

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 17.09.2018
Date of Decision : 21.12.2018

+ O.M.P. (COMM) 258/2016
PIPAVAV ENERGY PVT LTD Petitioner
Through: Mr. Shamik Sanjanwala and Mr.
Sunil Kumar Kaundal, Advocates.

versus

MADHAVI PROCON PVT LTD Respondent
Through: Mr.A.K.Verma, Sr.Adv. with
Mr.A.K.Sharma, Mr.Ashish Joshi,
Mr.Akashdeep, Adv.

O.M.P. (COMM) 47/2017 & IAs 1614, 1616/2017
MADHAVI PROCON PVT LTD Petitioner
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CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions have been filed by the parties to the arbitration proceedings challenging the Arbitral Award dated 10.01.2015 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Letter of Award dated 03.05.2010 placed by Pipavav Energy Pvt. Ltd. (hereinafter referred to as the “petitioner”) on Madhavi Procon Pvt. Ltd. (hereinafter referred to as the “respondent”) for work of Enabling Works for the petitioner’s Thermal Power Project at Pipavav, Gujarat. While the petitioner is aggrieved of the amount of

Rs.7,57,17,173/- awarded in favour of the respondent towards loss of anticipated profits, and the direction of the Arbitrator to release and give back to the respondent the Bank Guarantees submitted by it under the Claim no. 7, the respondent has challenged the Arbitral Award insofar as it rejects respondent's Claim no. 3 (cost of bidding), Claim no. 4 (cost of mobilization), Claim no. 5 (Idle charges), Claim no. 6 (overhead expenses) and allows Counter Claim of Rs.30,39,189/- in favour of the petitioner.

2. The petitioner vide its advertisement dated 19.03.2010 had invited bids for Site Enabling Work for Thermal Power Project at Pipavav, Gujarat. The respondent participated in the said bid and a Letter of Award was issued in its favor by the petitioner on 03.05.2010. The respondent submitted a Bank Guarantee in favour of the petitioner in terms of the Notice Inviting Bids. The respondent also carried out certain works in terms of the Letter of Award.

3. By a letter dated 17.06.2010, the petitioner called upon the respondent to hold all activities on the work except Ch.0.00 to Ch. 2400 on approach road. The petitioner, vide its e-mail dated 22.06.2010 reiterated the factum of stoppage of work.

4. The petitioner thereafter released mobilization advance of Rs.5,37,59,742/- in favour of the respondent. The respondent in turn raised the Running Bill nos. 1 and 2 for the work done by them.

5. The petitioner finally by its letter dated 24.11.2011, relying upon Article 29.1 of the Conditions of Contract, terminated the Contract with

immediate effect and called upon the respondent to refund a sum of Rs.5,14,04,076/- to the petitioner.

6. The relevant extract from the letter is as under:

“We write to inform you that in terms of Article 29.1 of Part-III of Volume-1 of the Bid Tender Documents, we hereby terminate the contract with immediate effect. This communication may please be treated as the cancellation of the LOA /termination of the contract referred above. You are requested to please refund us a sum of Rs.5,14,04,076/- (Rs. Five crores fourteen lakhs four thousand seventy six Only) within seven days from the date of receipt of this letter and treat the said contract as closed. Non-receipt of the excess monies paid by us shall compel us to en-cash the Bank Guarantee.”

7. In response to the above letter, the respondent vide its letter dated 30.11.2011, while protesting the grant of only 7 days for return of mobilization advance, further submitted that a notice of termination should have been issued by the petitioner to the respondent under Clause 29.1.1 of the Agreement and upon payment of amounts in terms of Clause 29.1.3 (a) and (b) of the Agreement. The relevant extract from the letter is as under:

“For the Subject cited above, we are In receipt of your above cited letter by E-mail & by Speed Post on 29.11.2011. We are surprised by the manner which the Termination of contract was conveyed by you. We also feel regret the wording used & merely 7 days timing given to us for return of Mobilization advance. However it is to bring your kind notice that the way and the action taken by you for termination of the contract is against the contractual provisions and against the trade practice.

As per GCC cl.29.1.1, the notice of termination should have been issued to us. Without issuing notice, you have straightway terminated contract. Termination of contract as per owner's Convenience, without issuing notice under cl 29.1. 1 and without making contractors payment in accordance to GCC (Part III of Contract document) cl.29.1.3 (a) & (b) is Arbitrary, against contractual provisions and against trade practice.

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However on receipt of your letter, we have started reconciliation of accounts, finalization of measurements and bills. We are also in process of evaluating our losses due to premature closing of contract agreement. Therefore the 7 days time given by you shall not be sufficient for reconciliation and settlement of dues mutually.

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We shall submit the reconciliation of the dues/Money to you latest by 31st December 2011. It is therefore requested to extend your co operation for reconciliation of accounts as per the provision of contract and not to take any unjustified action for encashment of Bank Guarantee. Kindly do not take any action for encashment of B.G. and please refrain us for taking legal shelter for avoiding irrecoverable injury to us.”

8. The petitioner, however, invoked and encashed the Bank Guarantee submitted by the respondent towards the mobilization advance on 15.05.2012.

9. The disputes between the parties were thereafter referred to arbitration and have resulted in the Impugned Award.

10. The Arbitrator in the Impugned Award has held that it was the obligation of the petitioner to acquire and provide lawful and physical possession of the site to the respondent for proper execution of the work. The Arbitrator further held that not only was the respondent ready and

willing to perform its obligations under the contract but also that it was the petitioner who had failed to fulfil its obligations under the Contract. On the legality of the termination of the Agreement, the Arbitrator held as under:

“On the facts and in the circumstances of the case, I am of the opinion that the grievance raised by the claimant is well founded and it is entitled to certain reliefs from the Tribunal. I have already recorded a finding that in accordance with the terms and conditions of the contract, it was the obligation of the Owner (PEPL) to acquire land and to make the site available to the claimant. The Owner, however, failed to do so. The respondent had also asserted that it had acquired about 600 acres of land for the project in question. On that basis, bids were invited, tenders were issued and the offer of the claimant was accepted. I have held that the respondent failed to acquire land and in making the site available to the claimant. In the Written Statement also, the respondent has stated that since the State Government failed to fulfill its promise and did not acquire land, the respondent had no alternative but to terminate the contract. Thus, the respondent has terminated the contract on the ground that the State had failed to fulfill its promise.

I have already considered this aspect and held that nowhere the Agreement in question provided for acquisition of land by the State Government and it was the liability of the Owner PEPL to acquire land and to make the site available to the Contractor - MPPL. The respondent, however, failed to perform its obligation.

The Written Statement also sought to justify the action of the respondent of termination of the contract on the ground of "force majeure" i.e. failure of Government of Gujarat to allot land to the respondent.

I have considered that plea as well and have held that the respondent could not have invoked "force majeure" Clause in the light of contractual provisions of the Agreement.

If it is so, obviously, the impugned action of termination of Agreement by the respondent cannot be held legal, lawful or justified. The learned counsel for the claimant is right in submitting that to allow the respondent to terminate the Contract after recording a finding that it failed to perform its obligations under the contract to acquire land and make the site available to the contractor though the claimant was ready and willing to perform its part of the contract would amount to allowing the defaulting party (respondent) to take undue advantage of its own wrong. No Court or Tribunal would approve such a conduct on the part of the defaulting party."

11. The learned counsel for the petitioner, relying upon Clause 29.1.1 of the Contract, submits that as the termination was for owner's convenience, the question of breach of the Contract was immaterial. The Agreement empowered the petitioner to terminate the Contract "for any reason" and the consequence of such termination was provided in Clause 29.1.2 and 29.1.3 of the Agreement. He submits that though the petitioner had placed reliance on Clause 29.1 of the Agreement, the Arbitrator has not considered the same while holding the termination of the Agreement by the petitioner as unlawful. Placing reliance on the Judgments of the Supreme Court in ***Indian Oil Corporation Ltd. v. Amritsar Gas Service and Ors.***, (1991) 1 SCC 533 and ***Her Highness Maharani Shanti Devi P.Gaikwad v. Savjibhai Haribhai Patel and Ors.***, (2001) 5 SCC 101, and of the Delhi High Court in ***M/s Classic***

Motors Ltd. v. Maruti Udyog Ltd., 1997 (40) DRJ 462 as also of the Queen's Bench Division in *Comau UK Ltd. v. Lotus Lightweight Structures Ltd.*, [2014] EWHC 2122 (Comm), he submits that the power of terminating a contract for convenience is not only recognized but valid in law. In such exercise of power, the question of justifying the reason thereof is not required and cannot be gone into by any Court or the Arbitrator.

12. On the other hand, the learned senior counsel for the respondent, relying upon the Judgment of the Court of Appeal in *Socimer International Bank Ltd. (in liquidation) v. Standard Bank London Ltd.* [2008] Bus LR 1304, submits that even where the contract gives a power to one of the contracting parties to act in accordance with its discretion, such discretion must be exercised in good faith. In the present case, the Arbitrator having found that the termination of the Contract is not in good faith, the order deserves to be sustained. Further relying upon the Judgment of the Supreme Court in *Associate Builders v. DDA*, (2015) 3 SCC 49, he submits that the Arbitrator having construed the terms of the Contract in a reasonable manner, this Court cannot interfere with the same in exercise of its jurisdiction under Section 34 of the Act.

13. Clause 29.1 of the General Conditions of the Contract is quoted hereinbelow:

“29.1 Termination for Owner's Convenience

29.1.1 The Owner may at any time, terminate the Contract (in full or in part) for any reason by giving the Contractor a notice of termination that refers to this GCC Sub-Clause 29.0.

29.1.2 Upon receipt of the notice of termination under GCC Sub-Clause 29.1, the Contractor shall either

immediately or upon the date specified in the notice of termination

(a) cease all further work on terminated portion, except for such work as the Owner may specify in the notice of termination for the sole purpose of protecting that part of the Works already executed, or any work required to leave the Site in a clean and safe condition.

(b) terminate all subcontracts of terminated portion.

(c) remove all Contractor's Equipment (related to terminated part) from the Site, repatriate the Contractor's and its Subcontractors' personnel from the Site, remove from the Site by wreckage, rubbish, temporary structure and debris of any kind and leave the whole of the Site in a clean and safe condition.

(d) In addition, the Contractor, subject to the payment specified in GCC Sub-Clause 29.1.3 shall

(i) deliver to the Owner the parts of the Works (related to terminated part) executed by the Contractor up to the date of termination.

(ii) deliver to the Owner all non-proprietary drawings, specifications and other documents prepared by the Contractor or its Subcontractors as at the date of termination in connection with the Works (related to terminated part).

29.1.3 *In the event of termination of the Contract under GCC Sub-Clause 29.1, the Owner shall pay to the Contractor the following amounts:*

(a) The Contract Price, properly attributable to the parts of the Works executed and handed over to

the Owner by the Contractor as of the date of termination.

(b) Other demonstrable expenses which contractor is liable to incur in case of such termination.”

14. A reading of Clause 29.1.1 clearly shows that the petitioner may “at any time”, terminate the Contract “for any reason” by giving the respondent a notice of termination referring to the said Clause. Admittedly, the petitioner had addressed the termination notice dated 24.11.2011 to the respondent relying upon the said Clause.

15. In ***Her Highness Maharani Shanti Devi*** (supra), the Supreme Court rejected the submission that where a power had been conferred on the parties to cancel the contract unilaterally at their wish, then such a power of termination has to be exercised for a good and reasonable cause, otherwise unilateral power of cancellation would have to be treated as void and ineffective in law.

16. Relying upon its earlier decision in ***Central Bank of India Ltd., Amritsar v. Hartford Fire Insurance Co. Ltd.*** AIR 1965 SC 1288, the Supreme Court held that under the general law of contract any clause giving absolute power to one party to cancel the contract does not amount to interfering with the integrity of the contract and such a contract cannot be held to be void only on this ground. The Supreme Court held as under:

“54. In our view, the aforesaid passage has been misread in National Fertilizers case. Further in Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd., decisions of the Madras High Court and of this Court (Union of India v. Maddala Thathaiah)

were considered. The question in that case was whether the insurance policy had been terminated. This Court was concerned with a clause in an insurance policy which, *inter alia*, provided that the policy can be terminated at the option of the Insurance Company. The contention of the respondent Insurance Company was that it had power under the said clause to terminate the contract at will and it had duly exercised that power. The appellant's contention was that it was implied in the clause that termination could only be for a reasonable cause which did not exist in that case. It was further contended that if this interpretation of implied term is not accepted, the clause giving such right to terminate at will without reasonable cause must be treated as void and ignored. This Court said: (AIR p. 1290, para 5)

“5. The contention of the appellant is based on the interpretation of clause 10. Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however it may dislike the result. We have earlier set out clause 10 and we find no difficulty or doubt as to the meaning of the language there used. Indeed the language is the plainest. The clause says ‘this insurance may be terminated at any time at the request of the insured’, and ‘the insurance may also at any time be terminated at the instance of the company’. These are all the words of the clause that matter for the present purpose. The words ‘at any time’ can only mean ‘at any time the party concerned likes’. Shortly put clause 10 says ‘either party may at its will terminate the policy’. No other meaning of the words used is conceivable.”

55. Regarding validity of the clause which gave power as aforesaid, this Court held: (AIR pp. 1292-93, paras 15-16)

“15. The next argument was that clause 10 was bad as it gave more option to the insurer than to the assured. We express no opinion as to whether the clause would be bad if it did so, for we are clear in our mind that it did not. The argument that it did was based on the use of the word ‘request’ in the case of a termination by the assured and ‘option’ in the case of a termination by the insurer. It was said that the word ‘request’ implied that the request had to be accepted by the insurer before there was a termination whereas the word ‘option’ indicated that the termination would be by an act of the insurer alone. We are unable to agree that such is the meaning of the word ‘request’. In our view, the clause means that the intimation by the assured to terminate the policy would bring it to an end without more, for the clause does not say that the termination shall take effect only when the assured's request has been accepted by the insurer.

16. Lastly it was said that the termination of the contract by the letter of August 7, 1947 was a conditional termination and as the condition was impossible of performance in the circumstances prevailing, there was in fact no termination. That condition, it was said, was the removal of the goods from Bakarwana Bazar, Amritsar to a safer locality. We have nothing to show that the condition, if it was such, was impossible of performance. However, that may be, there is no question of any condition. The letter clearly terminated the policy. It gave an option to the assured to keep the policy on its feet if it did something. Further we do not think that it can be said that if a party has a right at will to terminate a contract, the imposition by him of a condition, however hard, on failure to fulfil which the termination was to take effect, would make the termination illegal, for the party affected was not entitled even to the benefit of a difficult condition. The agreement was that the power to terminate could be exercised without more and that is what we think was done in this case.”

(emphasis has been supplied by us)

56. From the aforesaid, it is clear that this Court did not accept the contention that the clause in the insurance policy which gave absolute right to the Insurance Company was void and had to be ignored. The termination as per the term in the insurance policy was upheld. Under general law of contracts any clause giving absolute power to one party to cancel the contract does not amount to interfering with the integrity of the contract. The acceptance of the argument regarding invalidity of contract on the ground that it gives absolute power to the parties to terminate the agreement would also amount to interfering with the rights of the parties to freely enter into the contracts. A contract cannot be held to be void only on this ground. Such a broad proposition of law that a term in a contract giving absolute right to the parties to cancel the contract is itself enough to void it cannot be accepted.

57. In view of the above discussion, we find force in the contention that the agreement in question was terminable before delivery of possession; it was so determined and to the agreement clause (c) of Section 14(1) of the Specific Relief Act, 1963 applies. Therefore, agreement cannot be specifically enforced.”

17. In ***M/s Classic Motors Ltd.*** (supra), this Court while interpreting a clause which empowered the party to terminate the Agreement “without assigning any cause” held as under:

“68. The aforesaid expression appears in clause 21 of the agreement which states that either party to the agreement could terminate the contract after giving to the other party a notice of 90 days ‘without assigning any cause’. The present agreement, it must be remembered, was entered into by the parties in the realm of private law as a result of purely private commercial transaction. It is also to be remembered that in a private contract a party is free to choose the person and the subject matter of the transaction according to its own free will. No restriction or fetter could be imposed on either of the parties to the manner, mode and the nature of the

agreement that they choose to enter into. But the law applicable would be different when such an agreement is entered into in the realm of public law.

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70. In view of long catena of decisions and consistent view of the Supreme Court, I hold that in private commercial transaction the parties could terminate a contract even without assigning any reason with a reasonable period of notice in terms of such a clause in the agreement. The submission that there could be no termination of an agreement even in the realm of private law without there being a cause or the said cause has to be valid strong cause going to the root of the matter, therefore, is apparently fallacious and is accordingly, rejected.

71. On an overall view of the entire matter, it appears to me that the present agreement was never intended to be permanent and that in respect of dealership sales agreements between private parties such agreements could never be held to be perpetual unless so intended by the parties and specifically stated in the agreement itself. On a reasonable construction of the agreement in hand I hold that either party to the agreement was entitled to terminate the contract without assigning any reason by giving 90 days notice or even without giving any notice upon the happening of an event. Termination without cause in common law is a valid power which the parties may give to themselves.”

18. The Court further held as under:

“35. The question of a clause being against the public policy and/or arbitrary or unconscionable could definitely be advanced when the contract relates to the realm of public law. However, when such a clause relates to a private contract the law definitely would stand on a different footing. In a private contract a party can deal

with a party with whom he wants to, and such a party cannot be compelled to deal with a person they are unwilling to do so. In Srilekha Vidyarthi case (supra) it has been held by the Supreme Court that there is a fundamental difference between the contract in the public law field and the private field. Upholding the appointment of Public Prosecutors the Supreme Court held that the words 'without assigning any cause' would still mean there exists reason even though the same is not communicated. In Central Inland case (Supra) relied upon by the plaintiff the Supreme Court while examining the question of economic duress and unconscionability of contracts based the ratio of its judgment on the principle of Article 14 and terms of the contract. The Supreme Court however, was conscious of the fact that the law laid down therein would not be applicable when the case relates to a commercial transaction, when it observed at page 216:

“This principle however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both the parties are businessmen & the transaction is a commercial transaction”.

The Supreme Court further held at paragraph 102 of the judgment thus:—

“it is not possible to equate the employees with goods which can be bought and sold. It is equally not possible for us to equate a contract of employment with a mercantile contract between two businessmen and much less to do so when the contract of employment is between a powerful employer and a weak employee”.

36. Similarly the case of LIC of India (Supra) is a case relating to a contract entered into by an instrumentality of a State in the realm of public law and in that context the Supreme Court held in paragraph 29 of the said judgment that the actions of the appellants (LIC of

India) bear public character with an imprint of public interest element in their offers regarding terms and conditions mentioned in the appropriate table inviting the public to enter into contract of life insurance and that it is not a pure and simple private law dispute without any insignia of public element. It was further held that the actions of the State, its instrumentality, any public authority or persons whose actions bear insignia of public law element or public character are amenable to judicial review and validity of such an action would be tested on the anvil of Article 14.

37. The ratio of the aforesaid decisions, therefore, cannot be said to be applicable in a case of dealership agreement entered into by the defendant, purely on private commercial transaction, who has been held to be not an instrumentality of State by a Division Bench of this Court in P.B Ghayalod v. MUL & others; AIR 1992 Delhi 145.

38. While enforcing the contract for a gas dealership by Bharat Petroleum the Allahabad High Court has held in the case of Shyam Gas Co.v. State; reported in AIR 1991 Allahabad 129, that the principle of unconscionability of a clause will not apply in case of commercial transaction where both the parties were businessmen but carved out an exception only in the Scheduled Caste quota in order to salvage the down-trodden and economically distressed.

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43. Under these circumstances, I, therefore, have no hesitation in my mind to hold that the aforesaid clause 21 is a valid clause to which the parties hereto agreed upon to abide by the same. Besides the said clause having been the part of the agreement entered into between the plaintiff and the defendant for the first time in 1983 and thereafter again in 1988 could not have been challenged in the present suit filed after several rounds of earlier litigation.”

19. This Court further in *Altus Group India Pvt. Ltd. v. Darrameks Hotels & Developers Pvt. Ltd.* 2018 SCC OnLine Del 8263, while taking cognizance of a clause therein allowing parties to terminate the Agreement without cause, has held:

“9. In my opinion, the Arbitrator has completely misguided himself. It cannot be denied that commercial contracts by their very nature are determinable. A contract may provide for the termination of the contract with or without a cause. Private commercial transactions can be terminated by the parties even without assigning any reason, with a reasonable period of notice in terms of a clause in the agreement authorizing such termination. Such termination cannot be challenged even on the grounds of it being malafide.

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14. In Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49, the Supreme Court had cautioned the courts that in exercise of its power under Section 34 of the Act, if an Arbitrator construes the terms of the contract in a “reasonable manner”, the Award cannot be set aside; construction of the terms of the Contract is primary for an Arbitrator to decide, unless the Arbitrator construed the Contract in such a way that it can be said to be something that no fair minded and reasonable man could do. In the present case, the arbitrator, in the name of interpreting the contract, has in fact, rewritten the same. Equally, in his endeavour to harmoniously construe Clause 9 so as to prevent 9(II) from becoming redundant, has made 9(IV) redundant.

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16. As noted by me above, in the present case, there was no question of interpretation involved at all. Clause 9(IV) being explicit, was the final word on the intent of the parties. There are two distinct rights of termination vested in the hands of the parties in Clause 9 of the agreement. While Clause 9(II) empowers the petitioner to terminate the agreement for a cause, Clause 9(IV) authorizes either party to terminate the agreement without cause and by simply giving notice to the other. The Arbitrator seems to

have proceeded on the basis that merely because a right to terminate for a cause is provided in the agreement, a separate right given to a party to terminate the agreement without cause would run counter to the same and therefore, would require to be harmoniously constructed with the right to terminate for a cause. This was a fundamental error committed by the Arbitrator vitiating the Impugned Award.

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18. The agreement in form of Clause 9(IV) being explicit in the present case; authorizing either party to terminate the agreement with a simple notice of thirty days and not requiring any reason thereof to be in existence or stated in such notice, the Arbitrator could not have gone into the reasons behind the notice of termination by the petitioner.”

20. The Division Bench of this Court thereafter in ***Darrameks Hotels & Developers Pvt. Ltd v. Atlus Group India Pvt. Ltd.*** 2018 SCC OnLine Del 9335, while dismissing the appeal against aforesaid order, held as under:

“6. We do not find any merit in the said stand and stance as Sub-clause (IV) of Clause (9) is clear and categorical and does not suffer from any doubt or ambiguity. Either party had option to terminate the contract by giving thirty days notice in writing. Sub-clause (II) on the other hand is a specific clause, which empowered and gave option to the respondent i.e., to the Project Manager and Consultant to terminate the agreement in case of non-payment of fees within thirty days from receipt of reminder by a courier letter. There would be instant termination on satisfaction of the stipulations under Sub-clause (II), whereas in case of Sub-clause (IV) termination would take place vide thirty days prior notice. Sub-clause (II) had dealt with a specific eventuality, i.e., non-payment of fee by the owner/appellant to the Project Management and Consultant/respondent. Sub-clause (IV) obviously was incorporated with the intention giving an option to the either party to terminate the contract. No doubt, Sub-clauses (I) and (IV) would overlap insofar as right of the owner, i.e., the appellant is

concerned, but this cannot be a ground to hold that Sub-clause (IV) would not be available to the respondent. Sub-clause (IV) in plain and simple words thus states that either party could terminate the contract by giving thirty days notice in writing to the other. In a way, both the appellant and the respondent were placed equally and given same right and option of termination by thirty days notice.

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12. The present case, according to us, falls within the four corners of the expression “patent illegality” as expounded and explained in the said decisions, as clause 9(IV) has been completely misconstrued and made inconsequential and redundant. There is apparent and patent fallacy and flaw in the interpretation which is contrary to the plain language and therefore must be checked and corrected. This is not a case of fair minded or reasonable construction, but a construction which is ex facie contrary to the written and agreed clause and the interpretation is completely erroneous. Interference was, therefore, justified and required. Accordingly, we do not find merit in the present appeal and the same is dismissed, without any order as to cost.”

21. In the present case, there was no challenge made by the respondent to Clause 29.1 of the Agreement. The petitioner having exercised its right under the said Clause, therefore, the finding of the Arbitrator that such termination is invalid, cannot be sustained, being contrary to the terms of the Contract between the parties

22. The submission of learned senior counsel for the respondent that even if discretion is vested in a party to a Contract, the same is to be exercised in good faith, cannot also be accepted in view of the Judgments of the Supreme Court in **Central Bank of India** (supra) and **Her Highness Shanti Devi** (supra) noted hereinabove.

23. As far as the submission of the learned senior counsel for the respondent that the jurisdiction of this Court is limited and this Court cannot interfere with the finding of the Arbitrator on the interpretation of the Contract or on facts, does not persuade me in the facts of the present case. The Arbitrator, in the Impugned Award has not interpreted Clause 29.1 at all. In fact, the effect of Clause 29.1 of the Agreement, though raised by the petitioner as a defence, has been completely ignored by the Arbitrator. The Arbitrator has held that the termination of the Contract by the petitioner was unjustified, however, as held by the Supreme Court in ***Central Bank of India Ltd.*** (supra), once the contract did not require any reason to be stated for terminating the contract and empowered the petitioner to terminate the contract “for any reason”, the Court/Arbitrator must give effect to the plain meaning of the words, even if it may dislike the result.

24. The Supreme Court in ***Food Corporation of India v. Chandu Construction & Anr.*** (2007) 4 SCC 697 has noted that a deliberate departure from contractual terms amounts to misconduct and has held as under:

“11. It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the court. We may, however, hasten to add that if the arbitrator commits an error in the construction of 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 (see Associated Engg. Co. v. Govt.

of A.P. and Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises).

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15. Therefore, it needs little emphasis that an arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action (also see Associated Engg. Co. v. Govt. of A.P).

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19. Having accepted the terms of the agreement dated 19-9-1984, they were bound by its terms and so was the arbitrator. It is, thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. We are of the view that the arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low and another contractor, namely, M/s Gupta and Company had been separately paid for the material. The claimants' claim had to be adjudicated by the specific terms of their agreement with FCI and no other."

25. Further, the Supreme Court in ***Steel Authority of India Ltd. v. J.C. Budharaja, Govt. & Mining Contractor*** (1999) 8 SCC 122, held that an award ignoring terms of the contract is without jurisdiction. It was held that:

"15. Clause 32 of the agreement specifically stipulates that no claim whatsoever for not giving the entire site on award of work and for giving the site gradually will be tenable and the Contractor is required to arrange his working programme accordingly. Clause 39 further stipulates that no failure or omission to carry out the provisions of the contract shall give rise to any claim by the Corporation and the Contractor, one against the other, if such failure or omission arises from compliance with any statute or

regulation of the Government or other reasons beyond the control of either the Corporation or the Contractor. Obtaining permission from the Forest Department to carry out the work in the wildlife sanctuary depends on statutory regulations. Clause (vi) of the general conditions of the contract also provides that failure or delay by the Corporation to hand over to the Contractor possession of the lands necessary for the execution of the work or any other delay by the Corporation due to any other cause whatsoever would not entitle the Contractor to damage or compensation thereof; in such cases, the only duty of the Corporation was to extend the time for completion of the work by such period as it may think necessary and proper. These conditions specifically prohibit granting claim for damages for the breaches mentioned therein. It was not open to the arbitrator to ignore the said conditions which are binding on the contracting parties. By ignoring the same, he has acted beyond the jurisdiction conferred upon him. It is settled law that the arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action. In the present case, it is apparent that awarding of damages of Rs 11 lakhs and more for the alleged lapses or delay in handing over the work site is, on the face of it, against the terms of the contract.

16. Further, the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existence depends upon the agreement and his function is to act within the limits of the said agreement. In *Continental Construction Co. Ltd. v. State of M.P.* this Court considered the clauses of the contract which stipulated that the contractor had to complete the work in spite of rise in the prices of materials and also rise in labour charges at the rates stipulated in the contract. Despite this, the arbitrator partly allowed the contractor's claim. That was set aside by the Court and the appeal filed against that was dismissed by this Court by holding that it was not open to the contractor to claim extra costs towards rise in prices of material and labour and that the arbitrator misconducted himself in not deciding the specific

objection regarding the legality of the extra claim. In that case, the Court referred to the various decisions and succinctly observed: (SCC p. 88, para 5)

“If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not he can be set right by the court provided his error appears on the face of the award.”

*17. It is to be reiterated that to find out whether the arbitrator has travelled beyond his jurisdiction and acted beyond the terms of the agreement between the parties, the agreement is required to be looked into. It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. The arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error. For this limited purpose reference to the terms of the contract is a must. Dealing with a similar question this Court in *New India Civil Erectors (P) Ltd. v. Oil and Natural Gas Corpn.* held thus: (SCC p. 79, para 9)*

“It is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the

agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account.”

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19. *Further even if such reasons are not recorded, the claim itself for such prohibited items was not entertainable by the arbitrator. In the agreement between the parties, there is a specific bar to raising of such claims. Hence the decision of the arbitrator is without jurisdiction. This aspect is also dealt with by this Court in H.P. SEB v. R.J. Shah and Co. In para 26, the Court held as under: (SCC p. 225)*

“26. In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction.”

xxxxx

21. *Further dealing with a similar condition in the contract, such as no claim for price escalation other than those provided therein shall be entertained and “the Contractor will not be entitled for any extra rate due to change in selection of quarries”, this Court in Associated Engg. Co. v. Govt. of A.P. observed that four claims mentioned therein were not payable under the*

contract; in fact, it prohibited such payment and for this purpose. The Court held “this conclusion is reached not by construction of the contract but by merely looking at the contract”. The Court further observed that the arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract; his sole function is to arbitrate in terms of the contract. The Court further held thus: (SCC p. 103, para 25)

“25. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill and Boyd's Commercial Arbitration, 2nd Edn., p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see Halsbury's Laws of England, Vol. II, 4th Edn., para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.”

22. In view of the aforesaid settled law, the award passed by the arbitrator is against the conditions agreed by the contracting parties and is in conscious disregard of the stipulations of the contract from which the arbitrator derives his authority. His appointment as a sole arbitrator itself was a conditional one and he was informed that the same was “with reservation regarding the tenability, maintainability and validity of the reference as also on further grounds that the claim was barred by the period of limitation and that it pertained to excepted matters of general conditions of the contract”. Despite this he has ignored the stipulations and conditions between parties. Hence, the said award is, on the face of it, illegal.”

26. The Arbitrator having held that the termination of the Agreement by the petitioner was unlawful, has proceeded to award loss of profit at the rate of 15% in favour of the respondent.

27. As noted hereinabove, Clause 29.1.3 of the General Conditions of Contract gives the consequences of termination of the Contract. In terms thereof, the respondent is entitled to the contract price for the part of the work executed by it and other demonstrable expenses which it is liable to incur in case of such termination. The consequence having been provided in the Agreement itself, the Arbitrator has clearly erred in granting the loss of profit in favour of the respondent, much less at the rate of 15%.

28. In *Indian Oil Corporation Ltd.* (supra) the Supreme Court has held that where the contract empowers either party to terminate the Agreement by giving a notice of 30 days, the distributors/aggrieved party was entitled to compensation, being only the loss of earnings for the notice period.

29. In *Comau UK Ltd.*(supra), the Queen's Bench Division has held that where the contract could be terminated at any time for convenience, the contracting party cannot be held entitled to the profit on the whole of the goods and services to be supplied pursuant to the Agreement, but only to such profit as it might have gained prior to any "termination for convenience". The Award of full damages would have the effect of giving it "the benefit of a better bargain than it actually made".

30. Even otherwise, grant of loss of profit at the rate of 15%, in the peculiar facts of the present case, is totally unreasonable and cannot be sustained. The Letter of Award has been issued in favour of the respondent on 03.05.2010. By the letter dated 17.06.2010 the petitioner

called upon the respondent to hold all activities at work except on certain portions of the approach road. The petitioner reiterated the said request of suspension of work by its email dated 22.06.2010. Since the said letters, respondent was aware of the problem being faced by the petitioner regarding non-availability of land, however, did not raise any protest against it, nor rescinded the Contract for the default of the petitioner.

31. The Contract was thereafter terminated by the petitioner vide its letter dated 24.11.2011. Though the contract period was 18 months, clearly, within a month of the Letter of Award, the respondent knew that there were difficulties being faced by the petitioner and accepted the same. Award of loss of profit at the rate of 15% without any evidence in support thereof, therefore cannot be justified.

32. Counsel for the petitioner further submits that there was no prayer made by the respondent in its Statement of Claim seeking return of the Bank Guarantee. He submits that the Bank Guarantee having been encashed by the petitioner, question of return of the same does not arise. In any case, the Bank Guarantee has been given against the release of mobilization advance and therefore, the Arbitral Tribunal could not have ordered the return of the Bank Guarantee without calling upon the respondent to return such mobilization advance.

33. The Arbitrator framed issue no.6 as under:

“(6) Whether the respondent proves that the action of encashing bank guarantee was legal, lawful and in terms of the contract?”

34. The above issue was decided in favour of the respondent holding that the action of encashment of the Bank Guarantee by the petitioner was illegal, unlawful and contrary to law.

35. Claim No.7 of the respondent was for interest on the Bank Guarantee. Against this claim, the Arbitrator has held as under:

“While dealing with Issue No.6, I have held that the respondent was not justified in encashing Bank Guarantees submitted by the claimant. The said action was illegal and unjustified. I, therefore, direct the respondent to release and give back to the claimant Bank Guarantees submitted by the claimant.”

36. The Arbitrator, therefore, has completely acted in ignorance of the fact that the Bank Guarantee having already been encashed by the petitioner, cannot be returned to the respondent. If the direction of the Arbitrator is for return of the amount received by the petitioner on such encashment, the same can also not be justified. It is an admitted case of the respondent that the respondent had received mobilization advance from the petitioner on strength of such Bank Guarantee. Therefore, it was under an obligation to return the un-utilized portion of such mobilization advance to the petitioner. Equally, the Arbitrator had to adjudicate on the issue as to whether such mobilization advance has been fully spent by the respondent or not prior to the termination of the Agreement. Such adjudication is absent in the Impugned Award.

37. In view of the above, the direction of the Arbitrator to the petitioner to give back the Bank Guarantee to the respondent cannot be sustained.

38. The respondent has also challenged the Award insofar as it rejects the claim of the respondent on Claim nos.3,4,5 and 6 as also awards Counter Claim of Rs.30,39,189/- in favour of the petitioner.

39. Claim no.3 was for the cost of bidding allegedly incurred by the respondent and included the cost of site investigation, site visit, travelling, Bank Guarantee charges etc. The Arbitrator has held that such claim is not maintainable in light of Clause 5 and 12.4.5 of the Instructions to Bidders. I cannot find any fault in such finding of the Arbitrator. However, the effect of Clause 29.1.3 on this claim needs to be determined, especially taking into account the fact that the termination was one of petitioner's convenience.

40. Further, as far as Claim no.4 (cost of mobilization), Claim No.5 (Idle charges) and Claim no.6 (overhead expenses) are concerned, the Arbitrator has rejected such claims on the ground that he has awarded loss of profit in favour of the respondent. As the award of loss of profit in favour of the respondent has been set aside by this Court by the present judgment, the findings of the Arbitrator on Claim Nos.4 to 6 also deserve to be set aside, leaving it open to the respondent to claim the same through appropriate proceedings.

41. As far as the Counter Claim of the petitioner is concerned, the said Counter Claim was based on the assertion that an amount of Rs.31,01,213/- had been paid by the petitioner to the respondent over and above the mobilization advance and the petitioner was entitled to the refund of the same. The Arbitrator has given the following findings on the said Counter Claim:

“As regards an amount of Rs.30,39,189/- (Rs.31,01,213/- - Rs.62,024/- TDS), it was stated by the respondent that the payment of said amount has been admitted by the claimant. The defence of the claimant was that the said payment was not made under this

contract. There were several contracts between the claimant and its group company with the respondent. In my opinion, the argument of the learned counsel for the respondent is well-founded and should be accepted that if it was the case of the claimant that the said amount was paid towards another contract, the claimant ought to have placed the requisite material on record and to have established that fact, which it had failed to do. The payment was made to Madhavi Procon Pvt. Ltd. (claimant) under RTGS Remittance by a cheque bearing No. 897815 dated 20 July 2010 drawn on State Bank of India. A Xerox copy of Application for RTGS Remittance is also placed on record by the respondent with the Written Statement (page 416) of Volume II). I, therefore, see no reason to disallow the said amount towards Set-off/ Counter-claim.”

42. The above being finding based on the appreciation of evidence led before the arbitrator, cannot be interfered with in exercise of the power under Section 34 of the Act.

43. In view of the above, the Impugned Award in so far as it directs the petitioner to pay a sum of Rs.7,57,17,173/- to the respondent as loss of profit and directs the petitioner to return the Bank Guarantee submitted by the respondent to the petitioner and also rejects respondent's Claim nos.3 to 6, is set aside, leaving it open to the parties to re-agitate such claims and counter claims in appropriate legal proceedings.

44. There shall be no order as to cost.

NAVIN CHAWLA, J

DECEMBER 21, 2018/rv/Arya