

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

+ **OMP (COMM) 377/2017 & IAs 12254/2017,
184/2018, 3152/2018**

*Reserved on: 6th March, 2018
Date of decision : 10th April, 2018*

DELHI DEVELOPMENT AUTHORITY Petitioner
Through: Ms. Kanika Singh and Mr. Rishi
Vohra, Advocates.

versus

K. R. ANAND Respondent
Through: Mr. Harish Malhotra, Senior
Advocate with Mr. Rajender
Agarwal, Advocate.

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

1. The petitioner by way of this present petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), challenges the Arbitral Award dated 09.06.2017 passed by the Sole Arbitrator awarding certain claims in favour of the respondent.

2. The challenge in the petition was confined to the grant of Claim Nos.4,5,6,7 and 8. However, after notice of the petition was issued to the respondent, the petitioner by way of I.A. No.3152/2018, sought leave of this Court to amend this petition so as to also challenge the Award of amount in favour of the respondent under Claim No.14.

3. Before dealing with the objections against each of the claims, the following basic facts regarding the dispute may be noticed.

4. By the Letter of Acceptance dated 29.06.2013, the petitioner had awarded the work of dense bituminous carpeting on main carriage way of Master Plan Roads of Dwarka in favour of the respondent. The stipulated date of commencement of the work was 09.07.2013 and the stipulated date of completion was 08.01.2014. The actual date of completion of work was 16.06.2014. The tendered amount was Rs.28,74,24,811/-, whereas the actual amount as per the final bill was worked out as Rs.37,26,23,089/-.

5. Claim No.4 was raised by the respondent towards the balance payment due under Clause 10C of the agreement for an amount of Rs.16,86,296/-. While raising the said claim in its Statement of Claim, the respondent had deducted contractor's profit and overheads @ 15%. Taking advantage of the same, the petitioner reworked the amount already released in favour of the respondent under Clause 10C of the agreement and raised a counter claim for an amount of Rs.9,37,596/- against the respondent. Realising its mistake in the Statement of Claim, the respondent submitted the revised working of the claim in its reply to the counter claim, this time without making any deduction on account of contractor's profit and overheads. The Arbitrator, after analysing Clause 10C of the agreement, has awarded a sum of Rs.6,62,055/- in favour of the respondent.

6. Learned counsel for the petitioner has submitted that as the Statement of Claim had not been amended by the respondent, the respondent could not have been allowed to resile from its admission that an amount of 15% had to be deducted as contractor's profit and overheads while granting its claim under Clause 10C of the agreement.

7. I do not find any merit in the objection raised by the learned counsel for the petitioner. As pointed out by the learned counsel for the respondent and taken note of by the Arbitrator, in the contract between the parties, the component of labour is expressed as 25% of value of work for purposes of Clause 10C. As the percentage is to be calculated on total value of work, this would necessarily include the profit @ 15% prescribed in the contract. Further, for the work done till the 11th RA Bill, no such deduction on account of contractor's profit and overheads was made by either of the parties. It is only due to filing of the Statement of Claim by the respondent along with the calculations, that the petitioner became wiser and tried to take advantage and rework the amount already paid to the respondent, so as to make a counter claim against the respondent.

8. The Arbitrator faced with the above situation where both parties were changing stands, interpreted the agreement itself and held that the contract, in Clause 10C thereof, does not provide for calculating escalation excluding contractor's profit and overheads from the value of the work. The finding of the Arbitrator in this regard is reproduced herein below:

“25.3.6. The contract clause does not provide for calculating for 10C escalation by reduction due to contractor's profit and overhead. The tribunal, therefore, consider it appropriate not to make any change in the calculations made while making payment for the running bills by the Respondents. However, the escalation under clause 10C was not paid for the full amount of work done by the Respondents which is found payable to the Claimants under this claim.

9. In *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, the Supreme Court had cautioned the Court exercising its power under Section 34 of the Act as under:

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

xxxxxxx

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 face of the award.”

10. As far as the submission of the learned counsel for the petitioner that in absence of an amendment made in the Statement of Claim, the respondent could not have been allowed to resile from its stand, the submission, though in a normal situation would have been justified, however, in the peculiar facts of the present case cannot be sustained. As noted above, the respondent in reply to the counter claim had submitted the revised calculation, this time not excluding the contractor's profit and overheads. The petitioner was therefore, aware of this change in stand during the arbitration proceedings itself. The Arbitration is an informal mode of adjudication and in fact, Section 19(1) of the Act specifically states that the Arbitral Tribunal shall not be bound by the Code of Civil

Procedure, 1908 or by the Indian Evidence Act, 1872. Section 19(2) of the Act empowers the parties to agree on the procedure to be followed by the Arbitral Tribunal in conduct of its proceedings. As long as principles of Natural Justice are duly complied with, the Arbitrator cannot be shackled with technicalities of procedure. Therefore, in the present case, merely because the respondent did not formally apply for amendment of the Statement of Claim, the same cannot debar the respondent from maintaining its claim and equally cannot open the Impugned Award to challenge.

11. It is also to be noted that for the purpose of arriving at the final amount awarded, the Arbitrator has again interpreted Clause 10C and has held that taxes are to be deducted while making calculation under Clause 10C of the agreement. The Arbitrator has not therefore, gone solely by the calculation submitted by the respondent, but has arrived at the awarded amount upon interpretation of Clause 10C of the agreement and the same cannot be set aside on mere technicalities. I reproduce paragraph 25.3.8 from the Arbitral Award in this regard:

“25.3.8 The revised calculations done by the Claimants in their reply to the Counterclaims and attached as annexure 'A' (page 14) is in line with the Respondents' calculations done (R- 5, page 60-70 of Respondents amended reply to the Statement of Claim) while making payment of Running bills on account of clause 10C and held correct. The Claimants in their calculation have taken full amount as per final bill passed with pay order but not paid, without applying reduction for cp & oh, which is held correct. However, 7% taxes added thereon are not found admissible. The amount without the inadmissible 7% tax is Rs. 6,62,055 only as given below:

Escalation under Clause 10C

Gross Amount of Final Bill: 372623089.00

Less Amount of Extra item: 84361113.00

Gross Amount of work done Minus amount of Extra Item:
288261976.00

W=	Value of work done	Rs. 288261976.00
Y=	Component of labour expressed as %age of total value of work done = 25% as per Schedule 'F' of the Contract	0.25
LI=	Minimum wages in rupees of an unskilled male labour fixed under law statutory rule or order applicable on last date of the quarter to the previous to the one under consideration, whichever is less	Rs. 311.00
LIO=	Minimum daily wages in rupees of an unskilled adult male mazdoor fixed under any law, statutory rule or order as on the last stipulated date of receipt of tender including extensions, if any	Rs. 279.00
VL=	$W \times Y \times (LI - LIO) / LIO$	
VL=	$288261976.00 \times 0.25 \times (311.00 - 279.00) / 279.00$	Rs. 8265576.37

	<i>Total amount under Clause 10C</i>	<i>Rs. 8265576.37</i>
	<i>Less Already paid</i>	<i>Rs. 7603521.00</i>
	<i>Net Payable</i>	<i>Rs. 6,62,055</i>

12. The petitioner has also challenged the Award of Rs.55,75,185/- in favour of the respondent under Claim No.5. The said claim was towards balance payment due under Clause 10CA of the agreement. Learned counsel for the petitioner submits that while awarding the above amount in favour of the respondent, the Arbitrator has rewritten Clause 10CA of the agreement inasmuch as the Arbitrator has recalculated the “base price” of Bitumen instead of and in place of relying upon what was mentioned as the Base Price in Schedule ‘F’ of the agreement i.e. Rs.38,636/-. She further submits that the respondent, in his claim as also in the reply to the counter claim had used the figure of Rs.38,636/- as the Base Price for calculating the escalation under Clause 10CA of the agreement and therefore, the Arbitrator has awarded amount under Claim No.5 on the basis, which was not even claimed by the respondent.

13. Before dealing with the specific contention of the learned counsel for the petitioner, the relevant portion of Clause 10CA in the agreement is reproduced herein below:

“Clause 10CA

If after submission of the tender, the price of materials specified in Schedule F increase/decreases beyond the price(s) prevailing at the time of the last stipulated date for receipt of tenders (including extensions, if any) for the work, then the amount of the contract shall accordingly be varied and provided further that any such variations shall be effected for stipulated period of Contract including the justified period extended under the provisions of Clause 5 of the Contract without any action under Clause 2.

The increase/decrease in prices of cement, steel reinforcement and structural steel shall be determined by the Price indices issued by the Director General (Works), CPWD. For other items provided in the Schedule 'F', this shall be determined by the All India Wholesale Price Indices of materials as published by Economic Advisor to Government of India, Ministry of Commerce and Industry and base price for cement, steel reinforcement and structural steel as issued under the authority of Director General (Works) CPWD applicable for Delhi including Noida, Gurgaon, Faridabad & Ghaziabad and for other places as issued under the authority of Zonal Chief Engineer, CPWD and base price of other materials issued by concerned Zonal chief Engineer as indicated in Schedule 'F' as valid on the last stipulated date of receipt of tender, including extension if any and for the period under consideration. In case, price index of a particular material is not issued by Ministry of Commerce and Industry, then the price index of nearest similar material as indicated in Schedule 'F' shall be followed."

"Adjustment for component of individual material

$$V = P \times Q \times \frac{C_1 - C_{10}}{C_{10}}$$

where

V= Variation in material cost i.e. increase or decrease in the amount of rupees to be paid or recovered.

P=Base Price of material as issued under authority of DG(W), CPWD or concerned Zonal Chief Engineer as indicated in Schedule “F” valid at the time of the last stipulated date of receipt of tender including extensions, if any.

Q= Quantity of material brought at site for bonafide use in the works since previous bill.

Clo= Price index for cement, steel reinforcement bars and structural steel as issued by the DG(W), CPWD as valid on the last stipulated date of receipt of tenders including extensions, if any. For other items, if any, provided in Schedule ‘F’, All India Wholesale Price Index for the material as published by the Economic Advisor to Government of India, Ministry of Industry and Commerce as valid on the last stipulated date of receipt of tenders including extensions, if any.”

(emphasis supplied)

14. The Arbitrator, in his Impugned Award interpreted Clause 10CA and held as under:

“26.3.7 Since there is provision in the Clause 10CA that the base index shall be the index valid on the last day of the receipt of tender including extensions, the tribunal holds that the interpretation of the Respondents with regard to base index to be taken for Dec, 2012 is correct. 26.3.8 From the provisions of the contract under Clause 10CA it is clear that the Base Price and the Base index both should be valid on the last date of receipt of the tenders including extensions. It is possible to use the correct base index in case the tenders are received on a date later than it was originally contemplated while

finalizing NIT for call of tenders. In case of Base price, however, the relevant clause of the contract stipulate that this should be valid on the last date of receipt of the tender but this also says 'as given in schedule 'F'. In case, the base price given in Schedule 'F' is different from what it was on the last date of receipt of tender, then the remedy is not available in the contract.

26.3.9 It is necessary that, both the base index and the base price is of the same time and that time is required to be the last date of receipt of tender (including extensions) as per the provisions of Clause 10CA of the Contract.

26.3.10 In case, base price and base index are not of the same period, and a base price of different period is applied to the base index valid on the last date of receipt of tenders, the result will be erroneous and will defeat the purpose of arriving at the correct escalation. In fact, the circular of DG, CPWD date 27.02.2012 annexed by the Claimants with their Statement of Claims at page no 172 is basically to clarify this which the Respondents while inviting tenders in Dec, 2012 did not include though, the tender was received 10 months after the circular was issued.

26.3.11 Similarly, using the base index of a period to which the base price given in schedule 'F', in case it is different from that of "last date of receipt of tender", as have been done by the Claimants, will give erroneous result. This is because, the Claimants, while quoting for tender, like any vigilant contractor, must have calculated the rates as per price prevailing at the time of tender and not based on the base price given in schedule 'F'.

15. As noted above, the interpretation of the contract is the exclusive domain of the Arbitrator and until and unless it is shown that the interpretation given by the Arbitrator to the terms of the contract is totally implausible or impossible, this Court in exercise of its power under Section 34 of the Act cannot interfere with the same and cannot set aside

the Award merely because it would have preferred another interpretation of the contractual terms. In the present case, the interpretation to Clause 10CA given by the Arbitrator cannot be said to be completely unreasonable or arbitrary or impossible.

16. Clause 10CA provides for escalation in the price of material “beyond price(s) prevailing at the time of the last stipulated date for receipt of tenders”. It further gives the formula for calculating such increase. In such formula ‘P’ is the Base Price “valid at the time of the last stipulated date of receipt of tender” and Clo is the All India Wholesale Price Index for the material “valid on the last stipulated date of receipt of tenders”. The Arbitrator has also taken note of the fact that the petitioner, realizing that Clause 10CA is ambiguous and is susceptible to varying interpretation, had amended the same by its Office Memorandum dated 27.02.2012. The Arbitrator has found that Rs.38,636/- mentioned as the Base Price of Bitumen in Schedule ‘F’ of the contract was not the price “valid at the time of the last stipulated date of receipt of tender” and therefore, proceeded to determine such Base Price. The finding of the Arbitrator in this regard is reproduced herein below:

“26.3.13 As per the definition of Base price as per Clause 10CA (reproduced under para 26.3.5 above), there are two requirements

(a) This should be the price prevailing at the time of receipt of tender

(b) This should be as given in Schedule 'F'.

*In view of the facts brought out in preceding **para 26.3.10**, the base price given in schedule ‘F’ i.e. Rs*

38636 per MT is without doubt not the price prevailing at the time of tender i.e. Dec, 2012 which is around Rs 45,000 per MT. Therefore, if we take the Base price given in schedule 'F', we will not be adhering to the other requirement of the clause 10CA which requires that the 'base price to be as valid at the time of receipt of tender'. Also evident from the details in the preceding **para 26.3.10** is that the base price taken in the contract i.e. Rs 38636 per MT, pertains to either Oct. or Nov. 2012 when the price was around Rs. 39,000. To arrive at the correct escalation ensuring that it is as per the Contract, the Claimants get correct escalation and also that the Respondents do not pay more than the amount justified as per contract provision, it is necessary that the correction is applied to the Base Price given in Schedule 'F' in the following manner:

Option 1: Considering the base price given in schedule 'F' pertains to Nov. 2012. Correct Base price i.e. the Base Price at the time of Receipt of Tender which is Dec 2012 = $38636 + (E)$, where, (E) is the Escalation between the period of which the Base price was taken in Schedule 'F' i.e. Nov 2012 and Dec 2012 when the tender was actually received.

$$\text{Escalation (E)} = 38636 * ((328.6 - 271.6) / 271.6) = 8108$$

$$\text{Corrected Base Price} = 38636 + 8108 = \text{Rs. } 46744 \text{ (A)}$$

Option 2: Considering the base price given in schedule 'F' pertains to Oct, 2012:

Correct Base price i.e. the Base Price at the time of Receipt of Tender which is Dec 2012 = $38636 + (E)$, where, (E) is the Escalation between the period of which the Base price was taken in Schedule 'F' i.e. Oct. 2012 and Dec 2012 when the tender was actually received.

$$\text{Escalation (E)} = 38636 * ((328.6 - 280.3) / 280.3) = 6657$$

$$\text{Corrected Base Price} = 38636 + 6657 = \text{Rs. } 45,293 \text{ (B)}$$

Looking at the price of bitumen worked out in the **annexure** attached with this award and as stated in the preceding **para 26.3.11** above, it is observed that Base

*price derived as per option 2 which is **Rs 45,293** will be more appropriate .*

*I consider taking corrected base price of **Rs.45,293 per MT (X)** as per option 2 will take care of obvious reduced payment of escalation to the Claimants, at the same time, by using base price given in Schedule 'F' to arrive at corrected base price, it is also ensured that both the stipulations for base price as per Clause 10CA of the Contract is fulfilled."*

17. As noted above, though this Court may have some doubts and reservation on the course and interpretation adopted by the Arbitrator, it cannot set aside the Award only on this basis.

18. As far as the objection of the learned counsel for the petitioner that the respondent had itself taken the Base Price to be Rs.38,636/- while submitting its calculation in the Statement of Claim as also in the reply to the counter claim and therefore, the Arbitrator has erred in recalculating the Base Price as Rs.45,293/-, I would only note that the respondent while submitting its calculation taking the Base Price of Bitumen as Rs.38,636/-, had also taken the All India Wholesale Price Index prevailing as on October 2012 and November 2012 instead of and in place of December 2012, which is the last date of receipt of the tenders. Therefore, admission of the Base Price, if any, by the respondent was conditional on the All India Wholesale Price Index of October/November 2012 being also taken into account. The Arbitrator, on interpretation of the contract found the stand of the respondent to be incorrect on both counts. The petitioner, therefore, cannot rely on one part of the calculation and claim estoppel against the respondent, while contending

that the condition on which the so called admission was made was incorrect. The admission, if any, has to be taken as a whole or not at all. In any case, as noted above, the Arbitrator having interpreted the contract and such interpretation having been found to be sustainable, the challenge to the Award on this ground would not be sustained.

19. The petitioner has further challenged the Award of an amount of Rs.3,70,844/-in favour of the respondent under Claim No.6. The said claim was on account of reimbursement of the balance amount against the testing charges. Learned counsel for the petitioner submits that the respondent had not produced any proof of such payment having been made and therefore, was not entitled to the said amount.

20. I cannot agree with the submission made by the learned counsel for the petitioner. It is not denied by the petitioner that in terms of the contract between the parties, such testing charges had to be reimbursed by the petitioner to the respondent. It is also not denied that such testing had indeed been done by the respondent. The Arbitrator further records that enough documents have been produced by the respondent for allowing of such expenses.

21. The Arbitrator further held as under:

“27.3.3 The Respondents’ denial of this claim on the ground of pending audit/ vigilance investigation is not found valid. The Respondents’ denial on the basis of providing documentary proof of having made the payment is also not considered valid since enough documents are found to be there to allow reimbursement of these expenses. The Respondents have also not come forward with any other figure. The work has been completed as per provisions of

the contract and no completion can be given without having satisfied with testing requirements.”

22. The above being finding on fact, this Court cannot sit as a Court of Appeal to re-appreciate the evidence and to arrive at its own conclusion. Accordingly, the objection against grant of Claim No.6 in favour of the respondent cannot be sustained.

23. The petitioner further challenges the Award of an amount of Rs.33,98,270/- in favour of the respondent under Claim No.7 and 8.

24. Claim No.7 was for compensation on account of under utilization of infrastructure, staff establishment, overheads, labour/workers/T&P machineries etc. during the contract period due to non-fulfillment of the contractual obligations, which according to the respondent amounted to breach of the contract on the part of the petitioner.

25. Claim No.8 was towards the compensation on account of infrastructure, staff establishment, overheads, labour/workers/T&P machineries during the extended period of the contract due to prolongation of contractual period allegedly caused by the petitioner amounting to breach of the contract by the petitioner.

26. A bare reading of the heading of the claims would show that both the above claims were premised on the alleged breach of the contract by the petitioner. The Arbitrator in the Impugned Award, on this issue of breach has held as under:

“28.3.4 This is noted that the work was awarded such that, the date of start itself falls at the start of the rainy

season, though, the tender for the work was received as early as in Dec, 2012 with the bids to remain valid for 90 days only. Such long period of delay in awarding the work is abnormal. Therefore, the Respondents cannot absolve themselves of the responsibility of bringing the period of execution of work during rains. Similarly, the contract stipulates approval of design mix by CRRI or such organization. The Respondents again cannot absolve themselves of the responsibility of delay by CRRI which is a government organization like that of the Respondents and Respondents were in good position to get this expedited. The initial delay in award of work has also resulted into bringing the work running into extreme cold weather of winter season. Since the work is predominantly bituminous work which is not advisable to be executed during extreme cold weather and the period has rightly been allowed by the Respondents as a genuine delay. In view of this, it is considered that the Claimants need to be partly compensated for extra expenditure on overheads for the part of the period other than the period of delay due to extra work.”

27. A reading of the above finding of the Arbitrator would show that the Arbitrator has taken into account the alleged abnormal delay in awarding the work in favour of the respondent as a ground for finding the petitioner to be in breach of contract. In my opinion, this finding of the Arbitrator is completely perverse and unsustainable in law. The contract in question came into existence with the acceptance of tender by the petitioner on 29.06.2013. If the respondent had any grievance with the delay in issuance of the Letter of Acceptance, it could have refused to accept the same without any sort of repercussion on it, as the Arbitrator has also noted that the bids were to remain valid only for a period of 90 days. The respondent having accepted the Letter of Acceptance, cannot

now plead breach of contract on the ground of delay in the award of the work itself. Breach of contract certainly has to be after the work is awarded and not before it is so awarded.

28. The Arbitrator further holds that due to such delay in the award of the work, the execution of the work fell during the period of rain and extreme cold weather. Again, the respondent, while accepting the award of the work would have been well aware of the weather conditions in which it would have to work and perform the contract. In any case, this certainly cannot be said to be a case of breach of contract by the petitioner.

29. Another circumstance taken by the Arbitrator as breach of contract by the petitioner is the delay by CRRI in granting approval of the 'Design Mix'. The counsel for the petitioner draws my attention to Clause 28.5 of the contract which provides that the contractor shall have to get the 'Design Mix' approved from CRRI and any premier Government institution. Therefore, it was the obligation of the respondent to have obtained such approval. Merely because CRRI is a Government organization, it cannot be said that for the delay of CRRI, the petitioner can be held to be in breach of the Agreement. At the time of accepting the contract, the respondent would have been well aware of the delays that may be caused in obtaining approval from another Government organization. The respondent could not show any term of the contract which makes the petitioner responsible for any delay that may be caused by CRRI in granting such approvals. In absence of such contractual

term, the petitioner could not have been held to be in breach of the agreement.

30. In *Associate Builders v. Delhi Development Authority* (supra), while cautioning the Courts of the very limited grounds on which an Arbitral Award can be set aside, the Supreme Court also held as under:

“29. It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

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31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

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36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs. 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and

the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

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

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated in India-

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

31. The above exceptions would certainly be applicable to set aside the Impugned Award on Claim No.7 and 8.

32. Another important aspect of this claim was the application for extension of time filed by the respondent which *inter alia* contained a hand written note on behalf of the respondent stating that it will not claim anything extra due to extension of time as it had not suffered any loss/damages. The counsel for the petitioner submits that in view of this statement, the claim of the respondent was even otherwise not

maintainable. She further draws my attention to the fact that this application seeking extension of time was filed by the respondent in August, 2014 and on basis thereof, the time for completion of the work had been extended by the petitioner in October, 2014. The payment had also been made to the respondent in July, 2015. The counsel for the petitioner submits that for the first time, the respondent claimed damages by alleging breach of contract on behalf of the petitioner only in December, 2015. She submits that the above sequence of events would also show that the claim of damages was only an after-thought and could not have been granted by the Arbitrator.

33. The Arbitrator in the impugned award, so far as the statement of the respondent in its application seeking extension of time and effect thereof is concerned, has held as under:

“28.3.1. The Claimants’ certificate for not claiming damages for the delay on the proforma for extension of time and later withdrawal of the same is considered as his own prerogative as the contract do not bind him in this matter. The circumstances in which the certificate was given being not known, it is considered that the Claimants claim for the additional cost for on overheads cannot be denied on this score alone. I have no reason to disagree with the submissions made by the Claimants on this issue. It is quite common that officers of the government organization throw hints for levy of compensation for delay in completion and ask for such certificate. Such certificate for not claiming damages is neither a requirement as per the proforma prescribed for application for extension of time to be submitted by the contractor nor a requirement under any provisions of the contract. In my opinion, even a contractor of average prudence will not give such blanket certificate voluntarily. In view of the above, and also in

view of the fact that the Claimants have withdrawn the undertaking subsequently, I hold that this cannot be a deterrent in considering this claim of the Claimants.

(Emphasis supplied)”

34. A reading of the above findings would show that the Arbitrator has not gone into the circumstances in which the above certificate/application was made by the respondent. The Arbitrator, on the other hand, has premised his award on the basis of assumption that such certificate/application could not have been given voluntarily. He further holds that in view of the fact that the respondent had withdrawn this undertaking subsequently, it cannot act as a deterrent in considering the claim made by the respondent.

35. In my view, once the Arbitrator had held that the circumstances in which the abovementioned certificate/application had been made by the respondent were not established by the respondent before the Arbitrator, he could not have passed the award on basis of mere conjectures and surmises and presumed facts which were not proved by the respondent. Whether the certificate was given voluntarily or not is a question of fact, which had to be determined on the basis of evidence led by the parties.

36. This Court, in ***Gas Authority of India Limited vs. SAB Industries Limited***, 2012 (131) DRJ 469, had set aside an award based on similar findings of the Arbitrator holding as under:-

“20. Mr. Nidhesh Gupta earnestly pleaded that this was a classic case of a party being forced to sign the NDC under “economic duress”. He invited the Court to infer from the extracted passage of the impugned award that it was only

after analyzing the entire evidence that the learned Arbitrator concluded that SIL was made to sign on the dotted line. In the first place, that is not how the learned Arbitrator has approached the issue. He refers to no evidence that might have led him to draw that conclusion. Secondly, the learned Arbitrator in fact failed to demand that SIL should prove its allegation of coercion or duress by some credible evidence. Thirdly, the documents on record, placed by way of the unrebutted affidavit of Mr. Anoop Gupta do not support the plea of SIL. Lastly, the scope of the jurisdiction of this Court under Section 34 of the Act is limited. The Court cannot at this stage permit SIL to make good its failure to lead evidence before the learned Arbitrator.

21. *An allegation by a party that a certain document was got signed by the opposite party against whom a claim is made through duress or coercion is indeed a serious one. It ought not to be made lightly. The standard of proof that should be demanded by an Arbitrator before whom such allegation is made would be no different from the standard of proof required if such a plea were to be urged in proceedings before a civil court. This is clear from paragraph 50 of the decision in Boghara Polyfab Private Limited. In Union of India v. Master Construction Company, the requirement of the court having to be satisfied with the plea of “duress and coercion” even at the stage of appointment of an Arbitrator was emphasized. It was observed:*

“A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such plea must prima facie establish the same by placing material before the Chief Justice/his designate...if such plea is found to be and after-thought, make-believe or lacking incredibility, the matter must be set at rest then and there.”

22. *In the present case, the learned Arbitrator committed a patent illegality in not requiring SIL to prove through some credible evidence its allegation. His finding that SIL*

signed the NDC” on the dotted line” is not the same as the finding that SIL had signed the NDC under ‘ duress or coercion’ . Even if it were to be assumed to be so, such finding was not based on any evidence. SIL’ s claims ought not to have been entertained.”

37. In view of the above, the impugned award, as far as Claim No. 7 & 8 are concerned, cannot be sustained.

38. As noted above, though the petition was confined only to challenge the impugned award on Claim Nos. 4 to 8, the petitioner by way of IA No. 3152/2018 sought to amend the petition so as to challenge the award even on Claim No. 14.

39. In Claim No. 14, the Arbitrator has awarded a sum of Rs.8 lacs in favour of the respondent as cost of Arbitration proceedings. The only ground of challenge to the grant of Claim No. 14, even in the application seeking amendment of the petition is as under:-

“T. Because the Ld. Arbitrator has erred in awarding Claim No. 14 for Rs. 8,00,000/- towards costs. That the said award is liable to be set aside as it was the Respondent which had invoked arbitration for its false and concocted claims and thus was not entitled to claim any costs. That pertinently and importantly, the award qua the said claim is absolutely without any evidence and a perusal of the claim reveals the Ld. Arbitrator has not considered any evidence or document (in fact, none was filed before him) to award the arbitrary costs of Rs. 8,00,000/- and thus the award qua the claim is liable to be set aside.”

40. The Arbitrator, by way of the impugned award, has awarded sums in favour of the respondent on Claim Nos. 1, 2 and 4 to 8. The award with respect to Claim Nos. 1 and 2 has not even been challenged by the petitioner. As far as challenge to award on Claim Nos. 4 to 6 is concerned, I have found no merit in the same. The Arbitrator in his impugned award on Claim No. 14 had noted that the petitioner had needlessly dragged the respondent to litigation and had also found that the respondent had to undergo litigation for its legitimate claims and the respondent was therefore, entitled to be compensated for the cost of litigation.

41. Section 31(8) of the Act (prior to its amendment) grants a power to the Arbitrator to fix the cost of arbitration and also specify the party entitled to such cost and the party who shall pay such cost. Section 31A of the Act (as amended), states that as a general rule, the unsuccessful party shall be ordered to pay the cost to the successful party. This, in my opinion, is the correct principle of law. A party cannot be made to suffer a proceeding to claim what is otherwise found justified and also bear the cost of such proceedings. Equally, a party cannot without justification, withhold amounts otherwise payable to the other party, force it to initiate litigation and thereafter force it to even bear the cost of such litigation and itself go scot-free.

42. In the facts of the case, I do not find the award of cost of Rs.8 lacs to be unreasonable or disproportionate or warranting any interference by this Court.

43. In view of the above, the impugned award, only in so far as it awards a sum of Rs.33,98,270/- in favour of the respondent under Claim Nos. 7 & 8, is set aside.

44. The petition is partially allowed to the abovementioned limited extent. There shall be no order as to cost.

NAVIN CHAWLA, J

APRIL 10, 2018/Arya

