

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH, NAGPUR**

**ARBITRATION APPEAL 10 OF 2016**

Shri Damodhar Rokde,  
aged about : Major, Occ. Business,  
r/o. Binaki, Mangalwari,  
Nagpur – 17

..... **APPELLANT**

**...VERSUS...**

The Defence Estates Officer,  
Mumbai Circle, Colaba,  
Mumbai 5

... **RESPONDENT**

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Mr. W. T. Mathew, counsel for appellant.  
Mrs. Pranita Choube h/f. Mrs. Anjali Joshi, counsel  
for respondent.  
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**CORAM: ROHIT B. DEO, J.**

**DATE : 07.01.2021**

**ORAL JUDGMENT:**

Heard Mr. W.T. Mathew, the learned counsel for the appellant and Mrs. Pranita Choube h/f. Mrs. Anjali Joshi, the learned counsel for the respondent.

2. The short question involved in this appeal under section 37 of the Arbitration and Conciliation Act, 1996 (“Act” for short) is whether the Principal District Judge, (“PDJ”) Nagpur erred in setting aside the Arbitral Award dated 30.9.2004 on the premise that the arbitrator ignored the contractual terms and

conditions and that the Arbitral Award falls foul of the substantive law of the land.

2. Only those facts which are absolutely necessary to decide the issue involved, need be stated.

3. The Defence Estates Officer (“DEO”) representing Ministry of Defence, Government of India, is the claimant, who sought the relief of forfeiture of security deposit and imposition of penalty from the arbitrator.

4. The genesis of the arbitration is Tender Notice dated 1.12.2000, issued by the claimant, inviting offers for grant of licence for removal of sand from the Kanhan River Bed, within the jurisdiction of Kamptee Contentment for the period of one year from date of handing over the possession.

5. The appellant herein, was the successful bidder, who deposited Rs. 92 lacs as the bid amount and Rs. 9.20 lacs as security deposit.

6. It would be apposite to note certain contractual terms

and conditions, which are also culled out in the judgment impugned

7. The routes for removal of sand from river bed admeasuring 343.17 acres were described as “Ajni Ghat and Ghat Across the Railway Line”. The Tender Notice specifically stated that the contractor shall not be provided route from Gora Bazar. The further recital is, that the Government would have no objection to the contractor making available alternative routes internally through the river bed by erecting temporary bridges from Ajni Ghat or across the river to facilitate the removal of sand. A specific recital is that the contractor shall under no circumstances be allowed to enter the river bed either from Gora Bazar or through any other new route, not approved by the local army authority at Kamptee. The tenderers were advised to inspect the plan of area and to get acquainted with the site in the context of the terms and conditions. The material terms and conditions of the contract, are culled out by the learned PDJ in paragraph 2(d) of the judgment impugned.

8. It is irrefutable that the duration of the contract, which initially was 1.1.2001 to 31.12.2001 was extended upto

22.1.2002 on payment of licence fees on pro-rata basis and upon the determination of the contract, the possession of the site was handed over to the Sub-Divisional Officer, (Defence Estates) Kamptee at midnight of 22.1.2002.

9. The subsequent auction purchaser M/s. Heera Laxmi Infrastructure (P) Limited, Nagpur took the possession of the site on 23.1.2002. The Sub-Divisional Officer (Defence Estates) Kamptee conveyed to Defence Estates Officer, Mumbai that the inspection of the site revealed big pits made by the previous contractor – appellant herein in Gora Bazar Ghat area. As a consequence, the security deposit of Rs. 9.20 lacs was withheld and damages claimed from the previous contractor – appellant herein.

10. The previous contractor – appellant herein denied liability to pay damages, and consequently the Defence Estates Officer, Mumbai sought constitution of Arbitral Tribunal.

11. The Director, (Defence Estates), the authority to appoint the arbitrator in terms of clause 30 of the Tender Notice, appointed Mr. A.R. Datta as the sole arbitrator.

12. The claimant – respondent herein sought the relief of forfeiture of security deposit of Rs. 9,20,000/-, damages of Rs. 6,23,013/-, penalty of Rs. 10,00,000 and interest of Rs. 2,20,705/-, thus claiming Rs. 17,73,718/- cumulatively.

13. The appellant herein denied the claim and lodged a counter claim for damages for not providing sufficient routes for excavation of the sand. The appellant further claimed the alternative relief of extension of the contractual period by 631 days. The monetary claim and the claim in the alternative is as tabulated in the charts below.

Monetary claim:

|      |                                                                                 |                          |
|------|---------------------------------------------------------------------------------|--------------------------|
| i]   | Claim because of 85% area not available for removal of sand                     | : Rs. 78,20,000=00       |
| ii]  | Claim for establishment expenses                                                | : Rs.03,91,000=00        |
| iii] | Claim for idle machinery.                                                       | : Rs.12,00,000=00        |
| iv]  | Loss of profit.                                                                 | : Rs.11,73,000=00        |
|      | <b>Total</b>                                                                    | : Rs.1,05,84,000=00      |
| v]   | Add interest @ 18% from 1.1.2002 to 30.7.2004 (33 months) on Rs. 1,05,84,000=00 | : Rs.52,39,080=00        |
| vi]  | Add cost of litigation, arbitration etc.                                        | : Rs.01,00,000=00        |
|      | <b>Grand Total</b>                                                              | <b>Rs.1,59,23,080=00</b> |

## Alternative claim:

|      |                                                              |   |           |
|------|--------------------------------------------------------------|---|-----------|
| i]   | Claim because of 85% area not available for removal of sand. | : | 310 Days. |
| ii]  | Claim for establishment expenses                             | : | 016 Days. |
| iii] | Claim for idle machinery                                     | : | 047 Days. |
| iv]  | Loss of profit.                                              | : | 048 Days. |
| v]   | Add interest @ 18% from 1.1.2002 to 30.7.2004 (33 months)    | : | 208 Days. |
| vi]  | Add cost of litigation, arbitration etc.                     | : | 004 Days. |
|      | <b>Grand Total</b>                                           | : | 631 Days. |

14. The appointed arbitrator Mr. A.R. Datta did not, or could not, complete the proceedings within the stipulated period resulting in the appointment of Mr. G.C. Sarkar as the sole Arbitrator. It is Mr. G.C. Sarkar, who rendered the Arbitral Award, the operative part of which reads thus:

*“The contractor, Shri Damodhar Rokde is awarded a licence for removal of Sand / Kankar from Kanhan river bed comprising of GLR Sy No.1 & 1A of Kamptee Cantt admeasuring 343.17 acres for a period of 252 (two hundred fifty two) days from the date of handing over the site by the Department (DEO, Mumbai Circle). The Department (DEO, Mumbai Circle) shall hand over the site at the earliest possible to the contractor on the same terms and conditions of the tender notice bearing No.52/2/XXXVI/2000-2001 dt. 01.12.2000 (Document D-6) on realization of a security deposit of Rs.9,20,000=00 (Rupees Nine Lakh Twenty Thousand only) from the contractor. Both the parties shall bear their own cost of arbitration.”*

15. The defence Estates Officer was aggrieved by the rejection of the claim and the grant of the counter claim and two Civil Miscellaneous Applications under section 34 of the Act were preferred. Civil Miscellaneous Application 374/2012 challenged the grant of alternate relief sought in the counter claim, the effect of which is to grant licence to the appellant – contractor for removal of sand from the period of 252 days and Civil Miscellaneous Application 375/2012 challenged the dismissal of the claim put forth by the Defence Estates Officer.

16. The learned PDJ was pleased to allow Civil Miscellaneous Application 374/2012 vide judgment dated 16.5.2016 the effect of which is that the Arbitral Award, to the extent the counter claim of the appellant – contractor is allowed, and licence to remove the sand for period of 252 days granted, is set aside. It is this judgment which is impugned in the present appeal.

17. Mr. W.T. Mathew, the learned counsel would submit that the learned PDJ committed a serious error in interfering with the Arbitral Award in exercise of restricted jurisdiction under section 34 of the Act. The extension of the submission is that the

learned arbitrator committed no wrong in allowing the alternate claim and directing that the claimant – contractor be awarded licence for removal of the sand from the concerned site for a period of 252 days. Mr. W.T. Mathew would rely on the following decisions:

- (a) *Food Corporation of India vs. Jagdish Chandra Saha*, (AIR 1994 SC 219);
- (b) *Oil and Natural Gas Corporation Ltd vs. SAW Pipes Ltd*, (AIR 2003 SC 2629 (ONGC vs SAW Pipes Ltd));
- (c) *Ramana Dayaram Shetty vs. International Airport Authority of India*, (AIR 1979 SC 1628);
- (d) *Tarapore and Company vs. Cochin Shipyard Limited Cochin*, (AIR 1984 SC 1072);
- (e) *Bharat Coking Coal Ltd vs. Annapurna Construction*, [(2003)8 SCC 154];
- (f) *Vedansh Hospitality and Resorts Limited & Ors..vs.. New India Cooperative Bank Ltd*, (2013 Vol.4 BCR 292);
- (g) *State of Goa vs. Praveen Enterprises*, (2013 Vol. 4 BCR 292);

18. Mrs. Pranita Choube, the learned counsel holding for Mrs. Anjali Joshi would support the judgment of the learned PDJ. She would submit, that the learned arbitrator not only ignored the terms and conditions of the contract, he virtually brought into existence fresh contractual terms. Mrs. Choube submits that,

assuming arguendo the learned arbitrator is right in recording the finding that the contractor was entitled to damages, all that could have been done is to allow the monitory claim. Mrs. Pranita Choube would submit that grant of licence to excavate sand is statutorily regulated. The learned arbitrator ignored the fundamental law of the land and the Award is contrary to public policy.

19. Section 34 of the Act, prior to the amendment introduced vide Act 3 of 2016, read thus:

**34. Application for setting aside arbitral award. -**

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

2. An arbitral award may be set aside by the Court only if-

(a). 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:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v). the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b). the Court finds that-

(i). the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii). the arbitral award is in conflict with the public policy of India.

*Explanation* – Without prejudice to the generality of sub-clause (ii) of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the

arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

20. The phrase “public policy of India” was interpreted by the Supreme Court in a catena of decisions. Suffice it to refer to the decision of the Supreme Court in *Oil and Natural Gas Corporation Limited vs. Western Geco International Limited*, (2014)9 SCC 263. The Supreme Court noted that the expression “public policy of India” fell for interpretation in *ONGC vs SAW Pipes Ltd* and referred to and reproduced paragraph 31 of the said decision, which reads thus:

*“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 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.”*

21. The Supreme Court then proceeded to consider the width and amplitude of the expression “fundamental policy of Indian Law”. It would be relevant to reproduce the following observations of the Supreme Court, which are illuminating:

*“35. What then would constitute the ‘Fundamental policy of Indian Law’ is the question. The decision in **ONGC** does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression “Fundamental Policy of Indian Law”, we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a ‘judicial approach’ in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact that so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults*

*that can render the decision of a Court, Tribunal or Authority vulnerable to challenge.*

*36. In Ridge v. Baldwin, the House of Lords was considering the question whether a Watch Committee in exercising its authority under Section 191 of the Municipal Corporations Act, 1882 was required to act judicially. The majority decision was that it had to act judicially and since the order of dismissal was passed without furnishing to the appellant a specific charge, it was a nullity. Dealing with the appellant's contention that the Watch Committee had to act judicially, Lord Reid relied upon the following observations made by Atkin L.J. in R. v. Electricity Commissioners, ex p. London Electricity Joint Committee Co. (1920) Ltd: (KB p.205)*

*"....Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."*

*37. The view taken by Lord Reid was relied upon by a Constitution Bench of this Court in [Associated Cement Companies Ltd vs. P.N. Sharma](#) wherein Gajendragadkar, C.J. speaking for the Court observed : (AIR p.1601, para 14)*

*"14...."In other words, according to Lord Reid's judgment, the necessity to follow judicial procedure and observe the principles of natural justice, flows from the nature of the decision which the watch committee had been authorised to reach under S.191(4). It would thus be seen that the area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and consequently, the horizon of writ jurisdiction has been extended in a corresponding measure. In dealing with questions as to whether any impugned orders could be revised under A. 226 of our Constitution, the test prescribed by Lord Reid in this judgment may afford considerable assistance."*

*38. Equally important and indeed fundamental to the policy of Indian law is the principle that a Court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated 'audi alteram partem' rule one of the facets of the principles of*

*natural justice is that the Court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the Court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian Law.*

*39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury's principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a Court of law often in writ jurisdiction of the Superior courts but no less in statutory processes where ever the same are available.*

*40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest”.*

22. The articulation in **ONGC vs Western GICO**, which significantly expanded the scope of the phrase “public policy” impelled the legislature to legislatively interject and the dominant intent of the amendment is, therefore, to minimize the interference of the Court in the decision of the Arbitral Tribunal.

23. Section 34 as amended by Act 3 of 2016 w.e.f.

23.10.2015 reads thus:

**34. Application for setting aside arbitral award. -**

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

2. An arbitral award may be set aside by the Court only if-

(a). 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:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v). the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b). the Court finds that-

(i). the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii). the arbitral award is in conflict with the public policy of India.

Explanation 1. - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law ; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2 - For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section(5) is served upon other party.]

24. The legislative intent to minimize the interference of the Court in the decision of the Arbitral Tribunal is manifested from the substitution of explanation 1 to section 34(2)(b) which clarifies that an Award is in conflict with the public policy of India, **only** (emphasis supplied) – if

(i) The making of the Award was induced or affected by fraud or corruption or was in violation of section 75 or section 81 or;

(ii) It is in contravention with the fundamental policy of Indian law or;

(iii) It is in conflict with the most basic notions of morality or justice.

25. The scope of interference in exercise of jurisdiction under section 34 of the Act, on the ground that the Award is in contravention with the fundamental policy of Indian law is further

reduced in view of explanation-2 which provides that the test as to whether there is a contravention with the fundamental policy of Indian law, **shall not entail a review on the merits of the dispute.** (emphasis supplied)

26. The learned counsel, are however, in unison that since the arbitration application under section 34 of the Act is preferred on 11.11.2011, albeit decided on 16.05.2016, the pre-amendment provisions of section 34 would apply. The submission is consistent with the enunciation of the Supreme Court in *Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India (NHAI)*, [(2019) 15 SCC 131] which reads thus:

“16. Since the [Section 34](#) petition in the present case is dated 30.07.2016, an important question as to the applicability of the parameters of review of arbitral awards would arise in this case. More particularly, radical changes have been made by the Arbitration and Conciliation (Amendment) Act, 2015 [the 2015 Amendment Act] with effect from 23.10.2015 – in particular, in the “public policy of India” ground for challenge of arbitral awards. The question which arises is whether the amendments made in [Section 34](#) are applicable to applications filed under [Section 34](#) to set aside arbitral awards made after 23.10.2015.

17. This Court, in *BCCI v. Kochi Cricket (P.) Ltd.* (BCCI) has held that the [Amendment Act](#), 2015 would apply to [Section 34](#) petitions that are made after this date. Thus, this Court held (SCC pp 335 & 338 – 39, paras 75 and 78):

“75. Shri Viswanathan then argued, relying upon [R. Rajagopal Reddy v. Padmini Chandrasekharan](#), [Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.](#) [SEDCO Forex International Drill Inc. v. CIT](#) and [\[SEDCO Forex International Drill Inc. v. CIT, \(2005\) 12 SCC 717\]](#) and [Bank of Baroda v. Anita Nandrajog](#), that a clarificatory amendment can only be retrospective, if it does not substantively change the law, but merely clarifies some doubt which has crept into the law. For this purpose, he referred us to the amendments made in [Section 34](#) by the [Amendment Act](#) and stated that despite the fact that Explanations 1 and 2 to [Section 34\(2\)](#) stated that “for the avoidance of any doubt, it is clarified”, this is not language that is conclusive in nature, but it is open to the court to go into whether there is, in fact, a substantive change that has been made from the earlier position or whether a doubt has merely been clarified. According to the learned Senior Counsel, since fundamental changes have been made, doing away with at least two judgments of this Court, being [Saw Pipes Ltd.](#) and [Western Geco](#), as has been held in para 18 in [HRD Corpn. v. GAIL \(India\) Ltd.](#), it is clear that such amendments would only be prospective in nature. We do not express any opinion on the aforesaid contention since the amendments made to [Section 34](#) are not directly before us. It is enough to state that [Section 26](#) of the Amendment Act makes it clear that the [Amendment Act](#), as a whole, is prospective in nature. Thereafter, whether certain provisions are clarificatory, declaratory or procedural and, therefore, retrospective, is a separate and independent enquiry, which we are not required to undertake in the facts of the present cases, except to the extent indicated above, namely, the effect of the substituted [Section 36](#) of the Amendment Act.

78. The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact [Section 87](#) on the lines indicated in the

Government's Press Release dated 7-3- 2018. The immediate effect of the proposed [Section 87](#) would be to put all the important amendments made by the [Amendment Act](#) on a back-burner, such as the important amendments made to [Sections 28](#) and [34](#) in particular, which, as has been stated by the Statement of Objects and Reasons,

“... have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act”,

and will now not be applicable to [Section 34](#) petitions filed after 23-10-2015, but will be applicable to [Section 34](#) petitions filed in cases where arbitration proceedings have themselves commenced only after 23-10-2015. This would mean that in all matters which are in the pipeline, despite the fact that [Section 34](#) proceedings have been initiated only after 23-10-2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of courts, which ultimately defeats the object of the 1996 Act. [These amendments have the effect, as stated in [HRD Corpn. v. GAIL \(India\) Ltd.](#), of limiting the grounds of challenge to awards as follows: (SCC p. 493, para 18)

“18. In fact, the same Law Commission Report has amended [Sections 28](#) and [34](#) so as to narrow grounds of challenge available under the Act. The judgment in *ONGC v. Saw Pipes Ltd.*, has been expressly done away with. So has the judgment in *ONGC v. Western Geco International Ltd.* Both [Sections 34](#) and [48](#) have been brought back to the position of law contained in [Renusagar Power Plant Co. Ltd. v. General Electric Company](#), where “public policy” will now include only two of the three things set out therein viz. “fundamental policy of Indian law” and “justice or morality”. The ground relating to

“the interest of India” no longer obtains. “Fundamental policy of Indian law” is now to be understood as laid down in *Renusagar*. “Justice or morality” has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in *Associate Builders v. DDA*. [Section 28\(3\)](#) has also been amended to bring it in line with the judgment of this Court in *Associate Builders*, making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.”]

It would be important to remember that the 246th Law Commission Report has itself bifurcated proceedings into two parts, so that the [Amendment Act](#) can apply to court proceedings commenced on or after 23-10-2015. It is this basic scheme which is adhered to by [Section 26](#) of the Amendment Act, which ought not to be displaced as the very object of the enactment of the [Amendment Act](#) would otherwise be defeated.” (emphasis supplied)

18. There is no doubt that the amendments made in Explanations 1 and 2 to [Section 34\(2\)\(b\)\(ii\)](#) have been made for the avoidance of any doubt, which language, however, is not found in [Section 34\(2A\)](#). Apart from the anomalous position which would arise if the Section were to be applied piecemeal, namely, that Explanations 1 and 2 were to have retrospective effect, being only to remove doubts, whereas sub-section (2A) would have to apply prospectively as a new ground, with inbuilt exceptions, having been introduced for the first time, it is clear that even on principle, it is the substance of the amendment that is to be looked at rather than the form. Therefore, even in cases where, for avoidance of doubt, something is clarified by way of an amendment, such clarification cannot be retrospective if the earlier law has been changed substantively. Thus, in [Sedco Forex International Drill, Inc. v. CIT \(SEDCO\)](#), this Court held: (sc P724, para 17)

“17. As was affirmed by this Court in *Goslino Mario* a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also [Reliance Jute and Industries Ltd. v. CIT](#). An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See [Sonia Bhatia v. State of U.P.](#), SCC at p. 598, page 1282, para 24]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See [Shyam Sunder v. Ram Kumar](#), SCC (para 44); [Brij Mohan Das Laxman Das v. CIT](#), SCC at page 354, [CIT v. Podar Cement \(P\) Ltd.](#), SCC at p. 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are “it is declared” or “for the removal of doubts”.”

19. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of “public policy of India” in *ONGC Ltd. v. Saw Pipes Ltd.*, [“Saw Pipes”] and *ONGC Ltd. v. Western Geco International Ltd.*, [“Western Geco”] has been done away with, and a new ground of “patent illegality”, with inbuilt exceptions, has been introduced. Given this, we declare that [Section 34](#), as amended, will apply only to [Section 34](#) applications that have been made to the Court on or after 23.10.2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date”.

27. The Arbitral Award and the decision of the learned PDJ who interfered in exercise of jurisdiction under section 34 of the Act, will, therefore, have to be tested on the anvil of the pre-amended provisions of section 34. It would be necessary to briefly note few decisions of the Supreme Court on the pre-amended section 34, to understand the scope and amplitude of the

jurisdiction of the Court to interfere with the Arbitral Award.

28. In *Renusagar Power Co. Ltd..vs.. General Electric Co, 1993(4) SCALE 44*, the Supreme Court while construing the expression “public policy” in the context of a foreign award, held that the award would be set aside, as contrary to the public policy of India, if the Award is contrary to:

- (i) The fundamental policy of Indian law;
- (ii) The interest of India;
- (iii) Justice or morality.

29. The Supreme Court further held that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India since the statute is enacted to protect the economic interest of the nation. Disregarding orders passed by the superior Courts in India, was cited as an instance of contravention of the fundamental policy of Indian law.

30. In *ONGC vs SAW Pipes Ltd*, the Supreme Court held that in addition to the three grounds mentioned in *Renusagar Power Co. Ltd.* “patent illegality” would be a ground to set aside an Arbitral Award. The Supreme Court added that the illegality must go to the root of the matter, and if the illegality is of trivial

nature, it cannot be held that the Award is against the public policy. The Supreme Court further held that the Arbitral 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 vs. R.S. Sharma and Company, New Delhi, [(2008)13 SCC 80*, the Supreme Court summarize the law in paragraph 21, which reads thus:

“21. From the above decisions, the following principles emerge:

(a) An Award, which is

- (i) contrary to substantive provisions of law ; or
- (ii) the provisions of the Arbitration and Conciliation Act, 1996 ;

or

(iii) against the terms of the respective contract ; or

(iv) patently illegal, or

(v) prejudicial to the rights of the parties;

is open to interference by the Court under [Section 34\(2\)](#) of the Act.

(b) 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;

(c) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.

(d) It is open to the Court to consider whether the Award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, [Section 34\(2\)](#) of the Act, let us consider whether the Arbitrator as well as the Division Bench of the High Court were justified in granting the Award in respect of Claims 1 to 3 and additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the Award in respect of those claims with reference to the terms of the Agreement duly executed by both parties.

31. I have already quoted the relevant observations in *Oil and Natural Gas Corporation Limited vs. Western Geco International Limited*, supra. The said decision was considered by the Supreme Court in *Associate Builders VS. Delhi Development Authority*, [(2015)3 SCC 49], and the enunciation is that the juristic principle of “judicial approach” demands that a decision be fair, reasonable and objective. Paragraphs 29 to 34 of the decision in *Associate Builders*, read thus:

“29. It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The Audi Alteram Partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in [Sections 18](#) and [34 \(2\) \(a\) \(iii\)](#) of the Arbitration and [Conciliation Act](#). These Sections read as follows:

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

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

*(2) An arbitral award may be set aside by the Court only if-*

*(a) the party making the application furnishes proof that-*

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

*31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-*

*(i) a finding is based on no evidence, or*

*(ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or*

*(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

*32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, it was held (SCC page 317, para 7):*

*"7. ....It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."*

*In Kuldeep Singh v. Commr. of Police, it was held (SCC 14 at para 10):*

*"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which*

is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., this Court held (SCC pp. 601 – 02, para 21):

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

34. It is with this very important caveat that the two

fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.

32. The pre-amended section 34, therefore, envisaged judicial interference in the Arbitral Award, inter alia, if the Award is contrary to the fundamental policy of the Indian law, is patently illegal, is so unfair and unreasonable that it shocks the conscience of the Court, is contrary to the substantive provisions of law or the provisions of the Act or is against the terms of the contract or is prejudicial to the rights of the parties or the learned arbitrator fails to adopt a “judicial approach”. Notably, while in *Associate Builders*, the Apex Court observes that it is neither necessary nor proper to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law, if on the facts proved the Arbitral Tribunal fails to draw an inference which ought to have been drawn, or if the inference drawn, is on the face of it, untenable resulting in miscarriage of justice, the Award shall be vulnerable to challenge.

33. The learned arbitrator, while allowing the counter claim in part, brought into existence a fresh contract, which was foisted on the respondent – DEO. The learned arbitrator clearly

travelled beyond the contractual terms and awarded licence for excavation and removal of sand for period of 252 days. Assuming that the appellant – contractor established entitlement to claim compensation, he could have been monetarily compensated, which was not done. Licence to excavate sand is statutorily regulated and a direction to award licence for 252 days clearly falls foul of the substantive law. The direction is manifestly unreasonable and the implication thereof shocks the conscience of the Court. In my considered view, the learned PDJ committed no error in interfering with the Arbitral Award. The patent illegality is writ large on the face of the Award. Contractual terms and conditions are thrown out of the window. A fresh contract is brought into existence. A statutorily regulated licence to excavate land is awarded as a measure of compensation. In my considered view, the Arbitral Award is clearly contrary to public policy and the interference in exercise of jurisdiction under section 34 of the Act, is unexceptionable.

34. De hors the patently illegal relief in the nature of awarding a licence to excavate land, it is clear from record that the learned arbitrator fails to consider the contractual terms qua the routes. The learned PDJ considers the issue thus:

*“12. In the instant case, the Arbitrator reached to the conclusion of 252 days mainly on the basis of the documents on behalf of the contractor requesting the Government for alternate routes, etc. The Ld. Arbitrator also relied on the award in terms of days, passed in the earlier proceedings in the case of M/s. Heera Laxmi and the same was not challenged by the government. The Arbitrator have failed to consider the specific and express terms and conditions of the tender notice as regards the routes. In the tender notice itself, the route through Gora Bazar or any other alternate route which is objectionable to the local army authorities was specifically prohibited. The routes through Anni Ghat and ghat across railway line were provided. There was standing permission to the Contractor for building internal routes. As per record, the alternative route through Mal Road was also provided.*

*In the tender notice itself all the tenderers were also advised to inspect the plan of the area in the office of Defence Estates Officer, Mumbai Circle, Colaba, Mumbai and to get acquainted with the site and terms and conditions of licence.*

*Had the routes through Ajni ghat and ghat across railway line were not sufficient for the excavation and carrying of sand covering large river bed of about 342 acres, the non-applicant / respondent would not have given the offer of Rs. 92.00 lacs contract.*

*By not referring to the express terms and conditions in the tender notice, the Arbitrator based his decision by considering irrelevant material on record which makes the Award perverse. The Ld. Arbitrator relied on the award in terms of days, passed in the earlier proceedings in the case of M/s. Heera Laxmi as the same was not challenged by the government. Had there been the case of loss to the contractor for not providing sufficient routes, there would not have been an extension of the period for another 22 days on payment of the price on pro-rata basis. Even if the routes across railway line was not mentioned in the map and the officer admits their mistake, it does not mean that no route across railway line was provided when it*

*was the essential condition in the tender notice. Had it been the case, there was no impediment to the contractor for not invoking the arbitration clause immediately and there was no question for further extension of period for 22 days on payment of price on pro-rata basis”.*

35. In my considered view, the learned PDJ did not commit any error, factual or legal, in interfering with the Arbitral Award.

36. The decisions pressed in service by Mr. W.T. Mathew, do not take the case of the appellant any further. ***Food Corporation of India vs. Jagdish Chandra Saha*** holds, in the context of section 30 of the Arbitration Act, 1940 that Award cannot be set aside on the ground that it was non-speaking and the High Court should remit the matter for considering the permissible objections. I have already referred to ***Oil and Natural Gas Corporation Ltd vs. SAW Pipes Ltd. Ramana Dayaram Shetty vs. International Airport Authority of India*** considers the scope of judicial interference in Government contracts. ***Tarapore and Company vs. Cochin Shipyard Limited Cochin*** holds that if in an agreement of construction, there is provision for modification, the contractor can claim the amount of increase in the price of equipments and fees incurred for technical guidance and that said

claim is covered within the arbitration clause. The said decision, which is rendered in the context of the provisions of the Arbitration Act, 1940 is of no relevance. ***Bharat Coking Coal Ltd vs. Annapurna Construction*** which again is rendered in the context of the provisions of Arbitration Act, 1940, notices the difference between error within jurisdiction and error in excess of jurisdiction. ***Vedansh Hospitality and Resorts Limited & Ors..vs..New India Cooperative Bank Ltd*** articulates that the arbitrator is bound to notice the basic principles of Civil Procedure Code and Indian Evidence Act before relying on the material on record. ***State of Goa vs. Praveen Enterprises*** considers the tenability of the counter claim in the factual matrix.

37. In the light of the discussion supra, the appeal is dismissed.

**JUDGE**