

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

A.P.590 of 2011

The Board of Trustees for the Port of Kolkata

Vs.

ABG Kolkata Container Terminal Private Limited

For the Plaintiff : Mr. Tilak Kr. Bose, Sr. Adv.
Mr. Ashok Kr. Jena, Adv.

For the Respondent : Mr. Sabyasachi Chowdhury, Adv.
Mr. Rajarshi Datta, Adv.
Mr. Soorjya Ganguli, Adv.
Mrs. Radhika Misra, Adv.
Mr. Debjyoti Saha, Adv.

Last Heard on : 9.10.2020 & 18.12.2020.

Delivered on : 24.12.2020.

Moushumi Bhattacharya, J.

1. The petitioner has applied for setting aside of an Award dated 18 April, 2011 passed by a learned Sole Arbitrator in an arbitration in which the respondent herein was the claimant. By the impugned award, the

Arbitrator found that the respondent was entitled to the claim for the amount adjusted towards Service Tax in excess of 8% for the months of July and August, 2009 amounting to Rs. 2,14,27,220/- and the amount adjusted from the subsequent bills of the respondent being Rs. 6,54,54,216/-. Interest at the rate of 12%, translated to a sum of Rs. 34 lakhs was also awarded to the respondent/claimant amounting to a total of Rs. 9,02,81,436/-. The Counter-Claim of the petitioner herein (respondent in the arbitration) was rejected.

2. For ease of reference, the petitioner (respondent in the arbitration) is referred to as Kolkata Port Trust/KoPT and the respondent/claimant as ABG.

3. The brief facts leading to the dispute being referred to arbitration by ABG are as follows. ABG entered into a contract with KoPT pursuant to a tender floated by KoPT for operation and maintenance of two Mobile Harbour Cranes with backup support equipment at the Container Terminal in the Kolkata docks of KoPT. The parties agreed that the contract was to be governed by the terms of the tender. Disputes arose between the parties when KoPT adjusted an amount of Rs. 2,14,27,220/- from the monthly bills of ABG for June and July, 2009 on account of service tax paid in excess of 8% and withheld bill amounts for the months of January to March, 2010. ABG filed a claim for Rs. 2,14,27,220/- against the amounts adjusted towards service tax in excess of 8% in July, August, 2009; Rs.7,66,78,396/-

against the other amounts adjusted from ABG's bills; and Rs. 49,20,900/- towards interest @ 18% p.a. till 31.05.2010. ABG claimed a total of Rs.10,30,26,516/- from KoPT under these heads. These figures would appear from the particulars of the Statement of Claim filed by ABG in the arbitration proceeding.

4. By the impugned Award, the Arbitrator allowed the claim of ABG pursuant to framing of questions for adjudication of the dispute. The crux of the dispute was whether service tax was to be paid by KoPT and if yes, at what rate. Upon considering the documents relied on by the parties, the refusal of KoPT to pay service tax was found to be wrongful and contrary to its stated position in a letter dated 6 October, 2003 issued by the Container Terminal Manager of KoPT which contains a statement to the effect that *"Service Tax at 8% shall be payable extra"* on the amount payable as per the rates quoted by the tenderer. The Arbitrator also found that KoPT had no authority to withhold payment of service tax in light of KoPT's conduct subsequent to the letter dated 6 October, 2003.

5. Mr. Tilak Bose, learned Senior Counsel appearing for KoPT assails the Award on the ground that the entire Award proceeds on the existence of a purported letter dated 6 October, 2003, which Counsel refers to as the "controversial/disputed letter". According to counsel, this letter is irrelevant in the context of acceptance of the terms of the contract by the parties which was on the basis of an open tender and would be evident from the fact that

the Letter of Acceptance of KoPT makes no reference to this letter. Counsel points to several documents which form part of the contract including a pre-bid meeting of 5 August, 2003 and letters exchanged between the parties on various dates including on 17 and 22 September, 2003 and 6 October, 2003 on which date, three letters were exchanged between the parties including the disputed letter. According to Counsel, the contract stood concluded on 28 January, 2004 on the basis of the Offer Letter of ABG dated 6 October, 2003 and there was no scope for the terms of the contract to be subsequently varied. Counsel submits that the Letter of Acceptance dated 28 January, 2004 makes no reference to the controversial letter of 6 October, 2003. Counsel clarifies that even if it is assumed that the controversial letter of 6 October, 2003 modifies the contract, the modification would be restricted to payment of service tax at 8% only. Counsel contends that since service tax is payable by the service provider, (ABG in this case) the claimant ABG would be liable for such and not KoPT. Counsel submits that even if the formal agreement dated 2 April, 2004 refers to the disputed letter of 6 October, 2003, Clause 3 of the said agreement makes it clear that the contract would strictly be in accordance with the conditions mentioned in the tender document.

6. The second point of challenge to the Award is that no reasons have been given in the impugned Award with regard to quantification of the amounts awarded to ABG. Counsel submits that the amount of Rs. 9,02,81,436/- awarded is not supported by any discussion preceding the

Award. Counsel submits that the Arbitrator may have relied on a Supplementary Affidavit of ABG which was never filed in the arbitration proceedings as would be evident from letters written to the Arbitrator read with the Minutes of the Meetings. It is also urged that KoPT was not given any opportunity to file its Counter to the Supplementary Affidavit and that the Award fails to take into account an amount of Rs. 61,66,406/- admittedly received by ABG from KoPT on 21 June, 2010. The last ground of challenge to the Award is that the finding of the learned Arbitrator justifying the rate of service tax above 8% is wholly based on a concession of learned Senior Counsel appearing for KoPT which is contrary to the terms of the contract agreed between the parties. On this point, Counsel submits that even if the disputed letter dated 6 October, 2003 is taken into account, the liability of KoPT at the highest will be restricted to reimbursement up to 8% service tax and no more.

7. In essence, Counsel contends that the Arbitrator has awarded reimbursement of service tax in violation of the terms of the contract and took irrelevant documents into account for construing the terms of the contract. Counsel relies on several judgments on the position of the law prior to the 2015 Amendment to section 34 of The Arbitration and Conciliation Act, 1996. *Associate Builders v. Delhi Development Authority* (2015) 3 SCC 49 is relied upon on the issue of perversity and patent illegality. *Oil and Natural Gas Corporation Limited v. Western Geco International Limited* (2014) 9 SCC 263 is shown on what would constitute

fundamental policy of Indian Law. Counsel has cited *State of West Bengal v. Bharat Vanijya Eastern Pvt. Ltd.* (2019) SCC Online Cal 3605 and *Steel Authority of India v. TLT Engineering* both decisions of a Division Bench on the point of non-furnishing of reasons for the quantum. *Kinnari Mullick & Anr. v. Ghanashyam Das Damani* (2018) 11 SCC 328 of the Single and Division Bench of this Court as well as the Supreme Court have been relied on the requirement of furnishing reasons under Section 31(3) of the 1996 Act. Counsel has also relied on *Central Bank of India v. Prakash Chand Jain* AIR 1969 SC 983 and *Rajinder Kumar Bindra v. Delhi Administration* (1984) 4 SCC 635 on the meaning of the expression “perversity”. *K. P. Poullose v. State of Kerala* AIR 1975 SC 1259 has been shown on what would constitute “legal misconduct” under the Arbitration Act, 1940.

8. Mr. Sabyasachi Chowdhury, learned Counsel appearing for the respondent/claimant ABG, relies on the pre-contract correspondence between the parties which according to Counsel was deemed to be read and construed as part of the agreement dated 2 April, 2004. Counsel relies on the controversial/disputed letter of 6 October, 2003 which states that “Service Tax @ 8% shall be payable extra...”. Counsel submits that besides the pre-contract correspondence, Clause 5 of the Work Order dated 18 April, 2004 reiterates the same position as that of the controversial letter. Counsel submits that KoPT initially paid service tax at 8% and thereafter at various rates in respect of bills raised by ABG from 2003 to 2009. It is submitted that the claim of ABG in the arbitration arose from an illegal

adjustment of Rs. 2,14,27,220/- by KoPT from the monthly bills of June and July, 2009 and that KoPT was liable to pay service tax at the then prevalent rate of 10.30% and not at 8%. Counsel relies on the pleadings of KoPT admitting to the existence of the controversial letter.

9. Counsel relies on *Mc Dermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181* for the proposition that construction of a contract is within the domain of the arbitrator and that the conduct of the parties would be a relevant consideration for such construction and on *Rashtriya Ispat Nigam Limited v. Dewan Chandra Ram Saran (2012) 5 SCC 306* where the Supreme Court held that an assessee can enter into an agreement to shift the liability of Service Tax.

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10. Upon hearing learned counsel appearing for the petitioner/KoPT and the respondent/claimant-ABG, it is clear that the dispute centres around two issues,

a) whether Service Tax was payable by KoPT and if yes, whether Service Tax payable at 8% or at the prevailing rate; and

b) whether the amount of Rs. 9,02,81,436/- awarded to the claimant-ABG, was justified.

Both the above issues were decided in favour of the claimant ABG in the arbitration proceedings.

11. In order to test whether the impugned Award can be upheld within the statutory framework, the reasons given by the learned Arbitrator in support of the findings arrived at should first be seen.

Whether KoPT was liable to pay Service Tax on the amount payable to ABG as per the rates quoted in the tender document?

12. ABG has relied on a letter dated 6 October, 2003 (“the controversial/disputed letter”) issued by the Container Terminal Manager of KoPT to ABG and other entities who participated in the tender. The said letter contains a statement to the effect that “*Service Tax at 8% shall be payable extra*” on the amount payable as per the rates quoted by the tenderer. The tenderer was requested to work out its competitive offer in view of the aforesaid statement. According to ABG, this document formed a part of the contract dated 2 April, 2004 entered into between KoPT and ABG for operation and maintenance of two Mobile Harbour Cranes. According to ABG, the liability to pay Service Tax at 8% was also part of the Work Order issued by KoPT which was acted upon by KoPT making payments in the course of the transaction.

13. The findings of the Arbitrator with regard to this issue are as follows :-

- (a) A letter dated 6 October, 2003 (described by the KoPT as the controversial letter) was issued by KoPT before the final agreement dated 2 April, 2004 which modified the clarifications arrived at the pre-bid meeting;

- (b) This letter had a bearing on the concluded contract between the parties;
- (c) The original letter was produced by KoPT and a xerox copy thereof was submitted before the Arbitral Tribunal;
- (d) The statement of KoPT contained in this letter namely that KoPT was liable to pay service tax at 8% extra was a collective decision of the higher authorities of KoPT;
- (e) Clause 2 of the formal agreement dated 2 April, 2004 referred to this letter and hence was deemed to form part of the agreement entered into between the parties;
- (f) That the offer was made by KoPT through inadvertence is not acceptable to the Arbitrator;
- (g) Clause 11 of the Work Order reinforced the liability of KoPT towards payment of service tax at 8%;
- (h) The disputed letter of 6 October, 2003, the formal agreement of 2 April, 2004 and the Work Order would cumulatively show that KoPT was liable for Service Tax;
- (i) KoPT acted in terms of the disputed letter of 6 October, 2003 by making payment towards service tax at 8% for a considerable length of time;
- (j) nobody on behalf of KoPT came before the Arbitrator to depose that KoPT had committed a mistake in issuing the disputed letter.

Based on the above findings, the Arbitrator came to the conclusion that KoPT had acted upon the letter, the formal agreement and the Work

Order and had made payments of Service Tax at 8% extra on the amount payable as per the rates quoted by ABG.

14. The above findings will need to be tested on the grounds taken by KoPT for setting aside of the Award. On the factual score, there are several important considerations which the Arbitrator overlooked in coming to the conclusions. The formation of the contract between KoPT and ABG culminated in the Acceptance Letter/Letter of Intent of KoPT dated 28 January, 2004 in which it is clearly stated that the contract would be as per the tender conditions agreed upon between the parties. This LOI only mentions ABG's Offer Letter of 6 October, 2003 and subsequent clarification of November, 2003 together with another letter of ABG of 15 January, 2004. There is no reference to the controversial letter of 6 October, 2003 having the reference "No.Mech/CTM/MHC". Notably, the 6 October, 2003 letter referred to in the LOI has a different reference number of RW1:CPT:03.

15. Besides the above, the relevant clauses in the tender terms in respect of freezing of pre-bid conditions, price-bid, duration, general conditions and special terms also do not refer to any liability on the part of KoPT in respect of payment of service tax at 8% or otherwise. Clauses 9 and 10 of the pre-bid meeting dated 5 August, 2003 make it clear that the parties agreed that all statutory taxes, duties, levies, etc. "*in vogue*" will have to be included in the rates to be quoted by the prospective bidders and more important, that "*no tax, duties, levies, etc. will be paid extra on the rates quoted*". The letter of

KoPT dated 17 September, 2003 states that “*deviations from tender conditions now stand frozen*” and in the event of any deviation, the offer of ABG will not be accepted. The Offer Letter of ABG dated 6 October, 2003 records that all terms of the Notice Inviting Tender were accepted. The Offer Letter of ABG dated 6 October, 2003 enclosing its price-bid also makes no reference to payment of service tax.

16. The impugned Award makes no reference to the Letter of Intent/Acceptance Letter of 28 January, 2004 by which ABG’s offer was accepted by KoPT and that the contract was concluded between the parties as per the tender conditions. The impugned Award consequently also does not refer to the fact that the concluded contract makes no reference to the controversial letter of 6 October, 2003 in which KoPT allegedly undertook the liability to pay service tax at 8% extra.

Whether the reliance placed by Arbitrator on the controversial letter dated 6 October, 2003 was justified :-

17. It is clear from the impugned Award that the controversial letter formed the sole basis of the Arbitrator finding that KoPT was liable for payment of service tax at 8%. In coming to such conclusion, the Arbitrator did not take into account the fact that among others, the controversial letter bears a totally different reference number “No.Mech/CTM/MHC” compared to the other documents forming part of the pre-contract correspondence culminating in the acceptance letter freezing the terms of the contract. The

impugned Award also does not consider that neither the Letter of Acceptance nor the Offer Letter or price-bid makes any reference to the disputed letter. The conclusion that the disputed letter modified the terms of the contract is therefore unfounded. This Court finds substance in the contention of KoPT that even if there is any factual basis to the controversial letter modifying the contractual terms between the parties, the modification would only be restricted to 8% service tax. The more fundamental argument made on behalf of KoPT that service tax is payable to the Government by the service provider, ABG in this case, is also tenable.

18. Repeated reference to a “formal contract” dated 2 April, 2004 signifying the terms agreed between the parties is not supported from the documents on record. This agreement merely records the correspondence between the parties and in fact refers to the Acceptance Letter of 28 January, 2004 of which the Award is totally silent. Significantly, Clause 3 of this agreement stipulates that the contractor (ABG) would perform “strictly in accordance with the tender conditions in “NIT No.Mech/CTM/ADV-3/2003” dated 13.06.2003 and the “LOI No.MECH/C/8/217” dated 28.01.2004.

19. In the impugned Award, the Arbitrator has also relied on clause 11 of the Work Order as reinforcing the liability of KoPT to pay Service Tax at 8%. The Arbitrator failed to notice that the Work Order is of 18 May, 2004 long after the Letter of Acceptance of 28 January, 2004 which crystallized the contractual terms between the parties. The Arbitrator, hence discounted the

fact that a Work Order cannot change the terms of contract agreed and accepted by the parties on 28 January, 2004 in respect of an open tender. However, as stated above, even if reliance is placed on clause 11 of the unsigned conditions attached to the Work Order, making KoPT liable for Service Tax, such liability can only be restricted to Service Tax at 8% and no more.

The finding of the Arbitrator in relation to the rate at which Service Tax was to be payable by KoPT.

20. The conclusion of the Arbitrator that KoPT was liable for payment of Service Tax in excess of 8% is based on the following:

(a) Pursuant to a change of law, the rate of Service Tax was varied from time to time and hence, KoPT would have to make payment of Service Tax as per the prevailing rate.

(b) The submission of learned Senior Counsel appearing for KoPT that although Service Tax is not payable by KoPT, *“if it is found that Service Tax is payable then the Service Tax at the prevailing rate has to be paid”*

(c) The above submission is an unequivocal and unambiguous admission on the part of KoPT to pay Service Tax at the prevailing rate.

The above points seem to suggest that the entire liability of KoPT to pay Service Tax at the prevailing rate was based on the concession of Senior Counsel appearing for the KoPT. This reasoning is wholly unwarranted since

no such concession on the part of KoPT was made in its pleadings or in the Minutes of Meeting which are part of records in the present proceedings. If the consistent position of KoPT is that it is not liable to pay Service Tax, the concession of senior counsel for KoPT cannot be taken as an unequivocal admission on the part of KoPT in altering that position. As stated above, even if the controversial letter dated 6 October, 2003 is given any credence, the liability of KoPT at the highest, would only be confined to reimbursement up to 8% Service Tax and no more. In any event, the stand taken by counsel cannot result in the terms of a contract being re-written.

Whether the amount awarded to Respondent/ABG is supported by reasons

21. The impugned Award found the Claimant/ABG entitled to the claim for an amount of Rs. 2,14,27,220/- on account of the amounts adjusted by KOPT towards service tax in excess of 8% and for Rs. 6,54,54,216/- on account of the amounts adjusted from the subsequent bills of ABG. The sole reason for allowing the amounts is that

“This claim on both these two heads appears to be just and proper.”

The claim of Interest at 12% has been allowed as according to the Arbitrator that

‘....will meet the ends of justice. In round figure it is found to be Rs.34 lacs only.’

After analysing the claims in the Supplementary Affidavit of ABG, the claimant/ABG was found to be entitled to Rs. 9,02,81,436/-. The Counter Claim of KOPT was rejected.

The lines quoted above are the only reasons given for quantification of the claims awarded to ABG. Thus, final figure of Rs. 9,02,81,436/- arrived at is singularly bereft of reasons. The Statement of Claim of ABG mentions the amounts Rs. 2,14,27,220/- + Rs. 65,45,4216/- (Rs. 5,52,51,176/- + Rs. 27,31,555/- + Rs. 74,71,485/-) which comes to Rs. 8,68,81,436/-. These amounts were claimed by ABG on account of adjustment of Service Tax from the bills of ABG. It would be contrary to the law as pronounced in *Ferro Concrete* and *Bharat Vanijya* if the quantum awarded to a party is bereft of reasons and awarded on the mere asking without any adjudication in the matter. It is also pertinent to state in this context that the quantum of Service Tax paid by ABG, the service provider in this case, is within the special knowledge of ABG of which KoPT cannot have any information. Hence, the view of the Arbitrator that the payment of Service Tax has to be made as per the prevailing rate with the variation of the law cannot be seen as tenable under any circumstances.

22. The amount of Rs. 9,02,81,436/- awarded to ABG may be traced to a Supplementary Affidavit filed by ABG on which the parties are at variance. According to KoPT, this Supplementary Affidavit was never filed before the Arbitrator and no opportunity was given to KoPT to file a counter to the Supplementary Affidavit. The Supplementary Affidavit becomes relevant

since the Award records that ABG received a sum of Rs. 61,66,406/- from KoPT on 21st June, 2010 on account of adjustment of Service Tax. This finding can be related to an identical paragraph in the Supplementary Affidavit of ABG which is part of records in the present proceedings. The awarded amount, however, fails to take this payment made by KoPT into account.

23. As to the rate of interest claimed, the Arbitrator has settled on 12% stating that it will meet the "*ends of justice*". There is simply no reason given for arriving at the rate of 12% except a "*round figure of Rs. 34 lakhs*". Besides the above, although a contractual sum of Rs. 2,14,27,220/- (part of the awarded amount to ABG) is mentioned in the Statement of Claim and the Supplementary Affidavit, the other principal claims are at variance as mentioned in the Statement of Claim and the Supplementary Affidavit. Further, the amount of Rs. 6,54,54,216/- mentioned as the amount adjusted from the bills of ABG does not find mention in the Supplementary Affidavit while the amount of Rs. 2,14,27,220/- (described as adjustment towards Service Tax in excess of 8% and included in both the statement of claim and supplementary affidavit) is inconsistent with the statement of Service Tax enclosed with the Statement of Claim of ABG. The impugned Award also does not explain why Rs. 2,14,27,220/- was included as part of the amount awarded instead of Rs. 7,66,78,396/- which is the amount shown as the total Service Tax component in the statement of claim of ABG. Hence, the computation of the final Award is clearly incorrect and fails to

consider material facts on which the final amount awarded should have been based.

24. Enquiry by a Section 34 court into an inconsistent approach of the factual matrix is not to enlarge the role of the court in the present proceedings. The role of a court in matters of this nature is limited by the statutory framework of the Act. The purpose herein is to pinpoint the loopholes in the decision of the Arbitrator where the amounts awarded are either based on an incorrect factual premise or are not supported by reasons. A court cannot supplement or supplant the reasons given by an Arbitrator or supply the missing links between the facts and the findings: reference *Steel Authority of India vs. TLT Engineering*.

25. In *State of West Bengal v. Bharat Vanijya Eastern Private Limited* (2019) SCC Online Cal 3605, a Division Bench of this Court emphasized the necessity of disclosing reasons. The Court was of the view that the quantum of compensation awarded to a party requires detailed attention and the reasons furnished call for a stricter scrutiny. The Court proceeded to hold that a party which was being saddled with a liability of a substantial sum of money was entitled to know the basis for the same. The issue of furnishing reasons for arriving at a quantum was considered in *Steel Authority of India v. TLT Engineering India Pvt. Ltd.* in FMA 406 of 2020, an unreported decision of a Division Bench of this Court in which the Court held that the 1996 Act casts an obligation on an Arbitral Tribunal to furnish reasons in support of the Award under the individual heads of claim since every

process of adjudication must reveal how the decision-making authority applied its mind to the matters before it. *TLT Engineering* held that the Court of first instance cannot take upon itself the burden of adjudicating the disputes since that would be against the mandate of section 34 of the Act.

26. The requirement of furnishing reasons with regard to quantum was also considered in *Kinnari Mullick v. Ghanshyam Das Damani* (2018) 11 SCC 328 where the question before the Supreme Court was whether section 34(1) of the 1996 Act empowers the Court to relegate the parties before the Arbitral Tribunal after having set aside the Award without any application being made in that respect by either of the parties to the arbitration proceeding. In that case, a learned Single Judge of this Court had allowed the application under section 34 for setting aside of the award and the Division Bench affirmed the decision of the First Court. The Supreme Court held that since no formal written application had been made by the petitioner in the section 34 application before the Division Bench, the latter could not have sent the matter back to the Tribunal under section 34(4) of the Act. The Single Bench decision in *Kinnari Mullick* is an important pronouncement on the requirement of furnishing reasons in support of the award under section 31(3) of the Act.

27. Since the impugned award is of 18 April, 2011, the present case falls before the 2015 Amendment. The law would hence be governed by the principles enunciated in *Associate Builders v. Delhi Development Authority*

(2015) 3 SCC 49 and *Oil and Natural Gas Corporation Limited v. Western Geco* (2014) 9 SCC 263.

28. An Award is said to be perverse when it is so irrational that no reasonable person would have arrived at the same. The benchmark of “....no reasonable person would have arrived at the same....” is on a different footing compared to an unreasonable Award, simpliciter. The threshold of legality is higher in the former, since the award may teeter on the brink of absurdity. *Associate Builders* explained the test of perversity as a finding based on no evidence, or considerations irrelevant to the decision or ignoring of vital evidence. In the present case, the Award can be assailed on all three of the aforesaid grounds. The entire basis of the Award is either on contractual terms which the parties did not intend to give effect to or a non-contextual reference to letters exchanged between the parties or accepting the claims on face-value without evidence. There is a singular absence of a nexus between the fact and the conclusion. Even if credence is given to the controversial letter relating to liability of KoPT in respect of Service Tax, the Arbitrator failed to restrict the said liability at 8% and instead relied on a statement of senior counsel for KoPT in deciding the rate of liability. Paragraph 31 of *Associate Builders*, outlines the parameters of perversity as being a decision which no reasonable person would have arrived at and borrows from the principles of administrative law to enumerate that a perverse decision would be (i) a finding which is based on no evidence; (ii) takes irrelevant materials into account; (iii) ignores vital evidence (each

disjunctive to the other). The Supreme Court proceeded to hold that an award is against “justice” only when it “shocks the conscience of the Court”. The Supreme Court took recourse to the Contract Act, 1872 to enlarge the expression “morality”. “Patent illegality” on the other hand, would come into play if an Arbitrator were to act in contravention of section 31(3) of the Act, that is, fails to disclose the reasons on which an award is based. An award would also be patently illegal if it is in contravention of section 28(3) of the Act which mandates that the Arbitral Tribunal shall take into account the contract and the trade usages applicable to the transaction. In *Central Bank of India Ltd. v. Prakash Chand Jain* AIR 1969 SC 983, the Supreme Court held that where the findings are not based on legal evidence or are such as no reasonable person could have arrived at on the basis of the material before the Tribunal, the findings are to be treated as perverse. This case delineates what a Tribunal can do, namely arrive at the conclusion that the findings recorded (by the Inquiry Officer in that case) were perverse and cannot; which is to sit in judgment over the view taken by the Inquiry Officer and make a further assessment of the facts.

29. The expression “fundamental policy of Indian law” was explained in *Oil and Natural Gas Corporation Limited v. Western Geco* (2014) 9 SCC 263 which referred to section 34(2)(b)(ii): “...in conflict with the public policy of India”. The Supreme Court referred to the interpretation of the expression “public policy of India” in *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* (2003) 5 SCC 705 and reiterated that the subject of public policy

connotes some matter which is of public interest and gave the example of an award which is patently in violation of statutory provisions or is likely to adversely affect the administration of justice. *Saw Pipes* further opined that an award could be set aside if it is contrary to fundamental policy of Indian Law, interest of India, justice or morality or is patently illegal. The Supreme Court in *Western Geco* enumerated three distinct juristic principles which should be understood as part and parcel of the fundamental policy of Indian law:

- (a) a judicial approach of a Court or authority in matters affecting the rights of a citizen and requiring the authority to act in a bona fide, reasonable and objective manner;
- (b) application of mind to the attendant facts and circumstances and administration of such by recording of reasons in support of the decision;
- (c) testing the perversity or irrationality of a decision on the touchstone of Wednesbury principle of reasonableness; the test being that the decision is so perverse that no reasonable person would have arrived at the decision.

30. *K. P. Poullose v. State of Kerala AIR 1975 SC 1259* decided under the Arbitration Act, 1940 defined legal misconduct under section 30(a) of the 1940 Act as not only a moral lapse but a decision ignoring material documents. *State of Rajasthan v. Ferro Concrete Construction Pvt. Ltd. (2009) 12 SCC 1* held that while the quantum of evidence required to accept a claim

may be a matter within the exclusive jurisdiction of the Arbitrator, the Arbitrator will be making a wholly invalid award if he awards the amount claimed merely on the basis of the claim statement and nothing more.

31. *McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181* has been relied upon by ABG for the proposition that the conduct of the parties would be a relevant factor in the matter of construction of a contract and further that the construction of the contract is within the jurisdiction of the Arbitrator. In *McDermott International*, the Supreme Court, relying on *D.D. Sharma v. Union of India (2004) 5 SCC 325*, opined that once it is held that the Arbitrator has the jurisdiction, no further question shall be raised unless it is found that there exists any bar on the face of the Award. There cannot be any dispute as to this proposition. A distinction must, however, be drawn as to what is meant by “*construction of contract*” as opposed to “*terms of contract*”. Under Section 28(3) of the Act, the Arbitrator is duty-bound to take into account terms of a contract between the parties and is accordingly required to decide the matter in accordance with the terms of the contract. The distinction between “*construction of a contract*” and “*terms of a contract*” becomes relevant where the Arbitrator fails to identify the terms of a contract from a plain and meaningful reading thereof and instead takes into account documents and materials which do not indicate what the parties intended. If the Arbitrator, as in the present case, takes recourse to the latter, the Award must fail on the ground of perversity. Section 28(3) of the Act makes it mandatory on the Arbitral Tribunal to take into account the

“terms of the contract”. The law is that construction of the terms of a contract is within the exclusive domain of the Arbitrator. The thrust of the 1996 Act is on intention of the parties as evident from the contract. The emphasis on the phrase *“terms of the contract”* under section 28(3) is to prevent an Arbitrator travelling beyond what the parties intended under the contract. The assumption is that the Arbitrator would construe the intention of the parties in accordance with a correct understanding of the terms of the contract. In the present case, the Arbitrator has disregarded the unambiguous intention of the parties to be bound by the tender conditions as stipulated in several documents including the Offer Letter, Letter of Acceptance and the agreement of 2 April, 2004 and has instead relied on an isolated letter which does not find mention in any of the relevant correspondence exchanged between the parties and is also contradictory to the clear terms of the contract. Hence, where an Arbitrator fails to identify the correct terms of a contract, it cannot be said that the view taken by the Arbitrator is a plausible view and would accordingly pass the test of section 34. If an arbitrator has failed to identify the correct terms of a contract and has consequently misconstrued the contractual terms, a Court can revisit the terms to ascertain whether the construction is irrational and should be integrated with.

32. *McDermott International* opined that the component of public policy would depend on the nature of transaction where the pleadings of the parties and the materials on record would be relevant. This position was

repeated in *Centrotrade Minerals & Metals Inc v. Hindustan Copper Ltd.* (2006) 11 SCC 245. *McDermott* has also been relied upon by ABG on the point of conduct of parties and correspondence exchanged being a vital tool for construction of a contract. On this score, the distinction between construction of contract and terms of contract are reiterated with the additional point that the contract between the parties was clearly meant to be based on the terms of tender (clause 3 of the formal agreement dated 2 April, 2004). *Godhra Electricity Co. Ltd. v. State of Gujarat AIR 1975 SC 32*, relied on by the Arbitrator makes it clear that the conduct of the parties and correspondence exchanged becomes relevant only where the terms of a contract are ambiguous. Notably, the Arbitrator failed to refer to this decision in its proper perspective.

33. The law as pronounced in *McDermott International Inc v. Burn Standard Co. Ltd.* (2006) 11 SCC 181 read with *Godhra Electricity Co. Ltd. vs. The State of Gujarat AIR 1975 SC 32* that conduct of the parties would be an aid in the construction of the contract where the contractual terms do not lend clarity to what the parties intended has to be seen in the foreground of the findings of the Arbitrator in reliance of the documents shown by ABG. The pre-contract negotiations do not refer to the controversial letter dated 6 October, 2003 in which KoPT allegedly agreed to pay Service Tax at 8%. The formal agreement of 2 April, 2004 also stipulated that ABG would implement the project strictly in accordance with the conditions contained in the tender document. The Arbitrator, however, erroneously construed the pleading of

KoPT in its counter-statement as the controversial letter of 6 October, 2003 being issued through inadvertence. *Rashtriya Ispat Nigam Limited v. Dewan Chandra Ram Saran* (2012) 5 SCC 306 was a decision on the liability to pay service tax where the Supreme Court held that since service tax is an indirect tax, it is possible for an assessee to enter into a contract to shift the liability of service tax.

34. The point taken by learned counsel for ABG that the petition under Section 34 does not contain a ground with regard to the supplementary affidavit is not acceptable for the following reason. Section 34 of the Act is a structured framework which provides for limited grounds on which an Award can be challenged. Apart from the grounds available to a party to challenge the Award on incapacity, lack of notice or the composition of the Arbitral Tribunal under section 34(2)(a), section 34(2)(b) lays down broader grounds such as the Award being in conflict with the public policy of India. The expression “*public policy of India*” has been clarified further under the three sub-heads to mean an Award induced or affected by fraud, is in contravention with the fundamental policy of Indian law or is in conflict with the most basic notions of morality or justice. *ONGC v. Saw Pipes* was one of several cases which shed light on what would constitute public policy, namely contrary to fundamental policy of Indian law; contrary to interests of India; contrary to justice or morality; patent illegality and shocking the conscience of the Court. Unlike the grounds taken in an appeal, the 1996 Act does not require particulars of the grounds to be pleaded unless a party

takes any of the grounds in section 34(2)(a) (incapacity, lack of notice or opportunity of hearing, composition of the Tribunal, etc). The ground of public policy has been taken in ground XXIII in the present petition and would cover the allegation of the Award being vitiated by lack of reasons in the quantification of the amount awarded.

35. An Arbitrator has a duty to adjudicate on the claims of a party on the basis of the documents furnished as evidence, in the context of the amount claimed and pit the claim of one party against the denial of the same by the opposing party. Adjudication does not mean blindly accepting the amounts claimed without taking into account the figures which would put the claim in doubt. "*Ends of justice*", as stated by the Arbitrator must involve a proper consideration of the competing claims put forward by the parties instead of arriving at a convenient figure at the expense of justice. In this context, reference may be made to *Ferro Concrete Construction*, where the Supreme Court held that while the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the Arbitrator, the decision in relation to such has to be accompanied with evidence.

In view of the above discussion, AP No.590 of 2011 is allowed and the impugned Award dated 18th April, 2011 is accordingly set aside. There shall be no order as to costs.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)

Later :

The prayer for stay of the operation of this judgment on the ground of an execution application is considered and refused since it is submitted on behalf of the petitioner that the respondent already stands secured in the execution proceedings filed by it.

(MOUSHUMI BHATTACHARYA, J.)