

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

+ O.M.P. (COMM) 220/2019 & I.A. No.7819/2019

Reserved on: 20.08.2019
Date of Decision : 24.12.2019

DIRECTORATE GENERAL, BORDER SECURITY FORCE &
ANR. Petitioners

Through: Mr.Kirtiman Singh, CGSC with
Mr.Prateek Dhanda & Mr.Waize
Ali Noor, Advs.

versus

NIIT TECHNOLOGIES LIMITED

..... Respondent

Through: Mr.Vikas Dutta, Mr.Siddharth &
Mr.Chander Joshi, 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 petitioners challenging the Arbitral Award dated 14.01.2019 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Acceptance of Tender dated 25.02.2010 issued by the petitioner in favour of the respondent awarding work of supply, installation and commissioning of BSF Intranet Prahari Project on Turnkey basis.

2. The Arbitral Award, while rejecting the counter claims of the petitioner no. 1 herein, granted claim nos. 1, 2, 3 and 7 (partially) of the

respondent herein, and granted the following relief in favour of the respondent:-

- “i) The respondent shall refund to the claimant the amount of Rs. 10,11,35,072/-, wrongfully deducted as LD along with simple interest of 9% p.a. w.e.f. 1.1.2014 till realization.*
- ii) The respondent shall also refund amount of Rs. 3,72,35,418/-, wrongfully deducted against the cost of cartridges for IPP project along with simple interest @ 9% p.a. w.e.f. 1.4.16 till realization.”*

3. The petitioner no. 1 had floated a tender for supply, installation and commissioning of BSF Intranet Prahari Project (IPP) on 23.10.2008. The respondent was awarded the said work on turnkey basis vide Acceptance of Tender (AT) dated 25.02.2010.

4. As per Clause 9 of the Schedule to the AT, the entire project was to be completed/ commissioned by 25.08.2010. Clause 9 further provided for the stages of delivery of the project, and is reproduced herein under:-

STAGES	TERMS OF DELIVERY/PROJECT	DURATION (From the Date of AT)
<i>Stage- 1</i>	<i>Receipt of Hardware at all locations and physical survey of the same (i.e. good and working condition)</i>	<i>On or before 25th May' 2010</i>
<i>Stage – 2</i>	<i>Successful Installation/Commissioning of the Hardware.</i>	<i>On or before 25th July' 2010</i>
	<i>Software development/Installation</i>	
	<i>Data Creation/Porting</i>	
	<i>Software Testing</i>	

	<i>Training simultaneously at all locations</i>	
<i>Stage – 3</i>	<i>Acceptance of project and submission of Project Report</i>	<i>On or before 25th Aug' 2010</i>

5. Clause 10 of the AT provided that the place of delivery was to be at the respective consignee locations provided for in Appendix 'A' attached to the AT.

6. Clause 12 of the AT stipulated for liquidated damages for delay in completion of the IPP on turnkey basis within the delivery period. The same is quoted hereinbelow:-

*“12. Liquidated damage for delay in supplies:
In case the firm does not complete the supply and/or installation /commissioning of BSF Intranet Prahari Project on turn key basis within the delivery period, action will be taken against the firm as per Para 14. 7 (i) of General condition of the contract of Department of supply, Ministry of Commerce, New Delhi. The purchaser has the right to recover from the contractor under the provisions of Clause 14(7)(1) of the general conditions of the contract issued by Govt of India Ministry of Commerce, Department of Supply as **liquidated damages** if the contractor fails to commission the complete project within the specified period as mentioned in clause-9 above.”*

7. Clause 20(II) of the AT provided for a Guarantee/ Warrantee period of 24 months from the successful installation and commissioning of the entire project.

8. Clause 20(VI) of the AT further provided for an Annual Maintenance Contract (AMC) for a period of 5 years, beginning from the expiry of the Guarantee/ Warrantee period.

9. The respondent by letter dated 12.03.2010 suggested various amendments/clarifications to the AT as also by letter dated 17.03.2010 offered current models of the hardware products as certain models had become end of life/obsolete since the submission of the bid to the tender. The petitioners in response thereto issued Corrigendum-I dated 20.04.2010 to the AT, while accepting the current models of the products as stipulated for in the letter 17.03.2010.
10. The petitioners vide letter dated 29.04.2010 amended Appendix 'A' to the AT, which gave details of the list of consignees with the list of deliverables. The total number of consignees were increased to 186 from the original number of 13.
11. The respondent vide its letter dated 13.05.2010 sought Extension of Time (EOT) till 20.06.2010 for delivery of all hardware, which was to be delivered by 25.05.2010 as per the AT.
12. The respondent vide its letter dated 26.07.2010 sought further EOT for final commissioning and acceptance of the project till 31.12.2010 and for application training completion till 31.03.2011.
13. In response to the above letters, the petitioner no. 1 vide its letter dated 13.02.2010 intimated the respondent that the request for EOT was under active consideration and shall be communicated to the respondent in due course.
14. Subsequently, the respondent vide its letter dated 25.02.2011, while citing various reasons for the delay, sought another EOT till 31.03.2011 without Liquidated damages as also delinking of the data entry work from the project such that the Guarantee/ Warrantee period

could commence from 01.04.2011 and a separate completion date of 30.06.2011 for the data entry activity.

15. In response to the above, the petitioner no. 1 vide its letter dated 10.03.2011 stated that the AT being a Turn Key Project, Guarantee/Warranty period should start only when the project is completed in all respects.

16. The respondent vide letter dated 04.04.2011 sought further EOT without Liquidated damages till 30.06.2011.

17. The petitioner vide its letter dated 07.12.2011 granted EOT to the respondent till 31.12.2011 with Rights Reserved(R/R) and Denial Clause(D/C). The relevant portion of this letter is quoted hereinbelow:-

*“2. AT was awarded to you firm for supply, installation and commissioning of BSF Intranet Prahari Project with the total period of work as 180 days from the date of issue of AT i.e. **25 Feb 2010 to 25 Aug 2010**. The period included supply, installation and commissioning of BSF Intranet Prahari Project. Your firm failed to complete the work within the stipulated time and approached for extension of work completion period. The case was examined in light of terms and conditions of the AT and the delivery period is hereby extended from **26 Aug 2010 to 31 Dec 2011 with R/R and D/C**.*

3. Please note that price preference loss as stipulated in the schedule to the Acceptance of Tender, and an amount equal to the pre-estimated / liquidated damages for delay in completion of the work after expiry of the contract completion period shall be recovered from you as specified in clause 1 (k) of Annexure-I to the Acceptance of Tender /Clause 14 (7) (i) of the General Conditions of Contract DGS&D-68 (Revised) for the extended period notwithstanding the grant of this extension.”

18. The petitioner issued Corrigendum-III vide letter dated 30.12.2011, amending Clause 21 of the AT by making changes in item Nos. 59, 60, 64, 70, 71, 87, 92, 97 of the said clause. The said corrigendum was accepted by the respondent vide letter dated 09.02.2012, withdrawing its earlier representation dated 25.01.2012 against the said Corrigendum.

19. The petitioner vide its letter dated 17.01.2010 accepted the IPP as commissioned for use from 31.12.2011 with the warranty period starting from 01.01.2012.

20. The petitioners vide letter dated 18.03.2016 levied liquidated damages of Rs. 10,11,35,072/- on the respondent on account of alleged delay in supplies as stipulated for in Clause 12 of the AT.

21. The petitioner further vide letter dated 01.01.2016 pointed out that only 471 mono printer cartridges had been supplied to BSF field formations as against a commitment of 5148 cartridges. It was further stated that since the petitioner has no other option but to buy the same from the open market, the cost of such cartridges would be deducted from the amount due to the respondent for the Annual Maintenance Contract (AMC) period of June to December 2015. An amount of Rs. 3,72,35,418/- was deducted in this regard. This amount was inclusive of a penalty amount of Rs. 10,63,500/- deducted as per Clause 20(II)(ii)(F), that is the Penalty Clause.

22. It is the case of the petitioners that the project was to be completed by the respondent on 25.08.2010, however, the same was completed only after a delay of 16 months and handed over on 31.12.2011. Clause 9 of the AT provides for Stages and Terms of Delivery and the respondent having breached the same, the petitioner was entitled to impose

liquidated damages for the delay at various stages. The learned counsel for the petitioners submits that the AT clearly and unequivocally provides for imposition of liquidated damages for the delay at various stages and therefore, the finding of the arbitrator that liquidated damages cannot be levied at any stage prior to the date of completion, cannot be sustained.

23. The learned counsel for the petitioners further submits that the petitioners had taken into account all factors like delay on the part of the petitioners, force majeure conditions, inclement weather, stone pelting, local disturbances and the delay on the part of the petitioner before imposing the liquidated damages. He submits that even otherwise, in terms of the communication dated 07.12.2011 granting EOT to the respondent, specific rights were reserved by the petitioners in terms of the provisions of the AT, therefore, the EOT was never granted without imposition of liquidated damages as sought by the respondent. He submits that infact, extension was not even sought by the respondent post June, 2011.

24. The arbitrator, interpreting various clauses of the agreement, has held as under:-

“In a turnkey project the commissioning of whole project can alone be considered and commissioning of each site is of no significance. Moreover, no time table for commissioning of different sites and states was provided in the contract. The claimant in this case had handed over working sites and working states much before final commissioning.

The contract makes one thing clear that acceptance of stores at site was also to be done by the respondent after being satisfied on inspection that the store was of requisite quality and quantity. Acceptance of the entire project was to be done by the respondent

after run-in period of 3 weeks extendable by 2 days, without penalty and extendable for 30 days with penalty. Thus, clause 'n' of Annexure-I clause r /w clause No. 19 of AT makes it clear that the commissioning could have been accepted by the respondent only if the claimant had already secured the extension. Once the project in its entirety had been accepted by the respondent it only implies that respondent had agreed to extension of delivery period as asked by the claimant.

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Upto commissioning the project was a 'turnkey' project. In a 'turnkey' project, the delay may be there in different steps taken by contractor but this delay is in-consequential if he is able to deliver the project in time. The different stages of achievements or time table prescribed in the contract acts only as guidance for the contractor and cannot be stated to be the time limit of each stage. Delay in achieving first stage may be made up in 2nd or 3rd stage. In a turnkey project the calculation of liquidated damages cannot be done on the basis of delivery of each store item or stage-wise. If the liquidated damages are calculated on the basis of time prescribed in the contract for different steps, then it is not a 'turnkey' project, it is a stage-wise project. It has been emphasized by the respondent that it was not a stage-wise project but a 'turnkey' project and rightly so because the contract specifically provided that it was a 'turnkey' project to be completed within prescribed period and to be handed over on commissioning. The delay is therefore to be calculated only with respect to the date of commissioning. Since in this case the amendments of contract took place on 30.12.2011 and the commissioning took place on 31.12.2011, there can be no delay in commissioning of the project.

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On one hand, the respondent has claimed that the project was a – 'turnkey' project and it was not a stage-wise project or item-wise project on the other hand, LD had been imposed as if it was not a 'turnkey' project but was a stage-wise/ item-wise project. The argument given by the respondent is that while calculating LD a

lenient view was taken against the claimant. This argument of taking lenient view in favour of claimant is a farce as seen from the discussion stated in proceedings paras. The calculation of LD without taking into account the extension of contract period by virtue of making amendment by the respondent and without considering its own defaults cannot be a lenient view. The calculation of LD treating the contract as stage-wise/item-wise and not a 'turnkey' project is also not tenable. As already held that the time period in this case stood automatically modified and extended because of the unilateral amendment in the contract made by the respondent on 30.12.2011. There could have been no LD imposed upon the claimant and the calculations of LD are baseless.

25. The petitioner further submits that as per the AT, historic data of entire service book of all employees was required to be collected. He submits that even in the clarifications dated 28.04.2009, relied upon by the arbitrator, Clarification no. 16 clearly provides for the capture of HR data of all BSF officers and other employees. He submits that therefore the arbitrator's reliance on Clarification no.5, which deals with the capture of data at various locations only, holding that considerable delay in the project was attributed to the data entry work is erroneous and cannot be sustained.

26. The arbitrator in this regard has held as under:-

It is surprising that despite the entire system being in place, IPP system was not accepted or inaugurated and insistence was made that data entry work be completed. The data entry work as mentioned in the contract was only for a period of 5 years. After floating of tenders, various queries were made and responses were given by BSF to the venders. One of the queries was as under:-

Please clarify the:- 1) Volume of Data of last	At all Locations 5 year's historic data is required to be
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<i>5 years to be captured in MBs</i> <i>2) Number of locations where data will be made available.</i> <i>3) Who is going to provide infrastructure for data capture.</i> <i>4) It is assumed that BSF will be responsible for validating the Captured Data.</i>	<i>captured. Office Orders & documents are also required to be scanned for creating document Management.</i> <i>BSF officer will assist vendor in validating the captured data.</i>
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It is clear from the answer that only 5 years historic data was to be captured. Further correspondence between claimant and respondent showed that life time HR data in respect of each employee of BSF was asked to be captured and it was not limited to 5 years historic data. The claimant had complained a number of times about huge volume of data to be captured and to be authenticated and not visualized earlier. Not only there was an increase in capturing and validating data but there was deficiency in BSF staff and sufficient staff was not made available to the claimant for data entry. The data entry work therefore took more time than any other part of the project despite the claimant deploying considerable number of persons at all locations. This was something not visualized by both the parties and there was considerable increase in work which the claimant grudgingly did. This had impact on the delivery period. But for the data entry, the entire project was completed in June, 2011 and could have been commissioned. In fact, part of the project was used by the G.Os of respondent for budgeting and other purposes.”

27. The learned counsel for the petitioner further submits that the List of Consignees/ Place of delivery provided for in Appendix ‘A’ only indicates the ‘Rail Heads’ and the actual locations for installation were to

be obtained by the respondent from the petitioner and delivery was to be done at the actual sites of installation at the risk and cost of the respondent, as per Clause 11 of the AT. He further submits that even the preface of Appendix 'A' makes it clear that the installation was to take place at the 'Actual Location' and the amendment/ Corrigendum dated 29.04.2010 only provided the details of the Actual Locations of the various consignees at which the stores were to be installed. In any case, the delivery period for the same was extended from 25.05.2010 to 27.07.2010.

28. The learned counsel for the petitioner further submits that amendment/ Corrigendum-III dated 30.12.2011, wherein clause 21 was amended, was merely to record the work already done in the number of stores ordered against certain items and was for the purposes of record. He submits that the project was commissioned on the same day and therefore, no fresh work was required to be done pursuant to the Corrigendum-III.

29. The arbitrator on the impact of the amendments/ Corrigendums has held as under:

“It is apparent that though the respondent had fixed the last date for delivery as 25th May i.e. 3 months from the date of signing of – ‘AT’ but on 29.4.2010, the respondent had amended the contract and sent a letter telling respondent 186 locations instead of 13 where the material was to be sent. If the letter is presumed to be received within 2 days, practically that contract started from 1st May and not from 25th February. The respondent's stand is that in scope of work 'page 42 of AT' 231 places were mentioned where hardware was to be installed and commissioned. In tender enquiry claimant was told to implement at 257 BSF offices, 152 locations. The stand of respondent is contrary to contract and

tender document. 'AT' provides that 'AT' was sole repository of terms and conditions of contract. In 'AT' Annexure- 'A' gave list of places of delivery. This list is of only 13 places. The respondent amended the contract and substituted this list of 13 places by a list of 186 places. This was a substantial amendment.

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The 4th amendment to the contract was made on 30.12.2011 wherein some of the items mentioned in the AT to be delivered for the project were substituted and their quantities were changed and in some cases description were changed. These items were very much part of the entire project to be commissioned. Since the amendments to the contract were made unilaterally in respect of deliverable items by the respondent, the time period for delivery automatically stood extended upto the date of amendment plus reasonable time for delivering the articles. Once Clause 21 was amended the substituted items could not have been delivered by 25th May or 27.7.2010 as the substituted items were introduced in the contract on 30.12.2011. Thus, to say that 25th May or 27th July, 2010 (as extended) was the last date of delivery is factually incorrect. The respondent stated that only a small number of items were involved in 30.12.2011 amendment and could be supplied by the claimant easily. The claimant had not refused to supply these items. Only thing to be seen is whether these items were part of the contract or not. These items admittedly were the part of the contract and once the contract for delivery of these items was amended on 30.12.2011, the delivery could only take place subsequently on 30.12.2011. The entire argument of the respondent that all deliveries were to be completed within 6 months therefore has to be rejected once the respondent had taken liberty to amend the contract as late as on 30.12.2011 i.e. one day before commissioning. Clause 'n' of annexure-I to AT provided that the store tendered after delivery period will not be accepted unless extension has been applied for and secured. If the store had been ordered on 30.2.2011, its acceptance necessary would have been done after 30.12.2011 and once the acceptance of this store is done, the delivery period for the store got extended upto the date of acceptance of the store. It does not make a difference whether the

store was small quantity or large quantity. I therefore consider that the entire issue of extension of delivery period got settled by the corrigendum issued by the respondent dated 30.12.2011.”

30. I have considered the submissions made by the learned counsels for the parties. At the outset, it would be important to keep in mind the limited power of this Court while exercising its jurisdiction under Section 34 of the Act. The Supreme Court in ***Associate Builders vs. Delhi Development Authority*** (2015) 3 SCC 49, has clearly delineated such jurisdiction in the following words:

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

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

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H.

Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

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

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

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

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

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

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

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

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

“112. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission, (2003) 8 SCC 593; 2003 Supp (4) SCR 561 and D.D.Sharma v. Union of India.] (2004) 5 SCC 325.

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

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

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is

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

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

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

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

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

43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *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.”

31. The same was reiterated by the Supreme Court in ***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)***, 2019 SCC OnLine SC 677, keeping in view the amendment made to the Act, observing 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)."*

32. In the present case, the finding of the learned Arbitrator is not only based on the interpretation of the terms of the AT but also of the conduct of the parties. The learned Arbitrator has held that the project being one on turnkey basis, the period prescribed for various stages, were merely for guidance of the respondent and could not be used for imposition of liquidated damages. The learned Arbitrator has further found that there was some time taken for issuing Corrigendum recording change of the

obsolete items as also in mentioning the sites where the items were to be delivered. The learned Arbitrator has further held that there were other reasons for delay which needed to be accounted for. Placing reliance on certain Minutes of Meetings, the correspondences before April, 2011, and after the meetings, the learned Arbitrator found that the petitioners were majorly responsible for the delay in commissioning of the project. The learned Arbitrator has further found the method of calculation of the liquidated damages adopted by the petitioners to be even otherwise incorrect.

33. The question of time being of essence or not, as also the conduct of the parties which would lead to an extension of time being granted, are questions of fact which are to be arrived at by scrutinizing the evidence led by the parties. As noted hereinabove, the learned Arbitrator is the final Judge on these questions. This Court cannot sit as an Appellate Court to reconsider the same to arrive at its own conclusion. The parties having agreed to have their dispute adjudicated through arbitration, must remain bound by the finding of the learned Arbitrator, unless the same falls within the limited exceptions that have been enumerated in Section 34 of the Act and as explained by the Supreme Court in *Associate Builders* (supra). Reference can also be made to *Municipal Corporation of Delhi vs. Jagan Nath Ashok Kumar & Anr.* (1987) 4 SCC 497.

34. In the present case, though the learned counsel for the petitioners may be right in submitting that the Corrigendum allowing the change of items that had been rendered obsolete and which provided for the details of the locations had been duly accounted for while taking a decision to allow extension of time, at the same time, the fact that the final

Corrigendum was issued only on 30.12.2011 and there were other delays also attributed by the learned Arbitrator on the petitioners, would show that the ultimate finding of the learned Arbitrator on the question of imposition of the liquidated damages cannot be faulted in the limited extent of jurisdiction vested in this Court by Section 34 of the Act.

35. The learned counsel for the petitioner further submits that the respondent was required to supply cartridges during the Guarantee/Warranty period as well as the AMC period as per Clause 20 (ii) and (vi) of the AT. He submits that the respondent had admittedly supplied only 471 cartridges instead of 5148 for the year 2015 and therefore, there was a shortfall of 4677 cartridges. Therefore, in view of the above breach by the respondent, the petitioners were not required to show any loss suffered.

36. The arbitrator on this claim, has held as under:

“A perusal of all the documents placed on record of Tribunal by the respondent shows that there was not a single document showing that Mono cartridges were purchased by the respondent from the market at all. The respondent had not even pleaded that he had purchased Mono cartridges from the market. The respondent stated that it had purchased other than mono cartridges useful on its printers other than IPP printers and shifted the load of IPP printers to the other printers. There is, no proof, placed by the respondent on record, of shifting the printing load from IPP printers to other printer. IPP printers were at more than 250 places. Nothing has been stated at which place how much load was shifted and under whose directions. Moreover, there is no purchase order placed on record by the respondent even in respect of purchase of other cartridges during the year 2015-16. All purchase orders placed on record by the respondent are upto Dec. 2011 when the project had not been commissioned. There is only one purchase order of April, 2012 but that purchase order cannot

be taken into consideration as it is not the case of the respondent that claimant failed to supply cartridges during guarantee/warranty period. Thus, the respondent has miserably failed in justifying the deduction of the amount of Rs. 3,72,35,418/- against non-supply of cartridges from AMC. Deduction of amount made by the respondent was unlawful and could not have been made. The respondent had failed to prove either suffering of loss or purchase of the cartridges of any kind by the respondent. The claim No.3 of the claimant is therefore allowed.”

37. As is evident from the above observation of the learned Arbitrator, though it cannot be doubted that the respondent had failed to supply the cartridges during the AMC period in question, it was for the petitioners to have proved the damages suffered by it. The finding of the learned Arbitrator that there were no documents filed by the petitioners in support of its claim before the learned Arbitrator is not shown to be incorrect. In fact, faced with these difficulties, the petitioners filed an application, being I.A. No.10061/2019, seeking to place additional documents on record. The said application was dismissed by this Court by its order dated 20.08.2019.

38. The Supreme Court in ***M/s Canara Nidhi Limited v. M.Shashikala and Ors.***, (2019) 9 SCC 462, reiterated that an application/petition under Section 34 of the Act should be decided only with reference to the pleadings and the evidence placed before the learned Arbitral Tribunal and the grounds specified under Section 34(2) of the Act.

39. In the present case, in absence of any evidence having been led by the petitioners on the quantification of the damages suffered by it due to

non-supply of the cartridges by the respondent, the finding of the learned Arbitrator cannot be faulted.

40. The next challenge of the petitioner is to the non grant of the counter claim no.1 of the petitioners of ₹ 17,95,14,790/- towards the 1200 trained personnel that were not utilised for a period of 13 months on account of delay in completion of the project on 31.12.2011. The learned counsel for the petitioner submits that after completion of the training on Data Base Administrator (DBA) and fundamental training at different locations, no services could be availed of for the project till 13.12.2011.

41. The Arbitrator in this regard has held as under:-

“It is not the case of respondent that these 1200 personnel were recruited specially for the project, so that once the project takes off they would be deployed on the project. These 1200 personnel were officers and personnel of respondent, who were already in service of BSF discharging their various duties either at Bns. or at different offices. It was a requirement of the contract that they would be trained by the claimant so that once the project is commissioned, the respondent has not to hire additional manpower for handling the project and its existing manpower was so trained that it would handle and run the project. It is not the case of respondent that any of its officials remained idle and did not discharge its normal duties after the training. The respondent, therefore, was not entitled for any claim because of non deployment of these personnel on IPP from Feb. 2011 to Dec. 2011. These officials continued to discharge their normal duties, before the commissioning of the project as well as after the commissioning of the project. They were only given the additional knowledge and additional training to enable them to work on the project once the project was commissioned. The claim is rejected as it has no force.”

42. The petitioners could not dispute the finding of the learned Arbitrator that the officials continued to discharge their normal duties before commissioning of the project as well as after the commissioning of the project. In view thereof, the finding of the learned Arbitrator cannot be faulted.

43. The learned counsel for the petitioner lastly challenges the non grant of Counter Claim no.2 of ₹ 1,07,70,275/- of the petitioner on account of non supply of printer cartridges during delayed period of commissioning. The learned counsel for the petitioner submits that as per Clause 20(II)(ii), the respondent was to supply all spare parts including the printer cartridges during the Guarantee/ Warranty period that is after the commissioning of the project. He submits that the project having been delayed for 13 months, the petitioner had to purchase 2703 cartridges from the market for a cost of ₹ 1,07,70,275.

44. The arbitrator in this regard has held as under:-

“It is not disputed that liability of supplying the spare parts i.e. cartridges, ribbons etc. on the part of the claimant started only after commissioning of the project. The claimant had no liability to supply these things prior to commissioning of the project. The delay in commissioning of the project and reasons thereof had already been dealt in claim no. 1 of the claimant. Even otherwise in contract where provisions of liquidated damages are there, a claim for the expenses incurred due to delayed commissioning of project cannot be raised unless specifically provided in the contract.”

45. I do not find any merit in the challenge to the above finding of the learned Arbitrator on this counter claim.

46. For the reasons stated hereinabove, I find no merit in the present petition. The same is dismissed, leaving the parties to bear their own costs.

NAVIN CHAWLA, J

DECEMBER 24, 2019/Shikhar/rv

