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

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Date of Decision: 10th December, 2019

+ O.M.P. (COMM) 202/2018

ARAVALI INFRA POWER LIMITED

..... Petitioner

Through: Mr.Kunal Sharma, Advocate for the
official liquidator of the petitioner
company

versus

MICHIGAN ENGINEERS PVT. LTD. AND ANR. Respondents

Through: Mr.Rajat Sehgal, Mr.Debbarshi
Bhuyan, Mr.Aditya Swarup,
Advocates

CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

J U D G M E N T (O R A L)

1. The petitioner has filed objections to the award dated 27th December, 2017 passed by the sole arbitrator, Justice A.P. Shah (Retired).
2. The petitioner and the respondents entered into an agreement dated 02nd July, 2011 for design, supply, installation and commission of the solar photovoltaic power plant at Rajkot District, Gujarat. The respondent was required to complete the construction of the power plant by 15th December, 2011 for a consideration of Rs.66 crores.
3. The respondents completed the project on 26th January, 2012 within the permissible extended time but were not paid the contract amount whereupon the respondents invoked the arbitration.
4. The learned arbitrator awarded balance consideration of

Rs.59,11,10,823/- along with interest @ 18% per annum to the respondents.

5. The petitioner has challenged the award on the limited ground that the learned arbitrator has erroneously rejected the expert evidence of M/s. Nu-Techno Design Consultant and Rays Power Experts Pvt. Ltd.

6. Learned official liquidator urged at the time of the hearing that the aforesaid two expert witnesses proved the defence of the petitioner and the learned arbitrator erred in rejecting their testimony.

7. Learned counsel for the respondents urged at the time of the hearing that the ground raised by the petitioner does not come within the scope of Section 34 of the Arbitration and Conciliation Act. It is submitted that the learned arbitrator has given detailed reasoning for rejecting the reports of the two expert witnesses. Reliance is placed on *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49.

8. The law with respect to the scope of Section 34 of the Arbitration and Conciliation Act, 1996 is well settled. In *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, the Supreme Court elaborated the scope of Section 34 and held as under:

“Fundamental Policy of India Law

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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.

30. The audi alteram partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:

“18. Equal treatment of parties.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

*34. Application for setting aside arbitral award.—(1)****

(2) An arbitral award may be set aside by the court only if—

(a) the party making the application furnishes proof that—

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;”

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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Justice

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 Rs 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”.

Morality

37. The other ground is of “morality”. Just as the expression “public policy” also occurs in Section 23 of the Contract Act, 1872 so does the expression “morality”. Two illustrations to the said section are interesting for they explain to us the scope of the expression “morality”:

“(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code (45 of 1860).”

Patent Illegality

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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 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;”

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

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.”

(Emphasis supplied)

9. Applying the aforesaid principles to the present case, this Court is of the view that the challenge to the award does not fall within the scope of Section 34 of the Arbitration and Conciliation Act. That apart, there is no infirmity in the well reasoned findings of the learned Arbitrator. Learned arbitrator has discussed in detail the testimony of the two expert witnesses in paras 123 and 124 of the award. Learned arbitrator has recorded the findings with respect to the expert witnesses in para 142 of the award.

10. The objections of the petitioner are dismissed.

J.R. MIDHA, J.

DECEMBER 10, 2019/dk