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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 17.10.2019

Pronounced on: 27.02.2020

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O.M.P. (COMM) 218/2019 & I.A. 7757 & 14003/2019

SAMSUNG INDIA ELECTRONICS PVT. LTD. Petitioner

Through: Mr. Prashanto Chandra Sen, Sr.
Advocate with Mr. Niraj Singh,
Mr. Kaustubh Singh, Ms. Reha &
Ms. Rajlaxmi Singh, Advocates

versus

VISHAL VIDEO & APPLIANCES PVT. LTD. Respondent

Through: Mr. Rajshekhar Rao, Mr. Rohan
Sharma, Mr. Dheeraj Deo, Mr.
Roghav Koeker, Advocates

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petition has been filed under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') for setting aside the Award dated 09.01.2019 passed by the Arbitral Tribunal, whereby the Tribunal has allowed the claims of the claimant (respondent herein) and has awarded a sum of Rs. 1,24,78,655/- along with interest at the rate of 12% from the date of filing of the claim till realization and rejected the Counter claims of the petitioner.

2. On 17.10.2019, learned senior counsel for the petitioner had, at the outset, submitted that he would not press Counter Claim No. 3 and restricted his arguments to challenging the Award to the extent it has

allowed Claim Nos. 1, 2, 6 and 9 of the respondent and rejected Counter Claim Nos. 1 and 2.

3. Brief facts, which need a narration to decide the present petition are that the petitioner Company is in the business of manufacturing and sale of consumer electronics, mobile phones and home appliances under the brand name 'Samsung'. Petitioner entered into a commercial arrangement with the respondent in 2011 and respondent was appointed as a distributor for Lucknow, Allahabad, Gorakhpur, Kanpur and Jaipur. Subsequently, the respondent was given distribution for Delhi as well.

4. On 01.07.2014, on account of change in the business module, the petitioner entered into a Sale and Supply Agreement (hereinafter referred to as 'the Agreement') with the respondent for Distributorship at Lucknow. The Distributorship code for respondent's Delhi office was tagged in continuation of the said Agreement. Respondent was appointed as a non-exclusive Distributor.

5. It is the case of the petitioner that the various terms regarding the sale of products etc. were incorporated in Article 3 of the Agreement and Clause 8.1.1 gave the right to either party to terminate the Agreement with a thirty days' notice.

6. As per Clause 11.2 of the Agreement, it was agreed that in no event, the respondent or its agents, employees, sub-contractors etc. would be liable for any loss of profits, business, goodwill, indirect damages for any economic consequential loss.

7. Petitioner placed reliance on Article 21 to aver that it was envisaged that the Agreement would constitute the entire Agreement. As per the petitioner, the respondent did not come up to the expectations of

the petitioner and its conduct was prejudicial to the petitioner's interest. Hence, the petitioner issued a notice of termination dated 16.05.2016 terminating the Agreement with effect from 20.06.2016, invoking Article 8.1.1 of the Agreement.

8. Post the termination, respondent filed a petition under Section 9 of the Act before this Court seeking a restraint order against the petitioner from giving effect to the termination notice pending clearance of unsold stocks lying with the respondent and till payment of various credit notes and grant of receivables etc. from the retailers.

9. When the said petition was listed on 31.05.2016, petitioner avers that as a goodwill gesture, it agreed to verify the stocks within two weeks on receipt of inventory and to ensure the stock is diverted to new Distributors. The respondent was provided credits qua stocks lifted by new Distributors against a receipt. Petitioner further avers that when the stocks were verified by the Distributors, they were found to be defective/scrap and demand letters were received from various Distributors seeking compensation for the defective units.

10. Thereafter, disputes having arisen between the parties, the matter was referred for arbitration. Respondent filed the Statement of Claim and the petitioner filed Statement of Defence and raised Counter claims. Finally, the Tribunal passed an Award on 09.01.2019, which is assailed by the petitioner before this Court.

11. Learned counsel for the petitioner contends that the Award suffers from patent illegality. Respondent had sought only a sum of Rs.2,45,84,231/- towards credit balance for the territories of Lucknow, Allahabad, Gorakhpur, Kanpur and Jaipur. Petitioner in its Defence

Statement had admitted the credit amount due as per Books of Accounts and in compliance of the interim Award dated 21.07.2017 had already paid an amount of Rs. 3,07,07,902/-, which is inclusive of all pending and payable payouts, margins, incentives etc. It is submitted that the Tribunal had itself acknowledged that no further amount was payable by the petitioner and has yet awarded interest @ 12% amounting to Rs. 45,69,995/-.

12. It is contended that Claim No. 2 was for interest of an amount of Rs. 2,70,67,737/- towards Branch claims along with pre-litigation, *pendente lite* and future interest @ 18% per annum and has been wrongly awarded for the period 15.05.2016 to 13.10.2017, whereas it should have been awarded for the period commencing 20.06.2016. Learned counsel contends that though the petitioner had not disputed the credit balance since there was a running account between the parties, it had retained the amount on account of pending Counter Claims and losses caused due to old stocks. Petitioner had cleared the stock for the respondent but the Distributors were not willing to give the requisite amount. By way of interim award, the Arbitrator had directed to pay the said amount. Despite the pendency of dues to the petitioner, it paid the said amount on 13.10.2017 and thus, the award of interest was illegal. It is submitted that the petitioner had to in fact recover Rs. 1,18,07,323/- from the respondent and was thus not liable to pay any interest on the interim Award amount.

13. Insofar as Claim No. 6 is concerned, which was towards warehousing charges, it is argued that the Award is not only contrary to the terms of the contract but there was no evidence led by the respondent to substantiate the claim. The claim was also barred by limitation arising

under the Limited Liability Clause being Article 11.1 of the Agreement. It is sought to be argued that the contract nowhere provided for payment of warehouse charges. Clause 5 of Appendix II provided that the respondent would become owner of the goods once the goods were bought by the respondent from the petitioner. Once the respondent became the owner of the goods, there was no obligation on the part of the petitioner to take back the goods. It is submitted that even according to the respondent, there was delay of about one month and still the Arbitrator has awarded damages for two months, which on the face of it is perverse. Insofar as the order passed by the Court on 31.05.2016 is concerned, it is argued that it was only a goodwill gesture by the petitioner to have offered help in transferring the goods to other Distributors. This was neither an undertaking nor an Agreement between the parties as there was no consideration involved in the arrangement and has no legal force. It is further argued that assuming without conceding that this was a binding agreement, there was no Arbitration Clause on account of which the agreement could have been enforced. Moreover, the respondent was required to produce cogent evidence to sustain its claim for rentals of the warehouse, which it did not. Certain invoices that were produced allegedly to be with respect to the rentals were denied by the petitioner and thereafter no evidence was led. In fact, a question was put to the respondent regarding the falsity of the invoices. It is argued that in any case warehousing receipts are no indication of storage of goods of the petitioner and could have been with respect to any warehouse. Even the lease agreements on the basis of which the rentals were allegedly payable were not produced.

14. Learned counsel places reliance on the judgment of the Supreme Court in *Hindustan Zinc Ltd. vs. Friends Coal Carbonisation* (2006) 4 SCC 445 and *ONGC vs. Saw Pipes Ltd.* (2003) 5 SCC 705 for the proposition that an Award cannot be contrary to the terms of the Contract. Reliance is also placed on the judgment in the case of *Associate Builders vs. DDA* (2015) 3 SCC 49 to contend that a finding based on no evidence or when the Tribunal takes into account something irrelevant, is perverse.

15. Learned counsel for the petitioner assails the Award with respect to the Award of Claim No. 9 in favour of the respondent on the ground that it is contrary to the terms and conditions of the Agreement. The said claim of the respondent was on the basis of a Diwali Tie-Up Scheme introduced in September 2015 with entitlement of various margins for September to November 2015 along with interest. It is the case of the petitioner that Article 21.3 provided for schemes etc. to be introduced by the petitioner from time to time. The petitioner in the concerned scheme had given a target of Rs. 109 Crores to be achieved by the respondent between September 2015 to November 2015. As per the Scheme, if 100% target was achieved the margins were payable to the respondent at a decreasing rate being: September-4%, October-3% and November-2%. It is contended that it an admitted case between the parties that only 80% of the targets were achieved and therefore, as per the terms of the Agreement read with the scheme nothing was payable to the respondent. It is submitted that RW-1 in its evidence had categorically stated that the scheme was 100% target based. Although there was thus no obligation to pay yet as a good faith gesture, it paid to the respondent at 80% of 4% for September, 80% of 3% for October, 80% of 2% for November. It is

argued that being a commercial contract, question of fairness or discretion does not arise and the parties have to be strictly governed by the terms of the Agreement and the scheme.

16. Petitioner had sought recovery of Rs. 47,14,249/- from the respondent on account of losses due to defective products as Counter Claim No. 1. It is argued that the Counter Claim has been wrongly rejected by the arbitrator on the ground that the petitioner did not indicate the nature of damages. The respondent had to log the calls for defective products within 90 days, as per the policy, so that the petitioner could replace them or provide discount. Respondent failed to log the calls and in the garb of the order passed by this Court on 31.05.2016 shifted the defective or scrap units. Petitioner had placed on record the list of defective/scrap products mentioning the product code/date of invoice/amount of loss etc. The said evidence has been completely overlooked by the Arbitrator. What has also been ignored is a technical report/sample photographs of the defective goods, which were placed on record and indicated the nature of damage.

17. Under Counter Claim No. 2 petitioner had sought recovery of Rs. 69,01,648/- from the respondent on account of scrap units. It is contended that the Counter Claim was illegally rejected on the ground that details of the damages were not specifically pleaded. This was contrary to the evidence on record which included the technical report and sample photographs. Respondent had picked up the old stocks from the period 2014 to 2016 from its dealers and had returned the same to the petitioner.

18. Learned counsel for the petitioner placed reliance on the judgment in the case of ***Tamil Nadu Electricity Board & Anr. vs. N. Raju Reddiar***

& Anr. (1996) 4 SCC 551 for the proposition that parties are bound by terms and conditions of the Agreement. By operation of Section 91 of the Evidence Act, no party can prove the terms of the contract with reference to an oral or other documentary evidence. Reliance is also placed on ***Kuoni Travels (India) Pvt. Ltd. vs. Pharmaco Flavours & Fragrances Pvt. Ltd.* 2015 SCC OnLine BOM 3777** which lays down the law relating to binding nature of contracts. The judgment of the Supreme Court in the case of ***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)* 2019 SCC OnLine SC 677** is relied upon to argue that the findings of the Arbitrator based on evidence at all or if it ignores the vital evidence, would be perverse and liable to be set aside on ground of patent illegality.

19. Per contra, learned counsel for the respondent defending the Award argues that the scope of interference with an Arbitral Award is extremely limited and confined to parameters set out in Section 34 of the Act, as judicially interpreted. The present challenge by the petitioner is outside the contours of section 34 of the Act and there is no patent illegality or perversity in the Award. The view taken by the Arbitrator in allowing the claims and rejecting the counter claims is a reasoned and plausible view. The Arbitrator has considered the pleadings and evidence before it and it cannot be said that the view shocks the conscience of this Court. The view taken is also in accordance with the terms of the contract in terms of which the petitioner has also been given the benefit of Limitation of Liability Clause (Article 11) in the supply Agreement dated 01.07.2014. Thus if the petition is allowed it would amount to rewriting the contract.

20. Arguing with respect to claim No. 2, it is submitted that the same has been allowed in favour of the respondent owing to the admission by the petitioner that it was liable to pay a sum of Rs. 3,03,98,711/-. Vide interim Award dated 21.07.2017 the arbitrator had awarded the said amount which was never challenged by the petitioner and has attained finality. Accordingly, the Award of interest on the said amount @ 12% per annum as opposed to 18 % sought by the respondent was justified.

21. Defending the award under Claim No. 6 counsel for the respondent argues that while terminating the contract on 16.05.2016, petitioner had called upon the respondent to stop using its trade name or any other propriety right and return the said property. Given that the Agreement was a cash and carry agreement requiring the respondent to pay in advance for the good supplied respondent had filed a petition under Section 9 of the Act. On 31.05.2016 the petitioner had undertaken in Court to verify the stocks in two weeks and ensure their delivery to new distributor. In view of this undertaking, the Court had directed that the respondent shall not make fresh sales to the retailers but would be at liberty to make recovery of past sales. Petitioner, however, did not adhere to the timelines forcing the respondent to store their products in warehouses for an extended period thereby incurring losses in terms of rentals. Vide order dated 04.08.2016 the Court had given liberty to the respondent herein to agitate all issues including the amount of payments received against the transfer of stocks. The respondent in support of its claim had placed on record warehouse rental receipts and the summary sheet evidencing the rentals paid and also led oral evidence, the veracity of which was unchallenged through cross-examination. Respondent could

not have mitigated its loss as the interim order dated 31.05.2016 had barred the respondent from making fresh sales to retailers. It is argued that the petitioner is wrong in submitting that respondent could not demonstrate that the warehouses were used exclusively for storing Samsung products as the entire purpose of verification conducted by the petitioner pursuant to the undertaking before the Court was for this purpose alone. Given the fact that petitioner had verified the goods at warehouses, and never raised any challenge to its quality or the non-existence of warehouses the present argument cannot be raised.

22. The arguments of the petitioner challenging Claim No. 9 is vehemently opposed by the respondent. It is argued that the Diwali tie up scheme was introduced in September, 2015 entitling the respondent to certain margins over the three months. Respondent had made substantive investment so that momentum in sales could be created. The Sales target were fixed at Rs. 109 crores despite the respondent having informed the petitioner that prevailing market conditions would not permit the said targets. Admittedly, the respondent achieved 80% of the targets and was paid on pro-rata basis. It is further argued that the petitioner had also given sales targets to its sub-dealers but in their case not only were the targets reduced, but they were given their margins as per the original scheme. Evidence was led by the respondent to substantiate this. Neither did the petitioner cross examine the respondent on this aspect nor brought any witness to assail this contention. It is argued that the Arbitrator has rightly awarded 4% margin on the said targets based on pleading and evidence and by no standards is the finding or the Award perverse.

23. With respect to Counter Claim No. 1 of the petitioner, it is argued by counsel for the respondent that the arbitrator has rightly rejected the petitioner's claim for 816 defective units provided to its new Distributors for which compensation had been claimed. The Arbitrator found that the Counter Claim was flawed and too general in nature, coupled with their being no mitigation of damages. Despite verifying the stocks after the order of the Court dated 31.05.2016, no contemporaneous objection was raised by the petitioner as to any defects being discovered. No evidence was led of stocks being diverted to other Distributors. It was not demonstrated that the goods were from the respondent's warehouses.

24. In so far as Counter Claim No. 2 is concerned, it is argued that the same was rightly rejected as details of the scrap units had not been specifically pleaded by the petitioner ascertaining the actual damage. The Arbitrator rightly noticed that the petitioner had not made any previous complaint to the respondent and had led no evidence of mitigation of losses. Petitioner had miserably failed in establishing its losses. The counsel thus argues that the Award calls for no interference under Section 34 of the Act and the petition deserves to be dismissed.

25. I have learned counsel for the parties and examined their submissions.

26. Insofar as Claim No. 1 of the respondent is concerned, Arbitrator has observed that the respondent had claimed Rs. 57,72,978/- on account of admitted credit balance for the territory of Lucknow and Rs. 1,88,11,253/- for the other four territories. The admitted credit balance for Delhi had not been conveyed. The Tribunal had earlier passed an interim Award which was on the basis of the admitted liability of the

petitioner. The said interim Award was not challenged and the amount thereunder was paid to the respondent. In view of the said finding, the Tribunal held that no further directions were required to be passed. As far as Claim No. 2 is concerned, where interest at the rate of 18% till the date of payment was sought by the respondent, in the opinion of the Arbitrator, since the Agreement was terminated on 16.05.2016 and the payment was made on 13.10.2017, the petitioner had unlawfully retained the amount due to the respondent. However, the Arbitrator only awarded 12% interest as opposed to 18% sought by the respondent.

27. In my view, this part of the Award deserves no interference in a petition under Section 34 of the Act. Once the petitioner had admitted its liability and paid the money, the respondent was entitled to the balance claim on account of the said liability and was also entitled to interest for the period the money had been retained by the petitioner, despite being due to the respondent.

28. Under Claim No. 6, the Arbitrator has held that the reply of the petitioner herein itself revealed that the entire stocks had not been removed. Thus, the Arbitrator rendered a finding that the respondent remained liable to pay the rent for the warehouses as some of the stocks were admittedly not removed by the petitioner. The Arbitrator has also dealt with the plea of the petitioner that the respondent had not pressed for rent of the Warehouses during the pendency of the petition under Section 9 of the Act filed by the respondent. The Arbitrator has held that there was nothing on record to show that the respondent had foregone or waived the said amount. In my opinion, the respondent is right in submitting that it had placed on record various rental receipts and a

summary sheet evidencing the rentals paid. Documents to this effect have been brought to the notice of this Court during the hearing. Respondent is also right in contending that the veracity of the evidence led by the respondent was never challenged by the petitioner through cross-examination. The petitioner in the entire evidence has not been able to point out that there were no goods of the petitioner lying at the warehouses and in fact at no stage did the petitioner challenge that the warehouses were non-existent or were not being used to store the goods of the petitioner. Respondent is right in submitting that after the order passed by this Court on 31.05.2016 wherein the petitioner had undertaken to verify the stocks, the whole exercise that was carried out by the petitioner was only to verify the goods lying at the warehouses and nothing else. This Court finds no perversity or illegality in this part of the Award.

29. Much has been argued by both sides with respect to Claim No. 9. Having analysed the documents and heard the arguments, two things emerge to be undisputed between the parties. Firstly that the Diwali Tie-Up Scheme had a condition for achieving 100% targets and secondly, the margins that were to be disbursed to the respondent from the months of September 2015 to November 2015 were 4% for September 2015, 3% of the sales for October 2015 and 2% of the sales for November 2015. It is admitted that the respondent was not able to achieve the 100% targets stipulated in the Scheme and was able to achieve only 80%. The principal contention of the respondent under this claim is that even if the respondent had achieved only 80 % of the sales target fixed by the petitioner it could not have been paid on pro-rata basis and the margins of

4%, 3% and 2% should have remained static. In other words, the contention is that the petitioner was wrong in disbursing 80% of 4% of the sales for September, 2015, 80% of 3% for October, 2015 and 80% of 2% of the sales for November, 2015. The Arbitrator has observed that it was nobody's case that the target was not achieved and therefore the respondent was not entitled to anything. He has also observed that it was anybody's guess as to what was to be paid to the respondent where only 80% of the target was achieved. In the opinion of the Arbitrator, this was the scheme only made to encourage extra disposal and therefore a margin of 4% was taken to be payable. After analyzing the documents on record as well as the pleadings and evidence the arbitrator has come to a conclusion that 4% margin should be paid to the respondent and has held that an amount of Rs. 58,07,791/- is recoverable by the respondent. Based on the scheme and the fact that the petitioner did pay margins to the respondent on pro-rata basis, the Tribunal has taken a view on the amount that was payable to the respondent. This is a pure finding of fact based on appreciation of evidence led before the Arbitrator and is not open to interference by this Court under Section 34 of the Act. The Supreme Court on the issue of judicial review on the findings of the Arbitrator in the case of *Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49*, has held as under:-

“19. When it came to construing the expression “the public policy of India” contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] held: (SCC pp. 727-28 & 744-45, paras 31 & 74)

“31. Therefore, in our view, the phrase ‘public policy of India’ used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term ‘public policy’ in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

74. In the result, it is held that:

(A)(1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

- (i) a party was under some incapacity, or*
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any*

indication thereon, under the law for the time being in force; or

(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; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) *It could be challenged:*

(a) *as provided under Section 13(5); and*

(b) *Section 16(6) of the Act.*

(B)(1) *The impugned award requires to be set aside mainly on the grounds:*

(i) *there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;*

(ii) *in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;*

(iii) *it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;*

(iv) *on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;*

(v) *liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;*

(vi) *there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable;*

(vii) *in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract.”*

30. In the case of ***Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India Ltd.*** 2019 SCC OnLine SC 677, the Supreme Court has reiterated on the scope of interference in an Arbitral Award and relevant paras read 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).

42. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

31. In the case of ***McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors. (2006) 11 SCC 181***, the Supreme Court has clearly held that the courts under the 1996 Act have a supervisory role for review of the Arbitral Award only to ensure fairness. Intervention is envisaged in very limited circumstances and at a minimum threshold.

32. Very recently, the Supreme Court, in the case of ***Hindustan Construction Company Limited & Anr. Vs. Union of India & Ors., 2019 SCC OnLine SC 1520***, has further narrowed down the scope of examining the Arbitral Award in a petition filed before a Court under Section 34 of the Act. Relevant para is extracted hereinunder:-

“55. Further, this Court has repeatedly held that an application under Section 34 of the Arbitration Act, 1996

is a summary proceeding not in the nature of a regular suit - see Canara Nidhi Ltd. v. M. Shashikala 2019 SCC OnLine SC 1244 at paragraph 20. As a result, a court reviewing an arbitral award under Section 34 does not sit in appeal over the award, and if the view taken by the arbitrator is possible, no interference is called for - see Associated Construction v. Pawanhans Helicopters Ltd. (2008) 16 SCC 128 at paragraph 17.

56. Also, as has been held in the recent decision Ssangyong Engineering & Construction Co. Ltd. v. NHAI 2019 SCC OnLine SC 677, after the 2015 Amendment Act, this Court cannot interfere with an arbitral award on merits.”

33. Keeping in view the above law as laid down by the Supreme Court, the finding of the Arbitrator allowing the claim towards margins on the targets achieved cannot be interfered with by this Court.

34. In so far as the argument of the petitioner under Counter Claim No. 1 is concerned, the Arbitrator has held that the Counter Claim was flawed in as much as the petitioner did not give any details as to what was the nature of the defects alleged in the various goods for which the damages were claimed. The claim was too general in nature and there was no mitigation of damages. The Tribunal further held that even within 90 days no defects were pointed out by the petitioner. On this ground, the Counter Claim was rejected. In my view the respondent is right in his contention that despite verifying the stocks pursuant to the order passed by this Court on 31.05.2016, no contemporaneous objection was raised by the petitioner with regard to any defects in the stocks. No evidence was led of any distributor having received defective stocks. In order to seek damages, it was incumbent upon the petitioner to point out the nature of

damages detected in the goods supplied and to have raised objections at the earliest point in time. Petitioner should have mitigated the damages. Even assuming that nature of defects were shown by the petitioner, it has not given any proof of injury. No evidence was led to show the actual loss caused. The view of the Tribunal is a plausible view and in accordance with the law of damages and calls for no interference.

35. Counter Claim No. 2 pertains to loss alleged to have been caused to the petitioner on account of scrap units. Loss was calculated at Rs. 69,01,648/-. The Tribunal found as a matter of fact, based on the pleadings that the details of the scrap units had not even been pleaded as to the extent of damage caused. The Arbitrator notices that at no earlier point in time, any complaint was made by the petitioner pertaining to the scrap units and there was no mitigation of damages. In the opinion of Tribunal in the absence of any specific pleadings, it was not possible to arrive at any amount towards the alleged loss under Counter Claim No. 2.

36. The contention of the petitioner that it had placed on record sample photographs and technical report of the scrap unit is not enough to claim damages on account of the scrap units. The Counter Claim under this head as pleaded in the Statement of Defence by the petitioner reads as under:-

“B. Loss caused to the Defendant on account of scrap units:

Furthermore, the Defendant has ascertained that 361 units provided by the Defendant are scrap units and could not be of any use. Thus, a hundred percent loss has been caused to the Defendant vis-a-vis the said 361 units. A loss of Rs. 69,01,648/- (Rupees Sixty Nine Lakhs One Thousand

Six Hundred and Forty Eight only) has been caused to the Defendant till date. The Defendant by way of the present Counter-Claim seeks to-recover the aforesaid amount which the Defendant lost due to negligent acts on part of the Claimant.”

37. A perusal of the Counter Claim No. 2 as set up by the petitioner reveals that it has given no basis for calculating the loss it had claimed on account of scrap units. A vague pleading has been made that all the 361 units provided by the respondent were scrap units and of no use and value and loss has been claimed on value of entire lot. Even in the evidence led, the petitioner was unable to prove the extent of damage in the scrap units or the basis for computing the damages.

38. Supreme Court has in the case of ***Murlidhar Chiramjilal vs. Harishchandra Dwarkada*** AIR 1962 SC 366 clearly laid down the principles of Award of damages under Section 73 of the Contract Act, 1872 which are as under:

“The two principles on which damages in such cases are calculated are well settled. The first is that, as far as possible, he who has proved a breach of a bargain is to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the Contract had been performed; but this principles is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps: (British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Ry.Co. of London (1912) AC 673. at P.689). These two principles also follow from the law as laid down in S.73 read with the

Explanation thereof. If, therefore, the contract was to be performed at Kanpur it was the Respondents duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it is suffered any damages thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be reimbursed for the loss. Even if the Respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it...”

10. We, therefore, find the Respondent's contention that the Claimant has not suffered an actual loss to be unfounded in as much as the actual loss suffered by the Claimant in this case is the loss of an expected profit that the Claimant would have earned had the Respondent honoured its obligations under the Agreement. We find that none of the judgments relied upon by the Respondent i.e. (i) Bombay Container Terminals Pvt. Ltd. v. Central Warehousing Corporation [CS(OS) No.776-A of 2004], (ii) Ashok Kumar Khanna v. Johnson & Johnson Co. [RFA (OS) 32/2011] negate the aforesaid view and do not help the Respondent. We find that the Claimant calculated loss of profit as difference between the contracted rate and the spot market rate at which the Respondent fixed the same cargoes during the period. We, therefore, conclude that the Claimant is entitled to damages for its loss of profit.”

39. A Division Bench of this Court in ***Engineers India Limited vs. Tema India Limited*** 2016 SCC OnLine Del 86 held as under:

“22. The pleadings are silent with regard to the loss/damages suffered by EIL and the extent thereof. In terms of the law laid down by the Supreme Court, a party cannot be compensated for loss not suffered, more so, in

the case, where there is no pleading or proof of loss, having been suffered. EIL has not placed any material before the Arbitrator to show that it suffered any loss on account of the delayed delivery made by TEMA. EIL had a back to back contract with CPCL and there is nothing on record to show that on account of the delayed delivery, any penalty was imposed or any price reduction was made by CPCL in the amount paid to EIL by it. That being the position, EIL has clearly failed to aver that it had suffered loss/damages or even place any material before the Arbitrator that it had actually suffered any loss or damages on account of the delayed delivery. The purpose of the PRC was only to compensate EIL for any loss/damage that it may suffer on account of the delayed delivery by TEMA. Since EIL failed to prove any loss or damage, it was clearly not entitled to any amount on that account.”

40. Subsequently, another Division Bench of this Court in the case of ***Ahluwalia Contract (India) Limited v. Union of India 2017 SCC OnLine Del 11042*** has held as under:

“10. Bharat Coking (supra) and Brijpaul (supra), no doubt, are authorities for the proposition that the Court even in arbitration cases should be conscious of and ordinarily should not refuse claims towards loss of profits. At the same time, the reference to Section 73 - which finds express mention in Brijpaul (supra) clarifies that damages claimed cannot be granted as a matter of course; some material evidence is necessary. In this case, the extensions led to claims for payments on various accounts and heads during the extended period. The cumulative effect of the award and the impugned judgment is such that the majority of such heads of claim for extra expenditure, increased salary and other overheads for the additional period have been granted. They are based upon certain formulae under the contract. However, in the case of the claim of general loss of profits, having nexus with the

value of the contract, the Court finds that there is no worthwhile evidence - apart from the line of questioning adopted by the claimants.

“11. That in arbitration proceedings, just as in civil cases, an injured party can claim damages, does not necessarily translate into an award for damages towards loss of profits unless some diligence is exercised by the party (in the present case, Ahluwalia claiming it). In other words, a claim for damages (general or special) in the proceedings, cannot as a matter of course, result in an award, without proof of having suffered injury. The tribunal - as well as the learned Single Judge in this case appreciated the conspectus of circumstances. The former had the benefit of consideration of record as the primary adjudicatory body. The Tribunal was unable to discern any substantial material to justify the claim for damages towards loss of profits. Having regard to these facts, this Court is of the opinion that the rejection of claim nos. 12-13 was dealt with correctly and reasonably by the learned Single Judge in the impugned judgment, which does not warrant interference.”

41. In the opinion of this Court, this part of the Award also calls for no interference.

42. In view of the above there is no merit in the present petition and the same along with the pending applications is accordingly dismissed.

JYOTI SINGH, J

FEBRUARY 27th, 2020

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