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

\+ O.M.P. (COMM) 73/2018 & IA 7213/2018

Reserved on: 24.09.2019
Date of Decision : 27.11.2019

GAIL GAS LTD. ..... Petitioner

Through: Mr.Dhruv Mehta, Sr. Adv. with Ms.Manmeet Arora, Ms.Chand Chopra, Ms.Pavitra Kaur, Ms.Anupama Dhruve, Advs.

versus

PALAK CONSTRUCTION PVT LTD. ..... Respondent

Through: Mr.Kirti Uppal, Sr. Adv. with Mr.Ankit Gupta, Mr.Abhimanyu, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 30.09.2017 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Contract/Letter of Award dated 01.07.2010 by which the petitioner had awarded the work for MDPE Pipeline Laying and Associated Works in City Zone Distribution (CGD) project of the petitioner in Meerut Region-2 to the respondent.

2. Before the Sole Arbitrator, the respondent had preferred 11 claims totaling Rs.2,46,81,168/-, while the petitioner had preferred nine counter claims totaling to Rs.70,07,547.61. The Impugned Award awards six out of eleven claims of the respondent and disallowed six out of nine counter

claims of the petitioner, granting the following final relief to the respondent:

> *"Relief : In view of my finding in above issues the Claimant is held entitled to a sum of Rs. 76,61,916.00 (as per amended claim) + Rs.5,85,000.00 + Rs.1,04,602/- + Rs. 1,22,400/- (to be collected from authority) + Rs. 45,04,000.00 +Rs. 7,33,634.00 with interest @ of 12% per annum pendent lite and future whereas the respondent is held entitled to a sum of Rs. 1,85,956.32 + Rs.2,09,000/- + Rs. 1,01,036.40 with interest@ of 12% per annum pendent lite and future to be set off against the amount awarded to the claimant with no order as to costs in the facts and circumstances of the case."*

3. The facts in brief that need notice of are that the petitioner had issued the Fax of Intent dated 26.06.2010 to the respondent accepting the tender submitted by the respondent for the above work. The estimated contract value for the works was Rs. 4,50,31,750/- and the completion period was prescribed as 16 months from the date of Fax of Intent.

4. The petitioner thereafter issued the abovementioned Letter of Award (LOA) to the respondent. Clause 1 of the LOA described the scope of work, while Clause 3 gave the Completion Schedule and is reproduced hereinunder:-

> *"**3. <u>COMPLETION SCHEDULE</u>***
>
> *The contract shall be valid for 16 months from the date of Fax of Intent (FOI).*
>
> *Engineer-in-Charge will give "Letter of Intimation" for executing pipeline as & when requirement arises during the validity of contract.*
>
> *The completion period (reckon from "Letter of Intimation" by EIC) for various pipeline shall be as follows:-*

SL. No.	Pipeline Length	Time Schedule
1	*Upto 2 Kms*	*10 Weeks*
2	*More than 2 Km but less than 5 Kms*	*16 Weeks*
3	*More than 5 Kms but less than 20 Kms*	*24 Weeks*

5. Clause 6 of the LOA provided for the Price Reduction Schedule applicable incase of delay in completion of the work beyond the stipulated time. Clause 7 of the LOA required the respondent to submit the Performance Bank Guarantee.

6. Clause 8 of the LOA prescribed the Defect Liability Period to be 12 months from the date of completion of work as certified by the Engineer-in-Charge as per Clause 80 of the General Conditions of Contract (GCC).

7. It is the case of the petitioner that there were roughly thirty areas in Meerut where the pipeline had to be laid. Though the Contract was executed area wise, it was part of one integrated contract. As the respondent failed to comply with the completion period as specified in the LOA, the date of completion was revised to 25.01.2013, 15.03.2013, 25.04.2013 and lastly to 20.08.2013. The letters of extension clearly stated that they had been issued without prejudice to the petitioner's right and respondent's liabilities under the Contract. The respondent applied for a Completion Certificate only on 13.08.2013, however, in a fire incident on 21.01.2012, defects in the works executed by the respondent came to the attention of the petitioner. A surprise inspection of the

pipeline laying work was conducted on 12.04.2013 by a team of executives of the Vigilance Department of the petitioner as also by GAIL Gas Meerut executives. The same revealed various deficiencies in the work carried out by the respondent. Thereafter, in the presence of the respondent, detailed enquiry was conducted between 09.05.2013 to 17.05.2013 by digging forty test pits at an average of one pit in one kilometer range. During the inspection it was found that the respondent had executed the work without proper sand padding cover and low depth cover. Based on the findings and observations from the joint inspection, the Investigation and Analysis Report dated 31.07.2013 recommended a recovery of Rs. 6,63,839/- from the respondent for not providing sand padding and also called for rectification measures to be taken by the respondent. Thereafter, in a meeting held on 26.06.2015, the respondent agreed to undertake the rectification works as well as for deduction from the final bill, however, failed to do so. A Show Cause Notice dated 31.07.2015 was issued to the respondent and after considering its reply, vide letter dated 31.03.2016, the respondent was banned from participating in the biding process for any tender for a period of three years from 31.07.2015. The Performance Bank Guarantee submitted by the respondent was also forfeited on 21.04.2016 and the Contract was terminated vide notice dated 03.05.2016.

8. The first dispute between the parties was with respect to the claim of the respondent towards its final bill and for the refund of the amount recovered by the petitioner through encashment of the Performance Bank Guarantee. On the other side was the counter claim of the petitioner towards the cost of rectification works and for recovery of amounts for

non provision of sand padding and losses due to the fire incident on 21.01.2012.

9. The Arbitrator held that the Completion Certificate is to be counted from the date in between 03.07.2011 to 23.03.2012, when the work of laying and testing and commissioning of pipeline in the area stood complete. The Arbitrator further held that the Defect Liability Period, therefore, expired on 26.03.2013. Consequently, the letter dated 06.05.2013 and the Investigation report dated 31.07.2013 fell outside the Defect liability Period.

10. The learned senior counsel for the petitioner submits that the above finding of the Arbitrator is completely perverse. Apart from the fact that Completion Certificate had not been issued in favor of the respondent, the respondent had itself admitted in its Statement of Claim that the actual date of completion of the work was 25.04.2013. The petitioner had duly informed the respondent about the shortcomings in the work vide its letter dated 06.05.2013 as also its Investigation Report dated 31.07.2013, which, therefore, fell well within the Defect Liability Period.

11. The learned senior counsel for the petitioner further submits that though the respondent had applied for the Completion Certificate on 13.08.2013, the respondent was in the process of submitting final documentation vide its letters dated 05.04.2013, 27.07.2013 and 24.01.2014 and therefore, the question of issuing Completion Certificate did not arise. Equally, the respondent's alleged final bill dated 12.11.2013 cannot be relied upon as the respondent was contractually bound to submit all closing documents as also undertake rectification work before presenting such bill.

12. On the claim of rectification work, the learned senior counsel for the petitioner places reliance on the Investigation and Analysis Report dated 31.07.2013, recording the deficiencies in the work, as also the Minutes of Meeting dated 26.06.2015 to contend that the respondent had agreed to undertake the rectification work on normal surface as also agreed to a deduction from the final bill of an amount equivalent to the cost of rectification on built-up surface. The learned senior counsel for the petitioner further places reliance on the cross examination of Mr Ashwani Goyal/CW-1 to contend that the respondents were satisfied with the Investigation Report dated 31.07.2013. He submits that even in the Minutes of Meeting dated 26.06.2015, the respondent had agreed to undertake the rectification work and also agreed to a deduction from the final bill of an amount equivalent to the cost of rectification, however, despite undertaking to carry out the rectification work, the respondent failed to do so.

13. He submits that the rectification work was initially awarded to M/s SJ Construction on 07.11.2014 at a cost of Rs. 22,15,531/-, however, the work was not taken up. Thereafter, the work was awarded to two contractors, M/s A.K Enterprises and M/S Eoan Associates at an amount of Rs.24,17,536/- and therefore, the respondent was liable to pay the said amount to the petitioner. The finding of the arbitrator rejecting the counter claim of the petitioner, therefore, cannot be sustained.

14. The learned senior counsel for the petitioner submits that in view of Clause 24.4 and 28.1 of GCC and Clause 10.03 and 10.04 of Special Conditions of Contract (SCC), whenever any claim arises against the

contractor, the petitioner was entitled to recover such sum by appropriating the PBG. Therefore, Claim no. 7 of the respondent could not have been granted by the arbitrator.

15. The learned senior counsel for the petitioner further submits that the contract was to be completed within 16 months from the date of the Fax of Intent dated 26.06.2010. The respondent having delayed the completion of the project, the contract price was subject to a reduction of 5% percent as per Clause 51 of SCC read with Clause 27 of the GCC. The learned senior counsel for the petitioner submits that the extension of time granted by the Engineer-in-Charge vide its letters dated 01.10.2012, 02.01.2013 and 10.02.2013, was conditional and subject to the rights of the petitioner as stipulated for in the contract and therefore, the finding of the arbitrator rejecting the claim of the petitioner cannot be sustained.

16. Learned senior counsel has drawn from my reference to Clause 8 of the LOA which reads as under:

> *"8. **DEFECT LIABILITY PERIOD***
> *The defect liability period shall be 12 months from the date of completion of Works as Certified by the Engineer in Charge as per Clause 80.0 of General Conditions of contract (GCC)."*

17. He submits that in terms of Clause 80.0 of the GCC the Defect Liability Period, therefore, shall be twelve months from the date of completion of works as certified by the Engineer-in-Charge and mentioned in the Completion Certificate. Clause 80.1 of the GCC further provides as under:

"80.1 The CONTRACTOR shall guarantee the installation/ WORK for a period of 12 months from the date of 'completion of WORK' as certified by the ENGINEER-IN-CHARGE which is Indicated in the Completion Certificate. Any damage or defect that (May arise or lie undiscovered at the time of issue of Completion Certificate connected in any way with the equipment or materials supplied by him or in the workmanship, shall be rectified or replaced by the CONTRACTOR at his own expense as deemed necessary by the ENGINEER-IN-CHARGE or In default, the ENGINEER-IN-CHARGE may carry out such works by other work and deduct actual cost incurred towards labour, supervision and materials consumables or otherwise plus 100% towards overheads (of which the certificate of ENGINEER-IN-CHARGE shall be final) from any sums that may then be or at any time thereafter, become due to the CONTRACTOR or from his Contract Performance Security, or the proceeds of sale thereof or a sufficient part on thereof."

18. He further placed reliance on the Clause 81.1 of the GCC to contend that where the work is divided into various groups and is taken over by the respondent in groups, if such group is related to the integrated system of work, notwithstanding the date of grant of Completion Certificate for a group, the period of defect liability shall extend to twelve months from the date of completion of the entire work. Clause 81.1 of the GCC is reproduced hereinbelow:

"81.1 ***DEFECTS PRIOR TO TAKING OVER:***
If at any time, before the WORK is taken over, the ENGINEER-IN-CHARGE shall:

a) Decide that any works done or materials used by the CONTRACTOR or by any SUB-CONTRACTOR is defective or not in accordance with the CONTRACT, or that the works or any portion thereof are defective or do not fulfill the requirements or CONTRACT (all such *matters being hereinafter, called 'Defects' in this clause), and*

b) As soon as reasonably practicable, gives to the CONTRACTOR notice in writing or the said decision, specifying particulars of the defects alleged to exist or to have occurred, then the CONTRACTOR shall at his own expenses and with all speed make good the defects so specified.

In case CONTRACTOR shall fail to do so, the EMPLOYER may take, at the cost of the CONTRACTOR, such steps as may in all circumstances, be reasonable to make good such defects. The expenditure so incurred by the EMPLOYER will be recovered from the amount due to the CONTRACTOR. The decision of the ENGINEER-IN-CHARGE with regard to the amount to be recovered from the CONTRACTOR will be final and binding on the CONTRACTOR. As soon as the WORK has been completed in accordance with the CONTRACT (except in minor respects that do not affect their use for the purpose for which they are intended and except for maintenance thereof provided in clause 80.1 of General Conditions of Contract) and have passed the tests on completion, the ENGINEER-IN-CHARGE shall issue a certificate (hereinafter called Completion Certificate) in which he shall certify the date on which the WORK have been so completed and have passed the said tests and the EMPLOYER shall be deemed to have taken over the WORK on the date so certified. If the WORK has been divided into various groups in the CONTRACT, the EMPLOYER shall be entitled to take over any group or groups before the other or others and there upon the ENGINEER-IN-CHARGE shall issue a Completion Certificate which will, however, be for such group or groups so taken over only. In such an event if the group /Section/ part so taken over is related, to the integrated system of the work, not withstanding date of grant of Completion certificate for group/section/ part. The period of liability in respect of such group/section/ part shall extend 12 (twelve) months from the date of completion of WORK."

19. The learned senior counsel for the petitioner further placed reliance on the Clause 94.12 of the GCC to contend that the contractor was eligible to present the Final Bill only after obtaining the Completion Certificate.

20. As far as the liquidated damages in form of Price Reduction Schedule, the learned senior counsel for the petitioner has placed reliance on Clause 27 of the GCC, which is reproduced hereinbelow:

> *"**27.0Price reduction schedule:***
>
> *27.1 Time is the essence of the CONTRACT. In case the CONTRACTOR fails to complete the WORK within the stipulated period, then, unless such failure is due to Force Majure as defined in Clause 26 here above or due to EMPLOYER's defaults, the total Contract price shall be reduced by 5 % or the total Contract Price per complete week of delay or part thereof subject to a maximum of 5 % of the Total Contract Price, by way of reduction in price for delay and not as penalty. The said amount will be recovered from amount due to the Contractor/ Contractor's Contract Performance Security payable on demand.*
>
> *The decision of the ENGINEER-IN-CHARGE in regard to applicability of Price Reduction Schedule shall be final and binding on the CONTRACTOR.*
> *27.2 All sums payable under this clause is the reduction in price due to delay in completion period at the above agreed rate.*
> *27.3 BONUS FOR EARLY COMPLETION*
> *a.3 If the Contractor achieves completion of Works in all respect prior to the time schedule stipulated in the SCC, the Employer shall pay to the Contractor the relevant sum, if mentioned specifically in SCC, as bonus for early completion. The bonus for early completion, if provided specifically in SCC, shall be payable to the maximum ceiling of $2_{1/2}$ % of the total contract price.*

a.4(*) Partial earlier completion may not always produce net benefits to the Employer, for example where utilization of the completed Works requires (a) the fulfillment of all parts of the Contract (e.g .the training of personnel): or (b) the completion of all Sections (e.g. in pipeline laying, where early completion of the laying of pipeline would not be useful if the compressor is still under installation): or (c) certain seasonal affects to take place (e.g. onset of the rainy season, for impounding a reservoir): or (d) other circumstances. Also a more rapid drawdown of budgeted funds may be required. All such factors should be considered prior to the inclusion of a bonus clause in the Contract."

21. Based on the above Clauses of the GCC and the LOA, the learned senior counsel for the petitioner reiterates that as the respondent had not submitted the Final Closing Documentation till as late as 24.01.2014, the Arbitrator has erred in holding that the Defect Liability Period was over.

22. I have considered the submissions made by the learned senior counsel for the petitioner. At the outset, one must remind oneself of the limited jurisdiction that is vested in the Court while exercising the power under Section 34 of the Act. The same has been culled out by the Supreme Court in its judgments in ***Associate Builders v. Delhi Development Authority***, (2015) 3 SCC 49 and in ***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)***, 2019 SCC OnLine SC 677.

23. In ***Associate Builders*** (supra) the Supreme Court examined the scope and ambit of power of the same under Section 34 of the Act and held as under:

"33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

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

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

> *"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against*

another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.
xxxxxx
42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:
xxxxxx
42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:
"28. Rules applicable to substance of dispute. *(1)-(2)*
(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."
This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.
43. *In McDermott International Inc. v. Burn Standard Co. Ltd.,(2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)*

"112. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit

of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission, (2003) 8 SCC 593:2003 Supp (4) SCR 561 and D.D.Sharma v. Union of India.] (2004) 5 SCC 325.

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

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

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

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

> *"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.*
>
> *44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63: (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296: (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.*
>
> *45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)*

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

24. In ***Ssangyong Engineering & Construction Co. Ltd.*** (supra) the Supreme Court has re-examined the scope of the power of the Court especially in light of the Arbitration and Conciliation (Amendment) Act, 2015 and held as under:

> ***"35.** What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).*
>
> ***36.** It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.*
>
> ***37.** Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary*

to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

***38.** Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.*

***39.** Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.*

***40.** To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.*

***41.** The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to* *decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A).”*

25. Applying the above test to the facts of the present case, it is seen that the Arbitrator has based his finding on the “Status for Intimation” that was exhibited as Ex.PW1/8 before the Arbitrator. Only for the purpose of convenience and relevance, a portion of the same is reproduced hereinbelow:

Sl. No.	Intimation Letter No.	Intimation Date(a)	Gas arrived to Meerut date/any other document date (b)	Location	Work qty. to be covered	Duration of Schedule	Scheduled completion date	Pneumatic testing date (c)	Actual completion	__ __	Considered point for calculation	LD %
1	1	21.08.2010		Parta pur ind area	1235 Mtr.	10 weeks	30.10.2010	08.11.2010	04.07.2011	9	a & c	0.50
2	2	07.09.2010		Mohkampur phase 1 & 2	3924 Mtr.	10 weeks	16.11.2010	02.02.2011	19.08.2011	79	a & c	0.50
3	3	10.09.2010		Devlok colony (B&C)	1779.5 Mtr.	10 weeks	19.11.2010	17.11.2010	25.08.2011	In time	a & c	

26. A reading of the above document would clearly show that the completion date was certified by the Engineer-in-Charge based on various sectors/areas of work. Based thereon, the liquidated damages were also assessed by the Engineer-in-Charge. The said document

clearly negates the assertion of the learned senior counsel for the petitioner that the work in question had to be treated as an "integrated system". The learned Arbitrator found that not only were different completion dates prescribed for each area of work, but also gas was supplied using the pipelines at different periods. It is also to be noted that the petitioner in its reply and counter claim also did not assert its defence/counter claim on the basis of this being a case of "integrated system". The reliance of the learned senior counsel for the petitioner on a stray sentence in the cross examination of the witness of the respondent purportedly admitting the work to be an "integrated system", cannot be accepted as an estoppel or an admission of fact by the respondent so as to find fault in the Impugned Award.

27. As far as the contention of the learned senior counsel for the petitioner that the respondent itself had not completed the documentation for issuance of the Completion Certificate, the Arbitrator in his Impugned Award has held as under:

> *"In view of evidence on record as discussed above it is crystal clear that claimant submitted bill dated 12.11.2013 after submission of completion and last commissioning and handover done on 17.04.2013 vide ex. Pw 1/8 which has been dully signed by the engineer in charge, WGKI. They have also placed on proved on record ex. Pw 1/26 invoice to the Krishan Cap Box P. Ltd. situated at Meerut which shows that gas was supplied to them by the respondent after handover and commissioning of the same by the claimant. It is also proved on record that when MOM dated 26.06.2015 Ex Rw-1/13 was not complied with by the respondent by releasing payment RA bill no -14, the claimant submitted another final bill Ex Pw-1/5 dated 30.04.2016 for sum of Rs. 83,55,834/- which included RA 14 bill amount of Rs.*

28,19,085/-. As such I decide the issue no.1 and hold that claimant submitted the bill for Rs. 52,53,092/- dated 12.11.2013 after successful testing and commissioning of the complete pipeline work. In view of the authority cited above, there is no substance in the submission by Ld Counsel that under clause 94.1 of GCC and clause 94.2 the contract is eligible to present to final bill only after a completion certificate has been issued to the claimant which can only be issued when the work is actually measured by the respondent. In the given circumstances no value can be given to letter dated 03.05.2016 Ex.Rw-1/17 inviting the claimant to undertake joint measurement of work before submission of final bill which the claimant failed to do. Similar is my opinion about letter dated 12.07.2016 Ex-Cw-1/X2 with regard the document submitted by the claimant which were lacking in terms of contract."

28. The above findings being arrived at by the Arbitrator on appreciation of evidence led before him, cannot be challenged before this Court by calling upon this Court to re-appreciate such evidence.

29. Having said so, the "Status for Intimation" also shows that for certain area the defect as pointed out in the letter dated 06.05.2013 would have been within the Defect Liability Period. The learned senior counsel for the petitioner submits that for these areas as well, the defects have been pointed out not only in the letter dated 06.05.2013 but also in the subsequent meetings between the petitioner and the respondent. However, the learned senior counsel for the petitioner has not been able to co-relate such area with the letters pointing out the defects. In any case, it is not shown that this was pleaded as a defence before the Arbitrator. Certainly the Arbitrator cannot be faulted if an argument based on a document is not made before him.

30. As far as the claim of liquidated damages in form of Price Reduction Schedule is concerned, it is noted that the said claim was raised only with the counter claim filed by the respondent. The counter claim was filed by the respondent only on 20.08.2016. Therefore, again no fault can be found with the finding of the Arbitrator on this counter claim.

31. As far as the submission that the work of rectification has been awarded to a third party, the Arbitrator has noted that no such rectification work had been carried out till the date of the Award. In fact, on a query being raised, the learned senior counsel for the petitioner admitted that no such work had been carried out till date. The counter claim of the petitioner towards rectification of alleged defects, therefore, was clearly unsustainable and was rightly rejected by the Arbitrator.

32. The learned senior counsel for the petitioner further submits that the letter dated 06.09.2010 of the respondent seeking permission from the Engineer-in-Charge for the use of locally available yellow sand for the purpose of sand padding, cannot be relied upon inasmuch as in the cross examination of CW-1 dated 03.06.2017, the CW-1 admitted that there was no written approval for the same from the Engineer-in-Charge. He submits that as per Clause 60, any deviation from the contract has to be approved by the petitioner and in the absence of such approval, the Arbitrator has erred in not granting Counter Claim no.3 in favour of the petitioner.

33. The Arbitrator has noted that the petitioner failed to prove any loss on account of use of locally available sand for the purpose of sand padding and in any case the respondent had got the samples approved by

the Engineer-in-Charge vide its letter dated 06.09.2010. In view of the above finding, the Counter Claim of the petitioner is unsustainable and was rightly rejected by the Arbitrator.

34. The learned senior counsel for the petitioner further submits that in the Final Bill dated 31.04.2016 an amount of Rs.9,97,102/- was liable to be deducted as the actual value of the work on the basis of as-Built drawings was Rs.67,75,291.80 excluding tax, and not Rs.77,72,393.80 as claimed in the bill. The same was pleaded before the Arbitrator in the Rejoinder to the Counter-Claims as also in the evidence affidavit of Mr. Ram Babu, that is the representative of the petitioner. He further submits that an amount of Rs.80,000/- which was deducted from RA bill no. 7 as also of Rs.50,000/- which was deducted from the RA Bill no. 8, could not have been claimed in the final bill as both the above bills stood paid on 13.12.2011 and 19.03.2012, respectively. The Arbitrator having completely failed to give any finding in this regard, the Award is liable to be set aside.

35. I am unable to accept the above arguments of the learned senior counsel for the petitioner. Issues framed by the learned Arbitrator have been culled out in the Impugned Award. There was no issue framed before the learned Arbitrator with respect to the alleged discrepancy in the final payment. In fact, even in the pleadings, I do not find any such submissions having been made by the petitioner. The Award cannot be challenged on a new plea being raised before this Court especially when the plea involves disputed question of facts.

36. The next challenge of the petitioner is with respect to the claim of the respondent towards procurement of Warning Mat of the specification of 300*1 mm instead of 200*3 mm as stipulated for in the contract.

37. The learned counsel for the petitioner submits that the arbitrator failed to consider that the claim of the respondent was expressly barred by limitation. He submits that with its letter dated 28.07.2010, the issue of Warning Mat was treated as closed and the respondent never raised any demand towards the same till the filing of its Statement of Claim on 12.07.2016. He further submits that, in any case, the respondent had claimed an amount of Rs.5,98,878/- for the said claim as per Appendix H filed before the Arbitrator and the Arbitrator has erroneously awarded an amount of Rs.7,33,634/- for the same. Therefore, the award in this respect cannot be sustained.

38. The Arbitrator on the issue of Warning Mat has held as under:-

> *"After consideration of submission of the parties I am of the opinion that neither the claim is for additional payment for additional work for which notice is required. The respondent has not denied that no such amount as claimed by the claimant is an additional amount claimed as the mat of superior quality was procure and used under protest in term of email ex pw -1/22 (coly) and ex pw - 1/23. Further, more the claimant has claimed for the entire length of open cut trench RM 40541.00 as per Gail Gas report. EX. Pw-1/27. The argument that the claimant itself admit warning mat of size 300 X 1mm was a PTS (Particular Technical Specification) and that size 200x0.3 mm was a technical specification.*
>
> *Therefore, as per order of precedence set out in clause 1.6 of SCC, the specification of size 300 X 1 mm would prevail goes against the respondent as no contractor would use*

the warning mat of bigger size of 300x1mm at his cost and risk."

39. I do not see any reason to interfere with the finding of the learned Arbitrator except to the fact that the learned Arbitrator has erred in awarding a sum of Rs.7,33,634/- to the respondent when the claim of the respondent was only for Rs.5,98,878/-. The Award would therefore stand modified to the said limited extent.

40. The next challenge of the petitioner is to the award of Rs.5,85,000/- to the respondent towards rent for storage and handling of material at the stockyard of the respondent.

41. The learned senior counsel for the petitioner submits that the contract does not permit the respondent to claim any amount towards rent and even otherwise the respondent failed to prove the rent receipts which were not even in the name of the petitioner but in the name of Mr.Ashwani Goyal, Manager of the respondent company. He further submits that the claim relates to the year 2010-2011 and is therefore, barred by limitation.

42. The Arbitrator has held as under:-

"It has been argued by representative of claimant that vide Ex. Cw-1/X10 the respondent inform total 88,460 RM of MDPE pipe was issued to the claimant towards handling and storage for pipeline works at Meerut. Out of the said quantity only 59736.50 RM were required to be consumed in work. Ballance quantity of 26,051.51 RM of pipe has been either issued to other contractor by Respondent or returned back to CWC Ghaziabad store yard. The email dated 21.09.10, 23.04.11, 19.09.12 and letter dated 22.07.13 Ex Pw-1/15 further proved the pipes were unloaded in the warehouse in 2010 and some more pipes latter on without any specific detail where as

clause 28.1 states location of dumpyard/ store yard location city wise "for Meerut it is CWC Ghaziabad and there was no any store-yard at Meerut by the respondent." The rent receipt paid by representative of the claimant was no doubt for personal use but as discuss about extra pipe were kept by the claimant in his rented store yard which was belonging to respondent. It cannot be said by the respondent that the claim is not maintainable as is based on false and fabricated documents. In fact the email and rent receipt coupled with deposition of the claimant has proved on record that unloading and dumping outside the scope of work were done by the respondent in the store yard of the claimant. Hence the issue is decided and claimant is held entitled to sum of Rs. 5,85,000.00/- towards extra expenditure"

43. I have considered the above submission of the learned senior counsel for the petitioner, clearly the contract between the parties was not one of lease of space. It had also not been pleaded before the learned Arbitrator that such claim was raised by the respondent any time before filing of the Statement of Claim. Even if the said claim was to be raised, there had to be prior negotiation or at least acceptance of the petitioner to such liability. As far as the Award of this Claim of the respondent is concerned, the same was clearly beyond the scope of the Arbitrator, being beyond the scope of the Agreement itself. The same cannot, therefore, be sustained.

44. The petitioner further challenges the Award of Rs.1,04,602/- towards extra expenditure incurred on installing the RCC Marker of bigger size than specified in the contract. The learned senior counsel for the petitioner submits that the only basis for awarding the said amount was Appendix C filed by the respondent without any supporting documents for the proof of the costs. He submits that the rates for RCC

Marker were changed from Rs.1600/- to Rs.444/- as admitted by RW-1 in its cross examination and even the Final bill raised by the respondent was in accordance with the revised rate of Rs.444/-. He submits that therefore, the amount mentioned in Appendix C on which the claim of the respondent was based, was not proved. The learned counsel for the petitioner submits that the letter dated 22.10.2011, relied upon by the respondent to show that it had the petitioner's consent, was false and fabricated. He submits that the same bears the name of one Mr. Rajesh Srivastava who is not the competent authority under the contract. He further relies upon the cross examination of CW-1 on 29.04.2017 to submit that no approval for changing the technical specifications for the RCC markers was sought; in absence of the same the claim of the respondent could not have been granted by the Arbitrator. In any case, the respondent raised no such claim prior to filling of the Statement of Claim and therefore, the said claim is a complete afterthought and barred by limitation.

45. Learned senior counsel for the respondent could not deny the above submissions of the learned senior counsel for the petitioner that the Final Bill had been raised with the revised rate of Rs.444/- and that no such claim was raised at the time of filing the Final Bill. The letter dated 22.10.2011 had been denied by the petitioner. There is no mention in the Award as to how this document was considered as being proved by the respondent. In view of the above, the finding of the learned Arbitrator on this claim of the respondent cannot also be sustained and is set aside.

46. In view of the above findings, the petition is partially allowed. The parties shall bear their own costs.

NAVIN CHAWLA, J

NOVEMBER 27, 2019/*rv*