

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

+ **OMP (COMM) 152/2016**

Reserved on: 23th February, 2018

Date of decision : 23rd April, 2018

PEL INDUSTRIES LTD. & ORS. Petitioners
Through Mr.Vivek R. Mohanty and
Ms.Priyadarshini Pattanaik, Advs.
versus

S.E. INVESTMENT LTD. Respondent
Through Mr.P.Nagesh and Mr.Dhruv
Gupta, Advs.

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') challenges the Arbitral Award dated 10.09.2014 passed by the Sole Arbitrator in the arbitration proceedings between the parties.
2. The petitioner no. 1 had availed a loan facility of Rs. 1.50 crores from the respondent for business purpose. The loan was repayable in 24 months and the schedule of such payment was mentioned in Schedule A to the Loan Agreement dated 18.06.2011 executed between the parties.
3. Admittedly, petitioner no. 1 had defaulted in the payment of the monthly installments and certain cheques issued by the petitioner nos. 2 to 5 had also been returned unpaid by the banks, pursuant to which the respondent had initiated proceedings under Section 138 of the Negotiable Instruments Act against the petitioners. The respondent also invoked the

Arbitration Agreement contained in Clause 19 of the Loan Agreement and appointed a Sole Arbitrator.

4. The Arbitration proceedings have resulted in the Impugned Award by which the Sole Arbitrator has granted the following relief in favour of the respondent and against the petitioner:-

“In view of the above conclusions, the claim of claimant is allowed for a sum of Rs. 2,52,42,655/- (Rupees Two crores fifty two lacs forty two thousand six hundred and fifty five only) due as on 02.12.2013 with pendente lite interest of Rs. 1,41,86,372/- (Rupees One crore forty one lacs eighty six thousand three hundred seventy two only), as held in Issue no. (ii) above for the period of 03.12.2013 till 10.09.2014 making total of Rs.3,94,29,027/- (Rupees Three crores ninety four lacs twenty nine thousand twenty seven only). Thus, this Tribunal holds that the Respondent Nos. 1, 2, 3 and 4 are jointly and severally liable to pay to the Claimant amount of Rs. Rs.3,94,29,027/- (Rupees Three crores ninety four lacs twenty nine thousand twenty seven only) along with future interest @ 18% per annum compounded monthly from date of award till the payment of award money. The claimant is entitled to proceed against joint and several liability of Mr. Jayesh Harakchand Shah, who is arrayed as Respondent no. 5 in the statement of claim but is excluded from Arbitration proceedings on technical grounds mentioned in the previous paragraph hereinabove, in the manner the Claimant may deem expedient and feasible.

This Tribunal further holds that Claimant is entitled to cost of Arbitration proceedings which is fixed at Rs.1,50,000/- (One Lac Fifty Thousand Only) and shall be paid by the Respondents jointly and severally and shall be included in the amount reached in this award.”

5. The Impugned Award has been passed *ex parte* against the petitioners. The counsel for the petitioners submits that the petitioners had been wrongly proceeded *ex parte* by the Arbitrator. He submits that during the arbitration proceedings, as noted above, the respondent was also prosecuting proceedings under Section 138 of the Negotiable Instruments Act against the petitioners. The petitioners had been duly defending the same. The respondent had also filed an application under Section 9 of the Act before this court and the petitioners had appeared in the said proceedings as well. The counsel for the petitioners submits that the petitioners, therefore, had no reason not to appear before the Arbitrator in the arbitration proceedings and it was only because the petitioners were never made aware of the pendency of the same, that the petitioners could not appear before the Arbitrator. He further submits that it was only on 13.01.2015 that the counsel for the respondent, during the course of hearing of the application under Section 9 of the Act, informed the Court of the passing of the Impugned Award due to which the petitioners gained knowledge of the arbitration proceedings.

6. On the other hand, the counsel for the respondent draws my attention to the notice dated 03.12.2013 by which the respondent had invoked arbitration. He further draws my attention to the tracking report of this notice downloaded from the website of the Indian Postal Department, which shows that this notice had been duly served on petitioner nos. 2, 3 and 5. He further draws my attention to the order dated 24.12.2013 passed by the Arbitrator wherein he records that the notices sent by the Tribunal have been duly served on petitioner nos. 2 to 5 whereas, notices sent to petitioner no. 1 had been delivered back un-

served. Arbitrator's order dated 10.01.2014 records that the record of proceedings sent to the petitioner nos. 1 and 4 had been returned back undelivered whereas, the same had been duly delivered to petitioner nos. 2, 3 and 5. The record of proceedings on 21.01.2014 before the Arbitrator, records that the earlier order sent to petitioner nos. 1 (who should be petitioner no. 2), 3 and 5 had been returned back un-served with the remark "refused", while for petitioner nos. 1 and 4 they have been returned back with the remark "addressee moved". The Arbitrator had thereafter, directed issuance of *dasti* notices for petitioner nos. 1 and 4. The counsel for the respondent further draws my attention to the affidavit of service filed by the respondent before the Sole Arbitrator indicating that petitioner nos. 1 and 4 had refused to accept *dasti* service of the notice, whereafter in the hearing held on 05.02.2014, the Arbitrator had directed that petitioner nos. 1 and 4 to be served through publication. He further submits that the petitioners had been duly served through publication.

7. I have considered the submissions made by the counsel for the parties. The address given by the petitioners in the present petition is the same where attempts at service were made by the respondent and by the Arbitrator during the course of the arbitration proceedings. Apart from contending that there can be no reason for the petitioners not to appear in the arbitration proceedings when they were appearing in the proceedings under Section 138 of the Negotiable Instruments Act and under Section 9 of the Act in this Court, the petitioners have been unable to challenge the service of notice as recorded in the proceeding before the Arbitrator as mentioned herein above. It is also noted that petitioner nos. 2 to 5, even

as per the memo of parties filed in the present proceedings, are not only the members of the same family, but reside at the same address.

8. Section 3 of the Act provides for the mode of service of the written communication in the Act. The same is reproduced herein below:-

“3. Receipt of written communications. –

(1) Unless otherwise agreed by the parties, -

(a) Any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and

(b) If none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

(2) The communication is deemed to have been received on the day it is so delivered.

(3) This section does not apply to written communications in respect of proceedings of any judicial authority.”

9. In ***Shabnam Gulati v. M/s Religare Finvest Pvt. Ltd.*** 2017 SCC OnLine DEL 11656, this Court had explained the effect of Section 3 of the Act as under:-

“18. Section 3(1) of the Arbitration and Conciliation Act, specifically states that a written communication is deemed to have been received, if it is sent to the addressee’s last known place of business, habitual address or mailing address by registered letter or by any other means which provides a record of “attempt to deliver it”. Therefore, unlike Sub-Rule 5 of Rule 9 of Order V of CPC requiring proof of acknowledgment or any other receipt of due delivery of the summons, or drawing of a presumption of due service only where the summons were properly addressed but the acknowledgement was lost or misled or for any other reason was

not received by the Court, under the Arbitration and Conciliation Act sending of notice by registered letter or by other means at last known place of business, habitual residence or mailing address which provides the record of “attempt to deliver it” is sufficient to draw a presumption of service. In fact the sub-section holds that it is deemed service.

19. It is also important to note here that Section 19(2) of the Arbitration and Conciliation Act, specifically provides that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. Arbitration and Conciliation Act is a special statute and would therefore have primacy in matters of procedure, including mode of service of notice issued by the Arbitrator. In view, thereof, Order V of CPC would not have direct application in matter of mode and/or manner of service. Moreover, it is obvious that the appellant was trying to avoid service and wanted to take advantage of slyness and pretence.”

10. As it is not denied that the address mentioned in the Statement of Claim before the Arbitrator and upon which notices had been sent to the petitioners is correct, the service of notices on the petitioners was duly proved before the Arbitrator, and as they failed to appear before the Arbitrator, they were rightly proceeded *ex parte* by the Arbitrator.

11. On the merits of the award, the learned counsel for the petitioners submits that the rate of interest mentioned in the Loan Agreement is highly exorbitant and in fact, is unclear with respect to its calculation. He further submits that the loan had been secured by the petitioners through a cash collateral deposit of Rs. 37,50,000/- on which the petitioners were earning an interest at the rate of only 9% per annum whereas, under the loan transaction they were liable to pay and the respondent was claiming interest at a flat rate of 10.75% per annum and this shows that the rate of interest charged by the respondent was usurious in character. He further

submitted that upon default in making payments under the Loan Agreement, the respondent has charged a penalty in the form of late fees at the rate of Rs. 2/- per thousand per day, which translates to around 74% per annum. He submits that the said rate of interest being in the form of a penalty, could not have been allowed to be charged by the Arbitrator in the Impugned Award. In this regard he has drawn my attention to the Circulars dated 28.09.2006, 07.05.2007 and 24.05.2007 issued by the Reserve Bank of India (RBI). He further draws my attention to the judgment of the Supreme Court in ***Central Bank of India v. Ravindra and Others***, (2002) 1 SCC 367, to contend that such circulars were binding on the petitioners. He further refers to the judgment of the Supreme Court in ***Punjab and Sind Bank v. Allied Beverage Company Private Limited and Others***, (2010) 10 SCC 640; ***Ashutosh v. State of Rajasthan and Others***, (2005) 7 SCC 308; ***Rajasthan State Road Transport Corpn. v. Indag Rubber Ltd.***, (2006) 7 SCC 700, to contend that the Supreme Court had reduced the rate of interest awarded by the Arbitrator, where it found that the same was burdensome to the debtor. He submits that in the present case, by way of the Impugned Award the Arbitrator had awarded future interest at the rate of 10% per annum compounded monthly and the same cannot be sustained.

12. On the other hand, the counsel for the respondent submits that the transaction between the parties was commercial in nature. The petitioners being in business, were fully aware of the rate of interest being charged by the respondent and its method of calculation. They were further aware of the consequences of the default in making payments in accordance

with the Loan Agreement. Relying on the judgments in *Syndicate Bank v. West Bengal Cements Ltd. and others* AIR 1984 Del 107; *State Of Haryana & Ors Vs. M/S S.L.Arora*, MANU/SC/0131/2010; and *Hyder Consulting (U.K.) Ltd. Vs. Governor, State of Orissa* (2014) SCC OnLine SC 490, he submitted that the Arbitrator cannot ignore the terms of the contract while awarding interest under Section 31(7) of the Act. In the present case, the Arbitrator has awarded interest strictly in terms of the Loan Agreement and therefore, the award cannot be challenged. Further, relying upon the judgment of this Court in *Deepak Bhatia v. Virender Singh* MANU/DE/2749/2015, he submitted that even the interest at the rate of 240% per annum had been found to be justified in the case of a loan transaction by this Court. He further relied upon the judgment of the Supreme Court in *Swan Gold Mining V. Hindustan Copper Ltd.* MANU/SC/0849/2014, to contend that the powers of this Court while exercising its jurisdiction under Section 34 of the Act is highly restricted and this Court cannot re-examine reasonableness of the reasons given by the Arbitrator.

13. I have considered the submissions made by the counsel for the parties. As noted above, the award passed by the Arbitrator was passed *ex parte*. Therefore, before the Arbitrator, there were no submissions made by the petitioners with respect to the method of calculation of interest or its reasonableness or to the effect that the Loan Agreement violates the Circulars issued by the RBI in any manner. In the absence of any such submissions being made before the Arbitrator, the petitioners cannot be allowed to challenge the Arbitral Award raising such grounds for the first

time in an application under Section 34 of the Act and the present petition is liable to be dismissed on this short ground itself.

14. In any case, as noted above, the petitioners had availed the loan for its business. Being a business entity, the petitioners were well aware of the method of calculating the interest. In fact, the monthly installments had been clearly spelled out in Schedule A of the Loan Agreement. The petitioners, therefore, cannot plead ignorance of the method of calculating interest or the effect thereof.

15. Equally, it would be beyond the jurisdiction of this Court to go in the reasonableness or otherwise of the rate of interest agreed upon between the parties for the loan transaction. The respondent being a Non Banking Financial Institution, is certainly bound by the Circulars issued by the RBI from time to time, however, the petitioners are unable to show any Circular prohibiting charging of interest as prescribed in the Loan Agreement.

16. In ***Central Bank of India (Supra)***, the Supreme Court, had upheld the power of the Creditor to charge interest from his Debtor on periodical rest and also capitalize the same so as to make it a part of the principal. The relevant findings of the Supreme Court are reproduced herein below:-

“36. The English decisions and the decisions of this Court and almost all the High Courts of the country have noticed and approved long-established banking practice of charging interest at reasonable rates on periodical rests and capitalising the same on remaining unpaid. Such a practice is prevalent and also recognized in non-banking moneylending transactions. The legislature has stepped in from time to time to relieve the debtors from hardship whenever it has found the practice of charging

compound interest and its capitalization to be oppressive and hence needing to be curbed. The practice is permissible, legal and judicially upheld excepting when superseded by legislation. There is nothing wrong in the parties voluntarily entering into transactions, evidenced by deed incorporating covenant or stipulation for payment of compound interest at reasonable rates, and authorizing the creditor to capitalize the interest on remaining unpaid so as to enable interest being charged at the agreed rate on the interest component of the capitalized sum for the succeeding period. Interest once capitalized, sheds its colour of being interest and becomes a part of principal so as to bind the debtor/borrower.

xxxxxx

49. We are, therefore, of the opinion that the two-Judge Bench decision of this Court in Corpn. Bank v. D.S. Gowda and the three-Judge Bench decision in Bank of Baroda v. Jagannath Pigment & Chemicals are correctly decided and are, therefore, affirmed. A creditor can charge interest from his debtor on periodical rests and also capitalize the same so as to make it a part of the principal. Such a course can be justified by stipulation in a contract voluntarily entered into between the parties or by a practice or usage well established in the world to which the parties belong. Such practice is to be found already in vogue in the field of banking business. Such contract or usage or practice can stand abrogated by legislation such as usury laws or debt relief laws and so on.”

17. The Supreme Court at the same time had issued a word of caution against allowing penal interest, service charges and other overheads being debited from the borrower's account without him being made aware of the same. However, this caution was for the borrowers “other than those belonging to the Corporate Sector”. In the present case the petitioners cannot be said to be people who would not understand the terms of the Loan Agreement, the component of the interest provided

therein and / or the consequences of a default being committed in the payment of the installments as stipulated in the agreement.

18. The fallacious nature of defence raised by the petitioners is further evident from the various orders passed by this Court in the present proceedings. The parties had been directed vide order dated 16.02.2016 to file their respective calculations with regard to the amount due under the Loan Agreement. By a subsequent order dated 19.10.2016, the petitioners were granted four weeks' time to file their reply to the calculations submitted by the respondent. The petitioners have not filed their calculations in spite of several opportunities being granted to them in this regard. The petitioners therefore, cannot be heard to complain about the calculations of the amount due from them to the respondent and the award of the same by the Arbitrator in the Impugned Award.

19. Reliance of the petitioners on the Circulars issued by the RBI is also ill-founded. RBI in its Circular dated 28.09.2006 had prescribed the broad guidelines of the fair practices that are to be formed and approved by the Boards of Directors of all Non-Banking Financial Companies (hereinafter referred to as the 'NBFCs'). One of the fair practices prescribed was that the NBFCs should convey in writing to the borrower, by means of a sanction letter or otherwise, the amount of the loan sanctioned alongwith the terms and conditions, including the annualised rate of interest and the method of application thereof. As noted above, the Loan Agreement complies with the above condition as it clearly spells out the amount of loan, the rate of interest, the period of loan facility and even the monthly installment due and payable by the petitioners to the respondent. In Clause 7 of the Loan Agreement the consequence of the

default in the form of late fee is also clearly spelled out. The counsel for the petitioners could not show how any of the terms of the Circular dated 28.09.2006 remained uncomplied with by the respondent in the present case.

20. Circular dated 24.05.2007 advised the NBFCs to lay out appropriate internal principles and procedures in determining the interest rate and other processing charges. In fact, the said circular clearly records that the interest rates are not regulated by the RBI. In any case, as noted above, the petitioners being business entity and men of business and having accepted the interest as prescribed in the Loan Agreement, cannot be allowed to assail the same after having committed default in repayment of the loan amount. Therefore, I do not find any breach of the Circular dated 24.05.2007 on part of the respondents as having been proved by the petitioners.

21. Circular dated 07.05.2007 relied upon by the petitioners is in fact, issued to the commercial banks and not to the NBFCs. The said circular in any case, can be of no reliance in the facts of the present case, as it does not prohibit charging of interest or the late fee charges at the rate as mentioned in the Loan Agreement.

22. As far as the reliance of the petitioners on the judgment of the Supreme Court in *Punjab and Sind Bank (Supra)*; *Rajasthan State Road Transport Corpn (Supra)* and *Ashutosh (Supra)* is concerned, it may be noted that the Supreme Court had reduced the rate of interest post the award on the peculiar facts of those cases. In the present case, in my opinion, no interference is called for in the rate of interest awarded by the Arbitrator in favour of the respondent and against the petitioners.

23. Section 31(7) of the Act prior to its amendment, is reproduced herein under:-

“31. Form and contents of arbitral award:-

xxxxxx

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of award to the date of payment.”

24. Section 31(7) therefore, empowers the Arbitral Tribunal to award interest from the date of accrual of the cause of action and pendente lite in accordance with the agreement between the parties. In the present case it cannot be said that the interest awarded by the Arbitrator is not in terms of the agreement between the parties.

25. In ***Hyder Consulting (U.K.) Ltd. vs. Governor, State of Orissa*** (2015) 2 SCC 189, the Supreme Court, had stated the object of Section 31(7) of the Act as under:-

“8. Thus, sub-section (7) of Section 31 of the Act provides, firstly, vide clause (a) that the Arbitral Tribunal may include interest while making an award for payment of money in the sum for which the award is made and further, vide clause (b) that the sum so directed to be made by the award shall carry interest at a certain rate for the post-award period.

xxxxxx

26. Section 31(7)(a) of the Act deals with grant of pre-award interest while clause (b) of Section 31(7) of the Act deals with grant of post-award interest. Pre-award interest is to ensure that arbitral proceedings are concluded without unnecessary delay. Longer the proceedings, the longer would be the period attracting interest. Similarly, post-award interest is to ensure speedy payment in compliance with the award. Pre-award interest is at the discretion of the Arbitral Tribunal, while the post-award interest on the awarded sum is mandate of the statute-the only difference being that of rate of interest to be awarded by the Arbitral Tribunal. In other words, if the Arbitral Tribunal has awarded post-award interest payable from the date of award to the date of payment at a particular rate in its discretion then it will prevail else the party will be entitled to claim post-award interest on the awarded sum at the statutory rate specified in clause (b) of Section 31(7) of the Act i.e. 18%. Thus, there is a clear distinction in time period and the intended purpose of grant of interest.”

26. In **Hyder Consulting (UK) Limited v. State of Orissa**, (2016) 6 SCC 362, the Supreme Court, had allowed the appeal and set aside the directions of the High Court reducing the interest awarded by the Arbitrator from 16% with quarterly rest from the date of the cause of action till the date of the award and thereafter at the rate of 18% with quarterly rest from the date of the award till its final payment, to 15% from the date of the cause of action till the date of the award and 18% from date of the award till the final payment. The Supreme Court held that, as the rate of interest granted by the Arbitrator was in consonance with **M/s Hyder (Supra)**, there was no justification on the part of the High Court hearing the appeal to have modified the interest component applying equitable principle.

27. In **Syndicate Bank** (Supra), this Court had held that the grant of interest at the rate lesser than the contractual rate as a matter of rule, will

amount to giving premium to those who trade upon the money of others; the defaulting borrowers cannot be given the benefit by reducing the rate of interest. The Court also took into account the conduct of the defendants therein to hold that there was no exceptional or special circumstance justifying reduction of the rate of interest in that case.

28. In the present case as well, I find no exceptional or special circumstance warranting any reduction in the rate of interest awarded by the Arbitrator. After filing of the present petition, repeated opportunities were granted to the parties to arrive at an amicable settlement. In fact, even during the course of the final hearing of the petition, at the request of the counsel for the petitioners, the hearing was deferred so as to give another opportunity to the petitioners to arrive at a settlement. In spite of such opportunity being granted, the petitioners did not give any viable offer to the respondent to settle the matter, clearly showing their intent not to make payments of the awarded amount or part thereof to the respondent, but to take advantage of the law which had prescribed for an automatic stay on the enforcement of the Arbitral Award during the pendency of the petition under Section 34 of the Act. The petitioners, therefore, cannot claim any equity in the form of reduction of the rate of interest in their favour.

29. In *Deepak Bhatia v. Virender Singh*, MANU/DE/2749/2015, this Court had upheld charging of interest at the rate of 20% per month, observing that where there is extreme/urgent need of money and loan is taken for a short period, it is not unknown in the mercantile world that higher rate of interest is charged.

30. The reliance of the petitioners on interest being earned only at 9% per annum on the cash collateral deposit, in order to claim reduction of the contractually agreed rate, is also ill-founded. The said collateral was to be adjusted against monthly installments. The parties were aware of the interest that such collateral security would earn, however, still agreed to the contractual rate of interest. The contract cannot, therefore, be re-written on the ground that the cash collateral security is earning a lesser rate of interest.

31. As far as post award interest is concerned, keeping in view the contractual rate of interest and late fee charges payable under the contract, interest at the rate of 18% per annum compounded monthly cannot be held to be unreasonable. As noted above, in **Hyder Consulting (Supra)**, the Supreme Court had upheld an arbitral award awarding post-award interest at the rate of 16% with quarterly rest.

32. In any case, in **Associate Builders v. DDA**, (2015) 3 SCC 49, the Supreme Court had cautioned the Court exercising the powers under Section 34 of the Act in the following words:-

“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.

xxxxxx

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

xxxxxx

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.

xxxxxx

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.”

33. The Supreme Court had set aside the order passed by the High Court in *Associate Builders (Supra)* and held that:-

“56.....Also, it is extremely curious that the Division Bench found that an adjustment would have to be made with claims awarded under Claims 2, 3 and 4 which are entirely separate and independent claims and have nothing to do with Claims 12 and 13. The formula then applied by the Division Bench was that it would itself do “rough and ready justice”. We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression “justice” when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the arbitrator’s view and does what it considers to be “justice”. With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact.”

34. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with cost quantified at Rs. 25,000/-.

NAVIN CHAWLA, J

APRIL 23, 2018

rv