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

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Reserved on: 08.11.2019

Pronounced on: 13.03.2020

+ O.M.P. (COMM) 413/2018

**GURU GOBIND SINGH INDRAPRASTHA
UNIVERSITY**

..... Petitioner

Through Mr. Mukul Talwar, Sr. Advocate
with Ms. Anita Sahani, Advocates.

versus

ENGINEERS INDIA LTD

..... Respondent

Through Mr. Uday Gupta, Mrs. Shivani Lal,
Mr. M.K. Tripathi and Mr. Hiren
Dasan, Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for setting aside the Award dated 31.05.2018 rendered by the Arbitral Tribunal whereby the Arbitrator has allowed the claims of the respondent herein and has rejected the counter claims of the petitioner herein except counter claim no.(b). Modification of the Award is also sought against counter claim no.(b).

2. The facts that need mention for deciding the present petition are that the petitioner is a University and the respondent is a Public Limited Company (hereinafter referred to as 'EIL'). A contract was entered into

between the parties on 17.08.2005 whereby EIL was appointed as the Project Management Consultant (PMC) to supervise and oversee the construction of academic and residential buildings and related external development at the University's, Dwarka Campus in Delhi. The scope of work assigned to EIL included pre and post construction activities, besides supervision during the construction period.

3. In terms of the Agreement, EIL was to commence its activities from 07.07.2005 and the date of completion was 06.11.2008 so as to commence the academic session 2009-2010. It is the case of the petitioner that when the construction work was midway, with five other construction agencies working on the site for whom Engineers India Ltd. was Engineer In-Charge, respondent abandoned the work on 01.08.2009.

4. Disputes having arisen between the parties, the Arbitral Tribunal was constituted. EIL made the following claims :

“(a) Delay in pre-construction activities Rs.47,30,000 (Rupees Forty Seven Lakhs Thirty Thousand only).

(b) Refloating of tender for package 2, Rs. 2,20,000 (Rupees Two Lakhs Twenty Thousand Only).

(c) Reduction of plinth area -Rs.1,22,30,000 (Rupees One Crores Twenty Two Lakhs Thirty Thousand only).

(d) Working beyond contract period Rs.1,60,46,640 (Rupees One Crore Sixty Lakhs Forty Six Thousand Six Hundred Forty only).

(e) Fifteen percent profit on a, b & d = Rs.31,49,000 (Rupees Thirty One Lakhs Forty Nine Thousand only)

(f) Interest @ 18% per annum RS.3,45,00, 100 (Rupees Three Crores Forty Five Lakhs One Hundred Only).

Total Rs.7,08,77,000 (Rupees Seven Crores Eight Lakhs Seventy Seven Thousand Only).”

5. Petitioner raised the following Counter Claims:-

1. Extra cost incurred by the Respondent University in getting the balance work done from another agency-Rs.2.933 Crores.
2. Damages / Losses suffered by the Respondent University due to delay in shifting of the University to new campus-Rs. 6,46,43,351/- (Rupees 6.46 crores).
3. Damages suffered by the Respondent University due to improper supervision of work Rs.47,94,576/-.
4. Damage/ Losses suffered by Respondent University due to the illegal and unauthorized occupation of the site offices by the Claimant Company- Rs. 1,92,000/-.
5. Damages/Losses suffered by the Respondent University on account of delay in handing over the records by the Claimant Company-Rs. 3,84,000/-.
6. Interest
7. Costs.

6. The Arbitrator rendered its Award on 31.05.2018 and awarded a total sum of Rs. 78.37 Lakhs to EIL under 5 claims and also *pendente lite* interest @ 12% p.a. from 14.07.2010 to 30.05.2018.

7. With respect to the Counter Claims, the Tribunal awarded a sum of Rs.45,50,046/- to the petitioner under Counter Claim No. 2. However, no interest was granted to the petitioner on the said amount as claimed under Counter Claim No. 6. The total amount due under the Award to EIL is Rs.1,52,49,000/- and the amount due to the petitioner under Counter

Claim No. 2 is Rs.45,50,046/-. Thus, the net amount payable under the Award to the respondent is Rs.1,06,98,954/-. The petitioner on receipt of the Award observed certain calculation errors and filed an application under Section 33 of the Act on 26.07.2018, which was rejected by the Tribunal as being time barred.

8. Present petition has been filed assailing the Award dated 31.05.2018 and order dated 23.07.2018.

9. Learned Senior Counsel for the petitioner contends that the Arbitrator has granted 12% interest per annum on the claims of the EIL that were allowed, which itself comes to Rs.74.12 Lakh. However, on the counter claim of the petitioner, which was allowed to the extent of Rs.45.50 Lakhs, no pendente lite interest has been granted. The ground for disallowing the interest was that the counter claim was in the nature of damages. It is argued that this finding is patently illegal. Merely because a claim or a counter claim is in the nature of damages, does not disentitle a party to claim pendente lite interest. In any case, the claims of the EIL were also in the nature of damages and hence, the Arbitrator could not have applied different yardsticks for similar nature of claims. The Arbitrator ought to have allowed pendente lite interest on the counter claim allowed by the Arbitrator in favour of the petitioner.

10. It is further argued that the rate of interest allowed in favour of EIL is very high and the Arbitrator ought to have awarded only 6% per annum. In order to establish that the claims of the respondent were in the nature of damages, learned senior counsel has taken the Court through the various heads under which the claims were made. It is submitted that the claims on account of delay in pre-construction activities and re-floating of

Tender are clearly in the name of damages for the losses incurred. Fee payable to the respondent under the Contract was Rs.369/- per sq. meter of plinth area. The initial proposed area was later reduced. The contract specifically stated that no compensation or extra payment was payable in case of reduction in plinth area and this was agreed to by the respondent. The respondent nonetheless claimed the amount on the ground that the amount of work done by the respondent did not change despite reduction in the plinth area. The Arbitrator rejected the contention and held that the work has certainly reduced but on finding that the quantum of external services was 13.75% of the total work, awarded that portion of the fee. Since the amount has been awarded outside the terms of the contract, it is in the nature of damages. The claim for escalation beyond the contract period is clearly in the nature of damages and so is the claim for 15% profit on claims (a) to (d), being beyond the contractual terms.

11. Learned senior counsel next contends that while calculating the amounts under claim no.(c) i.e. reduction in plinth area, the Arbitrator has made two calculation errors which are apparent on the face of the record. The plinth area was reduced from 121848 sq. meter to 90154 sq. meter and the reduction was thus to the extent of 31694 sq. meters. The Arbitrator has, however, assumed the deduction to be 33,143.63 sq. meter and on that basis has calculated the figure as Rs.1,22,30,000/- whereas it should have been Rs.11695000/-. The second error, according to the petitioner is, that the Arbitrator has awarded the entire amount of reduction in fee whereas admittedly only 41.9% of the work had been completed. It is argued that even if the plinth area had not been reduced, respondent would have received only 41.9% of the total fee payable and

therefore, any compensation was to be calculated accordingly. Therefore, what ought to have been awarded should have been Rs.1,16,95,000/- x $0.84 \times 13.75\% \times 41.9\% = \text{Rs.}5,65,978/-$ and not Rs.14.09 Lakhs.

12. Learned senior counsel lastly contends that the Arbitrator has erroneously granted a sum of Rs.45.83 Lakhs to the respondent under Claim (d), based solely on the recommendation of a Committee constituted by the University ignoring the fact that the Committee was only a conciliation measure between the parties. Respondent had threatened to abandon the project unless its demands were met. It is a trite law that recommendations of a Committee formed to mediate or settle the disputes is not an adjudication that could have been relied upon by the Arbitrator. No reasons have been given by the Arbitrator while allowing this claim. The Arbitrator ought to have taken note of the fact that the Committee had specifically stated that the amounts recommended were payable only after the respondent completed the work. Since the respondent abandoned the work on 01.08.2009, the recommendation had no meaning.

13. Per contra, learned counsel for the respondent submits that the law on scope of challenge to an Award under Section 34 of the Act is no longer res integra. Reliance is placed on the judgment in the case of ***MP Power General Co. Ltd. & Anr. v. Ansaldo Energia Spa & Anr., JT 2018 (4) SC 371*** where the Court had held that an Award can be set aside if it is contrary to fundamental policy of Indian law or Interest of India or Justice or Morality. Patent illegality added to the three grounds must go to the root of the matter and in case it is of a trivial nature, the Award cannot be interfered with on ground of public policy. The limited scope

of power of the Court has been comprehensively brought out by the Supreme Court in the case of *Associate Builders v. Delhi Development Authority* (2015) 3 SCC 49. It is argued that possible view by the Arbitrator cannot be interfered with and if there are two interpretations, the Arbitrator's interpretation would be final as held in various judgments. It is submitted that none of the grounds raised by the petitioner fall within the scope of Section 34 of the Act as judicially interpreted.

14. It is next contended that the claims of the respondent were not in the nature of damages as alleged by the petitioner. The petitioner has itself treated the claims as a case of additional fees, as is evident from reading several paras of the statement of defence. The report of the Committee also refers to the claims as 'additional fee'. This is because all claims are for work done 'on site' or 'off site' and since the work continued beyond the agreed period under the Agreement.

15. Learned counsel for the respondent argues that the claim regarding plinth area was on the basis that the respondent had quoted a fee at the rate of Rs.369/- sq. meter for a proposed plinth area as specified by the petitioner itself. When the volume of work is huge, the fee gets reduced, since an increased volume is directly relatable to the costs involved and the profit to be earned. Once the fee was accepted but the petitioner reduced the work, it was naturally entitled to the said claim because the respondent would have quoted a higher fee than Rs. 369/- per sq. meter if the reduced work was initially quoted by the petitioner to meet its costs and profit element.

16. It is argued by the respondent that the petitioner never disputed the calculation made by the Arbitrator regarding the percentage of external development work and at this stage, it wants the Court to reduce the amount on the plea that only 41.9% work was completed. In the statement of defence before the Arbitrator, there was not a whisper regarding the calculation of 41.9%.

17. It is further argued by learned counsel that claim (d) has been allowed after detailed reasoning and not by simply relying on the report of the Committee. Learned counsel has taken the Court through this part of the Award. The reasoning according to the Arbitrator is that the extension to complete the work had been granted by the petitioner without any rider or caveat on 30.10.2008. The Arbitrator only borrowed the figure of Rs.45.83 Lakhs from the report since it was quantified after detailed deliberations by the Committee. It is further argued that it is fallacious for the petitioner to argue that the Committee's report is not binding. If the amount recommended by the Committee in favour of the respondent is not binding then the rejection of other claims of the respondent are also not binding and for this purpose the petitioner cannot rely on the report as it sought to do during the arguments.

18. In so far as the grant of interest is concerned, it is contended that interest has been awarded to the respondent since right from 2007 till the end of the proceedings, value of the claims of the respondent did not change. The Committee itself concluded that respondent was entitled to Rs.52.71 Lakhs which included 15% profit. It was apparent that the amount due to the respondent was illegally withheld by the petitioner, and thus the interest was legitimately payable to the respondent. As far as the

interest at the rate of 12% p.a. is concerned, not only is it reasonable but is within the domain of the Tribunal.

19. It is argued by the respondent that all the counter claims of the petitioner except one were rejected by the Arbitrator and there is no challenge to such rejection. In so far as the non-grant of interest on the counter claim awarded is concerned, the Arbitrator has given reasoning for not awarding the interest. The Arbitrator has taken note of two arguments of the respondent to conclude that interest was not payable. Respondent had argued that the contract did not envisage recovery for consequential losses and that the HRA/expenditure was only an estimated calculation or loss and the counter claim did not reflect any actual loss. As a matter of fact, there was no rebuttal by the petitioner qua the first argument and this is recorded in the Award. To the second argument of the respondent, also there was no denial by the petitioner. In fact, the initial and the amended counter claim had different figures. All figures were based on speculation and no evidence of any loss was placed on record. Yet the Arbitrator has awarded an amount of Rs.45,50,046/- on the ground of purported delay caused by the respondent. It is not a case where the respondent wrongfully withheld any amount due to the petitioner. It is thus submitted that the petition be dismissed as there is no cause or ground to interfere with the impugned Award.

20. I have heard the learned counsels for the parties.

21. The petitioner contends that the claims of the respondent which have been allowed by the Arbitrator are in the nature of damages and interest @ of 12% per annum has been awarded in favour of the respondent. By the same yardstick the Arbitrator should have granted

interest to the petitioner while allowing Counter Claim No. 2 which was in the nature of damages. Thus, the rejection of counter claim No. 6 which was for interest on the Award of amount under claim No. 2 is patently illegal. I find merit in the contention of the petitioner. Perusal of the Award indicates that the Arbitrator has disallowed claim No. 6 which was for interest on the damages/loss claimed under counter claim No. 2 only on the ground that the counter claim was in the shape of damages. The relevant part of the Award under counter claim No. 2 is as under:-

“According to respondent university, it was only in a position to partly shift to the new campus in August 2010 due to various breaches of the contract committed by the claimant and resultant delay in completion of construction work. Since duration of the courses was generally 6 years, loss of revenue had been calculated for 6 years along with an interest. The claimant argued that contract did not envisage recovery for consequential losses be in the shape of loss of revenue etc. It was further argued by the claimant that the contract provided only for the execution of PMC work at the risk & cost of the claimant if the claimant failed in its assignment. This argument of the claimant regarding consequential losses was not rebutted by the respondent university. The claimant further argued that delay in construction was caused by contractors and architects etc. and as such they should be penalized for the loss of revenue if any as bulk of the cost of project was constituted by payment to contractors etc. Respondent university has claimed an amount of Rs 20004983 plus Rs 4308768 i.e. Rs 24313751 from the claimant against house rent expenditure and interest thereon. This house rent allowance according to respondent university was paid by respondent university to the respondent university officials as construction was not completed by the claimant within the stipulated period. According to claimant house rent allowance/expenditure is only an estimated calculation as per the page 67 of list of documents volume 5

annexed by respondent university. As per page 67 only estimated loss on HRA (Type-1, Type-11 & Type-III Quarters) has been given and the same does not reflect actual loss. The claimant further averred that M/S DTDC / Respondent University had taken 43 months to complete the balance work against scheduled period of 17 months and thereby caused a delay of 26 months.

*Further the claimant pleaded that it is not clear from the counter claim whether any compensation has been charged by the respondent university from the contractors/architects. Moreover the charge of consuming 43 months in completing the work instead of 17 months has not been denied by the respondent university. The claim for loss of revenue for 6 years appears to be too farfetched and at best claimant could be blamed for the loss of revenue for the period for which the claimant delayed the construction. Delay in pre-construction activity was to the extent of 12 months. Out of 12 months, 2 months delay has been attributed to the respondent university and accordingly claim number 1 of the claimant has been upheld for 2 months. Therefore remaining 10 months delay was on account of the claimant. Total revenue loss with 6 year course is equivalent to Rs 36960330 minus Rs 4200000 (loss for 2 years duration} i.e. Rs 32760330 (refer to page 13 of amended counter claims.). Therefore loss per year is equivalent to Rs 32760330/6 i.e. Rs 5460055. Further loss of revenue for 10 months is Rs 4550046 i.e. Rs 5460055*10/12 months. In view of what has been explained herein above I award damages/losses suffered to the extent of Rs 4550046 (Rupees Forty Five Lakhs Fifty Thousand Forty Six only/-) in favour of the respondent university. No interest is payable on this amount.”*

22. Relevant part of the award rejecting counter claim No. 6 is as under:-

“As counter claim number 02 upheld to the extent of Rs 45.50 Lakhs is in the shape of damages, no interest is payable on the same.”

23. The petitioner is right in its contention that a claim for interest cannot be rejected on the mere ground that the claim was in the shape of damages. While there is also merit in the plea that if interest has been allowed to the respondent on claims for damages, there was no reason for the Arbitrator to apply a different yardstick to the petitioner, but dehors the said argument, even under law the Arbitrator has the discretion to award interest on the claim of damages. I am fortified in my view by the judgment of the Supreme Court in case of ***Assam State Electricity Board and Ors. Vs. Buildworth Private Ltd., (2017) 8 SCC 146***. The Supreme Court has clearly held in the said judgment that after the enactment of the Interest Act 1978, the legal position has undergone a change. The Supreme Court in the said case relied upon an earlier decision of the Supreme Court in ***State of Rajasthan vs. Ferro Concrete Construction (P) Ltd., (2009) 12 SCC 1*** wherein it was held that Sub-Section (1) of Section 3 of the said Act clearly empowers the Court or the Arbitrator in any proceedings for recovery of debt or damages in its discretion to allow interest at the rate of course not exceeding the current rate of interest. The position regarding the Award of interest has been summarized by the Supreme Court in the case of ***State of Rajasthan (supra)*** as under:-

“(a) Where a provision has been made in any contract, for interest on any debt or damages, interest shall be paid in accordance with such contract.

(b) Where payment of interest on any debt or damages is expressly barred by the contract, no interest shall be awarded.

(c) Where there is no express bar in the contract and where there is also no provision for payment of interest then the principles of Section 3 of the Interest Act will apply in regard

to the pre-suit or pre-reference period and consequently interest will be payable:

(i) where the proceedings relate to a debt (ascertained sum) payable by virtue of a written instrument at a certain time, then from the date when the debt is payable to the date of institution of the proceedings;

(ii) where the proceedings is for recovery of damages or for recovery of a debt which is not payable at a certain time, then from the date mentioned in a written notice given by the person making a claim to the person liable for the claim that interest will be claimed, to date of institution of proceedings.

(d) Payment of interest pendente lite (date of institution of proceedings to date of decree) and future interest (from the date of decree to date of payment) shall not be governed by the provisions of the Interest Act, 1978 but by the provisions of Section 34 of the Code of Civil Procedure, 1908 or the provisions of the law governing arbitration, as the case may be.

66. Therefore, even in regard to the claims for damages, interest can be awarded for a (sic period) prior to the date of ascertainment or quantification thereof if (a) the contract specifically provides for such payment from the date provided in the contract; or (b) a written demand had been made for payment of interest on the amount claimed as damages before initiation of action, from the date mentioned in the notice of demand (that is from the date of demand or any future date mentioned therein). In regard to claims for ascertained sums due, interest will be due from the date when they became due. In the present case, interest has been awarded only from 3-9-1990, the date of the petition under Section 20 of the Act for appointment of arbitrator. We find no reason to alter the date of commencement of interest.”

24. The respondent has not been able to point out any term of the Contract which prohibited the Arbitrator from granting interest on a claim for damages.

25. Supreme Court in *Assam State Electricity Board and Ors. (supra)* took note of a decision of the Three Judges Bench of the Supreme Court in *Union of India v. Ambika Construction* wherein it was held that the Arbitrator has the power to Award interest in the absence of specific power or a prohibition contained in the Contract. Having gone through the law on the subject regarding the Award of interest on the claim for damages, the Supreme Court held that the claimant therein was entitled to interest on the claim in the nature of damages and set aside the order of the High Court which had set aside the Award of interest granted by the Arbitrator. Thus, in my view the Arbitrator committed patent illegality in rejecting the claim for interest only on the ground that the counter claim No. 2 was in the nature of damages. This part of the Award is accordingly set aside.

26. The next contention of the petitioner is that the Arbitrator has erred in calculating the amounts due under Claim (c) i.e. reduction in the plinth area. The Arbitrator has analysed the claim of the respondent as well as the argument raised that reduction in the plinth area did not reduce the effort or volume of work done by the respondent as the schools or hostels were of repetitive type. There was no reduction in the staff employed and the quantum of external services, remained unaltered. The Arbitrator also analysed the defence of the University that different buildings had different configurations and the reduction of work was synonymous with foreclosure; the schools and hostels were not of a repetitive type and that

in the minutes of meeting held on 10.11.2014 the petitioner had agreed that irrespective of the reduction in plinth area, the quantum of external services will remain unaltered. The Arbitrator looked into the documents provided by the petitioner and went into the value of the work and the external services for the school and the hostel buildings and made detailed calculations and thereafter awarded a sum of Rs. 14.09 Lacs in favour of the petitioner. Relevant part of the Award reads as under:

“According to claimant, reduction in plinth area did not reduce the effort/volume of work to be done by claimant because of the following:

- (i) Schools/ Hostels were of repetitive type.*
- (ii) Bulk of cost was fixed one.*
- (iii) Claimant was entitled to compensation as it was not a case of foreclosure.*
- (iv) There was no reduction in the staff employed.*
- (v) Quantum of external services remained unaltered irrespective of reduction in plinth area. {Refer MOM held on 10.11.2014}.*

Respondent university rebutted the above as follows:

- (i) Different schools had different configuration.*
- (ii) Schools were not of repetitive type.*
- {iii) Two hostels were of a different package and therefore entire tendering process and other activities would have to be undertaken.*
- (iv) Reduction in scope of work was synonymous with foreclosure. (Refer to MOM held on 15.10.2014).*
- (v) In the meeting held on 24.11.2014, respondent university submitted a note dated 24.11.2014. Vide para 5 of this note, the respondent university very succinctly and ably brought to fore differences in school buildings. It was also argued by the respondent university that agreement nowhere suggests that schools and hostels will be of repetitive type.*
- (vi) The claimant did not furnish reply to para 5 of note dated 24.11.2014, despite opportunities given to the claimant vide MOM held on dated 22.12.2014, 12.01.2015, 26.02.2015 &*

23.03.2015. In the meeting held on 13.04.2015, claimant stated that it had nothing more to add to what had been already stated in the earlier meetings/presentation.

(vii) In the MOM held on 10.11.2014, claimant argued that irrespective of reduction in plinth area, the quantum of external services will remain unaltered. I find some merit in this argument. In the meeting held on 09.08.2017, I had asked for the element of external services from the respondent university and the same was provided as under in next hearing but the same was not recorded in the MOM inadvertently.

School Building:

Value of external services: Rs 10.23 Crores.

Value of package for schools: Rs 82.78 Crores.

Therefore % of external services is equivalent to 12.30% i.e. (Rs 10.23 crores/ Rs 82.78 crores) * 100.

Hostel Building:

Likewise the percentage of external services in hostel building was 15.20% i.e. (Rs 9.16 crores/ Rs 59.96 crores)*100. .

Thus average percentage of external services is equivalent to $(12.30+15.20)/2 = 13.75\%$.

Total value of 5 packages = Rs 82.78 crore (Package 1) + Rs 59.96 crore (Package 2) + Rs 8.97 crore (Package 3) + Rs 12.58 crore (Package 4) + Rs 3.85 crore (Package 5) = Rs 168.14 Crores.

Percentage of packages 1 & 2 which involve external services to whole work is equivalent to $(142.74/168.14)*100 = 84\%$.

Therefore fees payable to claimant against external services is equivalent to $Rs\ 1.22\ crores * 0.84 * 13.75 = Rs\ 14.09\ Lakhs$. In view of the above I award a sum of Rs 14.09 Lakhs against claim number 03 in favour of the claimant."

27. The Arbitrator has examined the stand of the parties and after looking into the documents made a detailed calculation of the variation due to the reduction in plinth area. The Arbitrator has thereafter come to

a conclusion that due to the reduction in the plinth area, the respondent was entitled to the claim being allowed as the volume of work had not changed. This Court finds no reason to interfere with this part of the Award in the present petition as the same is beyond the scope of judicial review of an arbitral award. Insofar as the alleged calculation error is concerned, it is not open for this Court to enter into the methodology of calculation adopted by the Arbitrator, more particularly, in view of the fact that formula adopted by the Arbitrator is not even questioned by the petitioner herein. The Arbitrator has gone by the fact that the reduction in plinth area did not make any difference to the volume of work, which the respondent had to carry out. What weighed with the Arbitrator was also the fact that the respondent had quoted fee @ of Rs. 369/- per square meter for the initial plinth area of 1,21,848 square meter as specified by the petitioner itself and when the volume of work is large the fee gets reduced compared to when the volume of work is less. The respondent is right in its contention that the petitioner is arguing for reduction of the amount on the plea that only 41.9% work was completed, but in the Statement of Defence there was not even a whisper regarding the manner or calculation by which this percentage had been arrived at.

28. Insofar as the challenge to the Award on claim No.(d) of the respondent is concerned, the respondent is right in its contention that the Arbitrator has not merely followed the report of the Committee but has given its own detailed reasoning. No doubt the Arbitrator has observed that it agrees with the recommendation of the Committee, but his own reasoning is that the petitioner never opposed the fact that time had been extended without any rider and thus the additional fee was payable in the

extended period of contract. The Tribunal has come to a finding that the report of the Committee in para 5.3.1 clearly indicated that there were delays in execution of the work due to the revised requirements of the petitioner and release of service drawings by the Statutory Authorities. Relevant part of the Award reads as under:

“(iv) Respondent university further argued that vide letter dated 10.06.2009 from the respondent university, it was nowhere agreed to make payment for working in the extended period. Moreover according to respondent university grant of provisional extension of time didn't imply that extension of time was granted because of the reasons attributable to the respondent university. (Refer MOM held on 29.06.2015).

To examine the claims of claimant Vice Chancellor of the respondent university constituted a broad based committee vide order dated 07.02.2009 and the committee submitted its report in June-July 2009. As per para 5.3.1 of the report at page number 10, there are apparent delays in execution of work due to revised requirements of the respondent university and release of service drawings by the statutory authority. Committee had recommended Rs 45.83 Lakhs against this claim without profit and I agree/ with the recommendation of the committee. As respondent university had not vehemently opposed the contention of the claimant to the effect that since time had been extended without any rider, additional fee was payable in the extended period of the contract and in view of the fact that broad based committee had unanimously recommended payment of Rs 45.83 Lakhs, I hereby award a sum of Rs 45.83 Lakhs without profit in favour of the claimant.”

29. Having analysed this part of the Award, I find no infirmity or patent illegality in the same. The principle reasoning of the Arbitrator is that when extension was given to the respondent to complete the work it was without any rider or caveat nor was any penalty imposed. The

Arbitrator has relied upon the recommendations of the Committee regarding the delay in execution of the work as the Committee had already delved into and analysed the issue in detail. Since the Committee had quantified the figure at Rs. 45.83 Lacs, after detailed deliberations, the Arbitrator in its wisdom took this figure, in order to award the claim in favour of the respondent. In my view, this finding and reasoning calls for no interference apart from the fact that the respondent is right in its contention that the petitioner had itself sought to rely upon the report of the Committee to the extent it had rejected some claims of the EIL. Reading of this part of the Award only shows that the Arbitrator has used the report only as an *indicia* for quantification and findings of delay on the part of the petitioner.

30. The law on interference under Section 34 of the Act is well crystallized and no longer *res integra*. Learned counsel for the respondent has rightly relied on the judgment in the case of MP Power, where the Supreme Court has held as under:

“18. It is necessary to refer to the settled law on the scope of Sections 34 of the Act. In this case we are concerned with the point as to whether an arbitral award can be set aside for being in conflict with the public policy of India. An arbitral award can 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. (Renusagar Power Co. Ltd. v. General Electric Co.1) Patent illegality was added to the above three grounds in ONGC v. Saw Pipes Ltd.2 . Illegality must go to the root of the matter and incase the illegality is of trivial nature it cannot be held that the award is against the public policy. It was further observed in the said judgment (ONGC v. Saw Pipes (supra)) that an award could also be set aside if it is so unfair and unreasonable that it

shocks the conscience of the Court. In Delhi Development Authority v. M/s. R.S. Sharma & 1 (1994) Supp.1 SCC 644 2 (2003) 5 SCC 705 23 Co.3 it was held that an award can be interfered with by the Court under Section 34 of the Act when it is contrary to : a) substantive provisions of law; or b) provisions of the 1996 Act; or c) against the terms of the respective contract; or d) patently illegal; or e) prejudicial to the rights of the parties The fundamental policy of India was explained in ONGC Ltd. v. Western Geco International Co. Ltd.⁴ as including all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. It was held inter alia, that a duty is cast on every tribunal or authority exercising powers that affect the rights or obligations of the parties to show a 'judicial approach'. It was further held that judicial approach ensures that an authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and its decision is not actuated by any extraneous considerations. It was also held that the requirement of application of mind on the part of the adjudicatory authority is so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law. This Court further 3 (2008) 13 SCC 80 4 (2014) 9 SCC 263 24 observed that the award of the Arbitral Tribunal is open to challenge when the arbitrators fail to draw an inference which ought to be drawn or if they had drawn an inference which on the face of it is untenable resulting in miscarriage of justice. The Court has the power to modify the offending part of the award in case it is severable from the rest according to the said judgment (Western Geco ltd. (supra)). 19. The limit of exercise of power by Courts under Section 34 of the Act has been comprehensively dealt with by Justice R.F. Nariman in the case of Associate Builders v. Delhi Development Authority⁵ . Lack of judicial approach, violation of principles of natural justice, perversity and patent illegality have been identified as grounds for interference with an award of the Arbitrator. The restrictions placed on the exercise of power of a Court under Section 34 of the Act

have been analyzed and enumerated in Associated Builders (supra) which are as follows: 5 (2015) 3 SCC 49 25 a) The Court under Section 34(2) of the Act, does not act as a Court of appeal while applying the ground of “public policy” to an arbitral award and consequently errors of fact cannot be corrected. b) A possible view by the arbitrator on facts has necessarily to pass muster as the Arbitrator is the sole judge of the quantity and quality of the evidence. c) Insufficiency of evidence cannot be a ground for interference by the Court. Re-examination of the facts to find out whether a different decision can be arrived at is impermissible under Section 34 (2) of the Act. d) An award can be set aside only if it shocks the conscience of the Court. e) Illegality must go to the root of the matter and cannot be of a trivial nature for interference by a Court. A reasonable construction of the terms of the contract by the arbitrator cannot be interfered with by the Court. Error of construction is within the jurisdiction of the Arbitrator. Hence, no interference is warranted. f) If there are two possible interpretations of the terms of the contract, the arbitrator’s interpretation has to be accepted and the Court under Section 34 cannot substitute its opinion over the Arbitrator’s view.”

31. Supreme Court in the case of **Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)** 2019 SCC OnLine SC 677 has held as under:

“35. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29

of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

36. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

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

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does

not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

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

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

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

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.”

32. In light of the said law laid down by the Supreme Court on the scope of judicial review by the Court under Section 34 of the Act while analyzing the Arbitral Awards in my view, the petitioner has not made out any grounds for interference except to the extent of rejection of Counter Claim No. 6. As regards the rate of interest awarded to the respondent, the same is purely in the domain of the Arbitrator and calls for no interference. The Award is based on pure findings of fact and the evidence led before it. The Arbitrator has adopted a certain criteria for calculation and has used the report of the Committee constituted by the petitioner itself as indicia for arriving at the quantification. None of these factors can be substituted by the Court by applying its own formulas or methodology. The view taken by the Arbitrator is not only a possible but a plausible view.

33. Present petition is thus partly allowed. Petitioner is at liberty to agitate its claim for interest on Counter Claim No. 2 in accordance with law. Remaining part of the Award is hereby upheld.

JYOTI SINGH, J

MARCH 13th, 2020

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