner and EKS/respondent



no.2 have been precluded from challenging any such demand being raised by the Income Tax authorities against them.

19. I am unable to appreciate the arguments raised by the counsel for the petitioner. The Arbitral Tribunal, after an extensive study of the provisions of the Income Tax Act, has given a finding that the determination and deduction of Advance Tax at Source was not only an obligation of the OC CWG but also a statutory power conferred on it as an employer/payer. Section 195 of the Income Tax Act, casts an obligation on the person making any payment to a foreign company to deduct tax at the time of making payment. Such deduction is to be made without waiting for any notice being received from the Income Tax Authorities in this regard or for an assessment to be made by the Income Tax Authorities of the liability. The Arbitral Tribunal, has further held that non-deduction of such tax would have made the OC CWG liable towards demand of interest and penalty from the Income Tax Authorities and, therefore, OC CWG was within its rights to have made the deposit of the tax without waiting for the demand being raised upon it for the same and definitely, without waiting for the assessment order in this regard.

20. The above finding of the Arbitral Tribunal cannot be faulted. In view of the same, I find no merit in the said objection of the petitioner. In case, the petitioner or EKS are of the opinion that EKS is not liable to pay any tax in India, it can always seek refund of the tax deposited from the Income Tax Authorities, in accordance with law. However, for that reason alone, OC CWG could not have not deposited the Advance Tax as mandated in Section 195 of the Income Tax Act.

21. It is further contended by the counsel for the petitioner that the payment of tax and consequently, the reimbursement of the same to the OC CWG, was a liability of EKS/respondent no.2 alone and the petitioner could not have been made liable for the same. In this regard, he draws my attention to clause 38 and 42, read with the Payment Schedule of the agreement to contend that the agreement itself showed that the payments were to be made to the petitioner separately from what was to be paid to EKS. He further draws my attention to the notice dated 19<sup>th</sup> September, 2011 issued by the OC CWG only to EKS, demanding the amount for the Income Tax liability as also the notice invoking arbitration issued to the petitioner by the OC CWG, where no such demand had been raised by the OC CWG against the petitioner. He contends that throughout OC CWG was aware that the petitioner is not liable to reimburse OC CWG against the amount deposited by it with the Income Tax Authorities on account of EKS and it is only with the filing of the Statement of Claim, as an afterthought, this demand was raised even against the petitioner. He further submits that in terms of Clause 9 of the agreement, the liability to pay tax was on EKS alone.

22. The Arbitral Tribunal has considered the above submissions of the petitioner and has given cogent and valid reasons for rejecting the same. As far as reliance on Clauses 38, 42 and the Payment Schedule is concerned, the Arbitral Tribunal, relying upon Clause 7 of the agreement has held that there was a joint and severe liability of the petitioner and EKS to discharge the tax liability. EKS having failed to discharge the same, the petitioner was equally responsible for making good the said liability. In this regard, I may quote from the Award itself as under:-

*“37. We have considered the contention of Respondent No. 2. Respondent No.2 has overlooked the fact that Respondent No. 1 as per the Special Conditions of the Contract was the lead partner of the Consortium and the notice invoking clause 46 was served on the said Respondent. In this regard it will be advantageous to refer to Clause 7 of the General Conditions of the Contract (GCC) between the parties:*

*“7. Authority of Lead Partner*

*In case the Consultant consists of a joint venture/ consortium association of more than one entity, the Members hereby authorize the entity specifies (Lead Consultant) in the SC to act on their behalf in exercising all the Consultant's rights and obligations towards the Employer under this Contract, including without limitation the receiving of instructions and payments from the Employer. However, each member or constituent of Consortium of consultant shall be jointly and severally liable for all obligations of the Consultant under Contract.”*

*Thus, according to clause 7 of the GCC, the lead partner nominated in the Special Conditions of Contract was conferred with power to act on behalf of both the members (E&Y and EKS) of the consortium and exercise all consultant's rights and obligations towards the employer under the contract, including without limitation the receiving of instruction and payments from the employer. As a result of the assignment by EKS, Switzerland to EKS, Mauritius the latter stepped into the shoes of the former Clause 2 of the Special Conditions of Contract with reference to Clause 7 of GCC has specified E&Y as lead member of the consortium. Therefore, clause 7 of the GCC binds Respondent No. 2, by virtue of which the lead member, E&Y also represented Respondent No. 2 and the*

*notice to the lead consultant was also a notice to Respondent No.2.*

*The decision cited by Respondent No. 2 in the case of Pandit Daya Shankar Vs. Sheo Ram (1956) 26 AWR 120 is of no help as clause 7 is peculiar to the case in hand.*

*In view of Clause 7 of the GCC, the objection of Respondent No. 2 that it was not served with the letter dated November 20, 2012 is untenable and is hereby rejected. The commencement of arbitral proceedings cannot be faulted."*

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*"75. In order to consider whether the dispute is arbitrable or not, we need to refer to clauses 7 and 9 of the GCC. We will also side by side take up the submission of Respondent No.1, advanced by Mr. Thakur, that it cannot be held liable to discharge the tax liability, if any, of Respondent No.2.*

*76. Clause 9 of the GCC deals with taxes and duties. It provides that the consultant shall be liable to pay such direct and indirect taxes, duties, fees and other impositions levied under the laws of India. The said clause imposes an obligation on the consultant to pay the taxes under the contract. The term "consultant" has been defined by clause 1(b) of the GCC. According to the said clause, consultant means:*

*"Any private or public entity that will provide the services to the employer under the contract. In this instance Ernst & Young Pvt. Ltd. and Event Knowledge Service referred to collectively".*

*77. Since E&Y and EKS joined together to provide the services to the OC CWG, they have been collectively referred to as the 'Consultant', of which E&Y has been declared as the lead consultant under special conditions of contract. Taking note of the meaning of the word 'consultant' as defined in Clause 1(b) of the GCC, there is no doubt that*

*under Clause 9 of the GCC both E&Y and EKS had contractually undertaken/agreed to pay taxes levied upon them. Advance-tax as determined by the OC CWG has been levied on Respondent No. 2 under Section 195(1) of Act, which is a law of this country. The tax so levied has been agreed to be paid. But Respondent No.2 denies its liability to pay under the said clause. Obviously, the aforesaid dispute has arisen between the parties in relation to or in connection with the terms of the contract. Clause 7 of the GCC, inter-alia, declares that "each member or constituent of the consortium of consultant shall be jointly and severally liable for all obligations of the consultant under the contract". The words 'all obligations' occurring in Clause 7 are of a wide amplitude. These words envisage each and every obligation cast upon the consultant under the contract. This includes an obligation to pay taxes, which is not only an obligation under the Act but in the instant case is also a contractual obligation under Clause 9 of the GCC. Therefore, Clause 9 read with Clause 7 thereof makes each member of the consortium jointly and severally liable for the taxes. In none of the cases cited by Respondent No.2 there were any terms of the agreement like Clauses 7 and 9 of the instant contract. The cases cited by Respondent No. 2 turned on their own peculiarities. Since the Advance-tax is determined by the payer under Section 195(1) and not challenged by the payee, the implication is that it is due for payment and there is no ostensible reason why a claim for the same cannot be entertained in arbitration proceedings initiated by the payer as it is his obligation and duty to deposit the Advance-tax due from the payee.*

*78. Mr.Thakur, learned counsel for the Respondent No.1, relied upon the decision of the Supreme Court in the case of Income tax Officer, Agra vs. Radha Krishan, AIR 1968 SC 46.In that case the tax liability attributable to the share of one partner of a dissolved firm, which he was not able to satisfy, was sought to be recovered from his erstwhile partner. Having regard to Sections 44 of the Act, it was held that joint and several liability of partners of the firm arises*



*where income of a dissolved firm is to be taxed but there is nothing in the aforesaid Section which creates joint and several liability of partners towards the tax assessed against share of a partner of a registered firm under Section 23(5)(a). Learned counsel for Respondent No. 1 laid emphasis on the following observations:*

*Counsel for the Income-tax Officer says that this is so because the liability of the partners of a firm in respect of all its obligations including the liability to pay tax is joint and several. Undoubtedly, contractual obligations of a firm are enforceable jointly and severally against the partners. But the liability to pay income-tax is statutory: it does not arise out of any contract, and its incidence must be determined by the statute. If the statute which imposes liability has not made it enforceable jointly and severally against the partners, no such implication can arise merely because contractual liabilities of a firm may be jointly and severally enforced against the partners."*

*79. It needs to be noted that the aforesaid observations were made while rejecting the argument that by implication Section 44 of the IT Act, which makes the partners of a firm jointly and severally liable to pay tax assessed against the dissolved firm, must be read to imply that it makes each partner jointly and severally liable to pay tax assessed against a partner of the firm. In the instant case, with a view to ensure that taxes are paid, the Respondents, under Clause 9 read with Clause 7 of the GCC, imposed an obligation on themselves and undertook to pay taxes and held out and clarified that each member of the consortium of consultant shall be jointly and severally liable for all obligations of the consultant (E&Y and EKS) under the contract towards the employer (OC CWG). There is no scope to argue that Clause 7 does not apply to responsibility of members towards payment of taxes. Clause 7 covers the obligations to*

*pay taxes as envisaged under Clause 9. Such like clauses, their implication, impact and relevance vis-a-vis the taxing statute were not the subject matter for the consideration of the Supreme Court in the case of Income tax Officer, Agra vs Radha Krishan(supra) and the other decisions cited by Respondent No. 2 in support of its argument.*

*80. We may observe that where a party under the contract agrees or undertakes to discharge the tax liability of another party, he is bound to do so as there is nothing illegal, about it. A conjoint reading of Clauses 7 and 9 reflect that the parties had agreed that they shall be jointly and severally liable to discharge the tax liability of a defaulting member. The mere fact that under Clause 42 of the GCC, each member is required to submit separate invoices for payment of their respective dues to it and under Clause 41 thereof separate payments are made to them, do not dilute the joint tax liability or nullify Clauses 7 and 9 of the GCC.”*

*(emphasis supplied)*

23. I do not find the above findings of the Arbitral Tribunal to be incorrect or open to challenge in any form. In any case, interpretation of the terms of contract is within the domain of the Arbitral Tribunal and in the case of the exercise of power under Section 34 of the Act, this Court cannot set aside the award only on the ground that another interpretation to the contract may be possible.

24. In **Associate Builders v. DDA** (2015) 3 SCC 49, Supreme Court, after analyzing the provisions of Section 34 of the Act, has held as under:-

*“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master*

*of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [ Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:*

*“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.*

*It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)*

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

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.

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42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

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42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

**“28. Rules applicable to substance of dispute. (1)-(2)**

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)

“112. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of



law. [See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission*, (2003) 8 SCC 593; 2003 Supp (4) SCR 561 and *D.D.Sharma v. Union of India.*] (2004) 5 SCC 325.

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the fact of the award.”

**44.** In *MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, (2011)10 SCC 573; 2012 3 SCC (Civ) 818, the Court held : (SCC pp. 581-82, para 17)

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See *Gobardhan Das v. Lachhmi Ram*, AIR 1954 SC 689, *Thawardas Pherumal v. Union of India*, AIR 1955 SC 468, *Union of India v. Kishorilal Gupta & Bros.*, AIR 1959 SC 1362, *Alopi Parshad & Sons Ltd. v. Union of India*, AIR 1960 SC 588, *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji*, AIR 1965 SC 214 and *Renusagar Power Co. Ltd. v. General Electric Co.* (1984) 4 SCC 679; AIR 1985 SC 1156)”

**45.** In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 306, the Court held: (SCC pp. 320-21, paras 43-45)

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of



*contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.*

*44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63: (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296: (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.*

*45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)*

*43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwaliti Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”*

**25. In *Sutlej Construction Limited v. Union Territory of Chandigarh* (2018) 1 SCC 718, the Supreme Court reiterated that:-**

*“11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the Court and would not include what the Court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be “justice”. (Associate Builders v. DDA), (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204.*

*12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of reappreciating the evidence as the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. (Sudarsan Trading Co. v. State of Kerala, (1989) 2 SCC 38: (1989) 1 SCR 665; Harish Chandra & Co. v. State of U.P., (2016) 9 SCC 478: (2016) 4 SCC (Civ) 526: AIR 2016 SC 4257 and Swan Gold Mining Ltd. v. Hindustan Copper Ltd. (2015) 5 SCC 739: (2015) 3 SCC (Civ) 27: (2014) 4 Arb LR 1)”*

26. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with no order as to costs.

**NAVIN CHAWLA, J**

**MARCH 20, 2018**

**RN**