IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 12TH DAY OF AUGUST 2021

THE HON'BLE MR. JUSTICE N. SATHISH KUMAR

O.P. No.5 of 2015

In the matter of Arbitration and Conciliation Act, 1996

AND

In the matter of Award dated 22.05.2014 passed by the 2nd Respondent.

Mr.V. Ramiah
No. 29, Neelakanta Mehta Street,
T. Nagar, Chennai- 600 017.

... Petitioner

-Versus-

M/s. Jain Housing and Construction Ltd,
No. 11, Somasundaram Street,
T.Nagar, Chennai- 600 017.

...Respondent/Claimant

Hon'ble Justice Mr. K. Sampath
(Retd. Judge of the Hon'ble High Court, Madras)
11, Second Street,
Jagadambal Colony,
Royapettah, Chennai – 600 014.

... 2nd Respondent

O.P. No.5 of 2015

Original Petition praying that this Hon'ble Court be pleased to:-

1. Set aside the award dated 22.05.2014 passed by the 2nd Respondent.
2. Award a sum of Rs. 5,00,00,000 (Rupees Five Crores) in Favour of the petitioner as damages as has been claimed in the Counter Claim

of the Petitioner in the Arbitration Proceedings.

3. Pay the costs of these proceedings.

This Original Petition having been heard on 22.07.2021 in the presence of Mr.Yashod Vardhan, Senior counsel for Mr. Rajnish Pathiyil, advocates for the petitioner herein and Mr. Kuberan for M/s.Rank Associates, advocates for the 1st respondent herein and upon reading the petition and the award dated 22.05.2014 filed herein and having stood over for consideration till this date and coming on this day before this court for orders in the presence of the said advocates for the parties hereto and this court having observed that Memorandum itself clearly indicate that the advance paid by the Respondent is only to settle the liabilities and get back the documents and the evidence before the Tribunal does not indicate any amount has been spent towards the construction and the Respondent is also received back amount advanced with interest, in such a view of the matter in the absence of any evidence to prove the actual damages on account of said amount, awarding compensation on just and equitable ground, certainly against the provision of law, further, without any evidence awarding such huge amount also violation of fundamental policy of India, in such a view of the matter, the Award passed by the Arbitrator is liable to the set aside and it is set aside and **it is ordered:-**

That the award dated 22/05/2014 passed by the 2nd respondent be and is hereby set aside.

WITNESS, THE HON'BLE MR.JUSTICE SANJIB BANERJEE, CHIEF JUSTICE, HIGH COURT OF MADRAS AFORESAID, THIS THE 12TH DAY OF AUGUST 2021.

Sd/-
ASSISTANT REGISTRAR (O.S.II)

//Certified to be true copy//
Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.

NS
16.09.2021

O.P. No.5 of 2015

DECREE
DATED 12/08/2021

THE HON'BLE MR. JUSTICE
N. SATHISH KUMAR

FOR APPROVAL: 24/09/2021

APPROVED ON: 24/09/2021

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
22~07~2021	12-08~2021

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P. No. 5 of 2015

M r.V. Ramiah
No.29, Neelakanda Mehta Street,
T.Nagar, Chennai 600017. .. Petitioner / Respondent

.Vs.

1. M/s Jain Housing and Construction Ltd.,
   No.11, Somasundaram Street,
   T.Nagar, Chennai 600017

2. Hon'ble Jusitce Mr.K. Sampath
   (Retd. Judge of the Hon'ble High Court, Madras)
   2nd Street,
   Jagadambal Colony,
   Royapettah, Chennai 600014. .. Respondent / Claimant

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 22.05.2014 passed by the 2nd Respondent; Award a sum of Rs.5,00,00,000/- (Rupees five Crores) in favour of the Petitioner as damages as has been claimed in the counter claim of the Petitioner in the arbitration roceedings with costs.

For Petitioner : Mr. Yashod Vardhan,
Senior Counsel for
Mr. Rajnish Pathiyil

For Respondents : Mr. Kuberan for
M/s Rank Associates for R1

O R D E R

Challenging the Award passed by the learned Sole Arbitrator, the present Petition petition is filed.

2. The parties are arrayed as per their own ranking before the Arbtitral Proceedings.

3. The brief fact leading to file this Petition is as follows:

3.a. The Claimant originally entered into a Joint Development Agreement (JDA) with the owners of the land of an extent of 2.95 Acres in R.S.No.25/1 on 14.4.1997. Thereafter, he has entered into a Memorandum of Understanding (MoU) with the Respondent on 14.07.2006 for the development of the property. As per the Memorandum the Claimant had to pay Rs.2,00,00,000/- (Rupees Two Crores) advance for getting back the original documents from the bank and to start the project. It is also agreed in the memorandum that the Respondent has agreed to pay Rs.3 Crores as fixed profits besides Rs.65 lakhs advance to the owners. The Claimant at his cost conducted the soil test. The claimant has also paid Rs.2 Crores by way of Pay Orders out of which three pay orders to the tune of Rs.1.15 Crores have been utilised. As per the Memorandum the Claimant is entitled to put up construction in the entire property of 2.95 Acres as per the prevailing rules in terms of plans that were to be approved, an extent of 212028 sq.ft. could be constructed and sold. It would translate into 120 apartments. Hence, the claimant has filed claim application for damages to the tune of Rs.28,47,01,440/-. The Respondent/Petitioner herein took the stand to the effect that there is no concluded contract and the claim for damages is not maintainable. MoU was never concluded contract, further agreement was not entered between the parties.

4. Denying the entire claim it is the case of the Respondent/Petitioner herein that the amount of Rs.1.15 Crores was given only as a business loan and not as an advance for development of the property. Remaining Rs.85 lakhs, out of Rs.2 Crores agreed to be given as advance has already returned.

5. The learned Arbitrator considering the various documents and evidence filed by both sides passed an Award as follows:

1. The Respondent shall pay a sum of Rs.275 lakhs to the

Claimant as the compensation within a period of four weeks from the date of order and thereafter with interest at 18% per annum till payment.

2. The Claimant is not entitled to a sum of Rs.20 lakhs as litigation expenses.

3. The Claimant is not entitled to the cost

4. The Respondent is not entitled for the Counter Claim of Rs.5 Crores.

5. The Respondent is not entitled to the cost of defending legal proceedings at Rs.25 lakhs.

6. Parties shall bear their respective costs at all levels.

6. Mr. Yashodh Varadhan, learned Senior Counsel submitted that though the Award was put into challenge of various grounds, his main focus is only with regard to the Arbitral Award passed on the basis of just and equitable ground which is no permissible under law. Though the ground has also been raised as to the enforcement of the MoU and the Arbitrator has factually found that there was a concluded contract between the parties, that ground has not pressed into service. At any event it is his contention that the Memorandum itself clearly indicate the property should be

developed by both the parties. Only on such development the fixed compensation has been agreed between the parties. The evidence on record clearly established that the entire project has been completed only by the Petitioner herein. The Respondent/Claimant has not done anything towards the development of property and amount given as loan has already repaid with additional amount Rs.25 lakhs as per the Orders of the Division Bench passed while disposing the Section 9 of the Arbitration and Conciliation Act application. Therefore, when the amount has already been returned, the question of payment of compensation does not arise at all. There is no evidence available on record to show that the Respondent/claimant has suffered damages on account of the contract. It is his further contention that the damages for breach of contract do not depend upon the gain that other party might have made. At any event, the parties have never agreed to pass an award on the just and equitable ground. Such being the position, without any evidence granting an Award on the equitable ground violates the very provision of the Arbitration and Conciliation Act. Hence prayed for allowing the Petition by setting aside the Award.

7. In support of his submission, he relied upon the following judgments:

1. *Mulamchand Vs. State of Madhya Pradesh reported in* ***AIR 1968 SC 1218***

__2.__ Union of India [UOI] Vs. L.S.N. Murthy and Ors reported in __[2012] 1 SCC 718__

__3.__ Chithra Kumar Vs. Aarthi Amarendra reported in __MANU/TN/5108/2019__

__4.__ State of Rajasthan and Anr. Vs. Ferro Concrete Construction Pvt. Limited reported in __[2009] 12 SCC 1__

__5.__ M.Maniappa Pilla Vs. I.Anthonisami Mudaliar and Ors reported in __MANU/TN/0145/1949__

__6.__ Surrey County Council and Another Vs. Bredero Homes Ltd. reported in __[1993] 1 W.L.R. 1361__

__7.__ Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. reported in __[2003] 5 SCC 705__

__8.__ Union of India [UOI] Vs. A.L.Rallia Ram reported in __[1964] 3 SCR 164__

__9.__ S.Dinesh Babu Vs. C.Venugopalan reported in __2019 SCC OnLine Ker 45 : [2019] 1 KLJ 416__

10. *Krishna Bhagya Jala Nigam Ltd. V. G.Harischandra Reddy and Ors reported in **[2007] 2 SCC 720***

8. Whereas Mr. Kuberan, learned counsel appearing for the Respondent submitted that the issuance of the Pay Order and receipt of the money is not in dispute. The Arbitrator actually found that the benefit received by the Respondent but for the amount advanced the project would not have kicked up which has been recorded by the learned Arbitrator in factually. Therefore, it is not permissible for the Court to re appreciate the evidence under section 34 (2)(a) of the Act. He further submitted that the learned Arbitrator has factually found and decided the issue the court cannot re-appreciate the entire evidence while exercising jurisdiction under Section 34 of the Act. It is his further contention that though the Petitioner has entered in JPA in the year 1997, project could be moved only in the year 2006 after the Petitioner received some benefit from the Respondent namely a sum of Rs.1.15 Crores out of Rs.2 Crores agreed as advance under MoU. Such being the position, having availed benefits and developed the property, the Respondent is certainly entitled to damages as per Section70 of the Contract Act. Therefore, his contention is that the Arbitral Award does not require any interference and prayed for dismissal of the the Petition.

9. The Award normally could be interfered only on the ground set out in the Section 34 of the Act.

"34 *(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.

2 [(2A) 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"

10. Challenge made in this Petition mainly on the ground of violation of the provision of the main Act. It is not in dispute that Memorandum of Understanding executed between the parties on 14.07.2006. the Memorandum indicate that the Petitioner originally entered into a Joint Development Agreement with the land owners to develop their property wherein he was entitled to 62% of the constructed area together with proportionate undivided share of the land and remaining 38% of the constructed area with proposed share of the land towards the land owners. Though the JDA has been entered long back, it appears that nothing could be developed in the land due to various other reasons. When the matter

stood thus, the Petitioner and Respondent entered into MoU. The terms agreed upon the parties are relevant. The same is extracted as follows:

> *Whereas, the Party of the First Part has entered into an Agreement for Joint Development with the landowners of the property morefully described in the schedule hereunder and the ratio of the Joint Venture between the landowner and the Party of the First Part is 70:30 which has been subsequently revised to 62:38 wherein 63% of the constructed area together with its proportionate undivided share of land is for the Party of the First Part and the 38% of the constructed area together with the proportionate Undivided share of land shall be for the Party of the First Part / Landowners.*
>
> *Whereas, after several discussions and negotiations, it has been agreed by both the parties that the schedule mentioned property shall be developed jointly by the parties above and this project shall be named as "JAINS-BBC RETREAT".*
>
> *Whereas, after considering the possibilities & profitability on development of the schedule mentioned property, the Party of the Second Part has agreed that the Party of the*

First Part shall be entitled to a FIXED PROFIT of Rs.300.00 Lakhs, apart from the reimbursement of the land premium of Rs.65.00 Lakhs paid to the landowners and this amount of Rs.365.00 Lakhs shall not carry any interest whatsoever.

Whereas, the Party of the First Part has expressed that he has availed certain credit facilities from M/s.Global Trust Bank Limited. Mylapore Branch, Chennai [now amalgamated with Oriental Bank of Commerce] and the original title deeds pertaining to the schedule mentioned property is in custody of the said bank.

Whereas, the Party of the First Part has expressed to the Party of the Second Part that he has negotiated the settlement with the bank and has made arrangements to release the original documents from the said bank and also obtain a "No lien Letter" or such other letters from the bank as required by the Party of the Second Part upon the Party of the Second Part agreeing to advance a sum of Rs.200.00 Lakhs [Rupees two hundred lakhs only] to the Party of the First Part/his nominees.

11. On a careful perusal of the agreed terms between the parties makes it very clear that both of them as agreed to develop the property jointly and the project shall be named as JAINS DBC. On such joint development the party of the first part will be entitled to fixed profit of Rs.3 Crores alone. For development of such property the Respondent also agreed to advance Rs.2 Crores to clear the encumbrance. So the terms agreed between the parties for fixed profits was always depended on development of property as agreed by both sides. Similarly, only to clear the marketable title and get back the documents, Rs.2 Crores agreed to be given as advance by the Respondent as per the above contract. It is also not disputed and it is on record that the Rs.2 Crores agreed to be advance was paid in 4 Pay Orders, 3 Pay Orders towards Rs.1.15 Crores and remaining for Rs.85 lakhs. Pay Order for Rs.85 lakhs said to have been returned immediately, which has not been utilised by the Petitioner. The remaining amount of Rs.1.15 Crores was also returned with additional amount of Rs.25 lakhs as per the Orders of the High Court which is also received without prejudice to their rights. These are all admitted facts. Now the compensation to the tune of Rs.28,47,01,440/- has been sought on the ground that the Respondent namely the Petitioner herein gained from the project. The learned Arbitrator after analysing the entire fact, categorically recorded in para 10.2.1 that

though there was breach of Memorandum by the Respondent/Petitioner herein except pressing into service Geo Mines Engineers to carrying out soil investigation in the site, no other contribution made by the Respondent.

12. In fact entire process of even before the submissions of plan papers were done by the Respondent. This finding has been recorded factually after appreciating the entire evidence and the learned Arbitrator has also recorded the fact that the Claimant has allowed the Respondent to take over the project. Thereafter, the Respondent pursued his own interest and ultimately the learned Arbitrator negatived the contention of the Claimant for damages for Rs.28 Crores, which has been worked out on the basis of the Respondents own documents. Such contention has not been accepted by the learned Arbitrator. However, the learned Arbitrator awarded Rs.275 lakhs reasonable amount as damages on the just and equitable basis. The learned Arbitrator also relied upon the judgment in ***Union of India vs. Col.LSN Murthy & Another [2006(3) Arb.L.R.552]*** which was set aside by the Apex Court in a judgement reported in ***Union of India vs. Col.LSN Murthy & Another [(2012) 1 SCC 718]***

13. Be that as it may. The learned Arbitrator awarded damages just and equitable basis. Absolutely there is no evidence placed before the

learned Arbitral Tribunal as to the nature of damages suffered by the claimant on breach of contract. Therefore, in the absence of any evidence as to any damages suffered in a breach of contract, the damages cannot be ordered on the basis of the gain of the other party.

14. It is the contention of Mr. Kuberan learned counsel for the Respondent herein that the Respondent is entitled to the damages as per Section 70 of the Contract Act. On a careful perusal of Section 70 of the Contract Act, it is clear that only when the entire conditions contemplated under Section 70 of the Contract Act established then Section 70 of the Contract Act can be pressed into service for awarding damages. The first condition is that the person should lawfully do some thing for another person or deliver something to him; second condition is that doing the said thing or delivering the said thing he must not intend to act gratuitously; and third condition is that other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. Only all these conditions are satisfied the person would be benefited is liable to make compensation to the person done something lawfully. Further on perusal, Section 70 of the Contract Act provides two situations. Without getting back the property delivered or restoration the person who done an act gratuitously can seek for compensation. Or he can seek for return of the

good delivered or money paid extra. In any of the above mode adopted by him then he cannot seek for either mode. Admittedly in this case it is the clear case of the petitioner that the amount has been advanced only as a loan at the time of entering into the MoU. In fact it has been established on record that out of Rs.2 Crores immediately Rs.85 lakhs have been paid. Remaining amount of Rs.1.15 Crores has also been restored with an additional amount of Rs.25 lakhs towards interest. Such being the position still claiming a compensation on the basis of Section 70 of the Contract Act will not arise at all. Section 70 of the Contract Act is not founded on the basis of the contract but embodies the equitable principle of restitution and prevention of unjust enrichment. As already indicated, the amount advanced to clearing the loans have been fully satisfied with additional interest Therefore, awarding damages is only unjust enrichment.

15. The learned Arbitrator has factually found that none of the works have been done by the Claimant. In fact, he was slept over, which enabled the petitioner herein to complete the project. The very clauses agreed upon the MoU indicate that only on completion of the project with joint development fixed profit agreed to be paid to the Claimant will arise. Except utilising of payment for certain period till the planning permission is obtained. The other development has been done only by the Petitioner

herein. In such a view of the matter, merely because some loan amount has been utilised at the earlier stage to get the planning permission, it cannot be said that entire project has been done and completed only out of the amount paid i.e., Rs.1.15 Crores. Therefore, this Court is of the view that when the evidence is lacking as to the utilization of the amount for completing the entire project from the advance paid by him, Section 70 of the Contract Act also cannot be pressed into service. Further, Respondent had already received back the money paid as advance with interest to the tune of Rs.25 lakhs. Such being the position, again awarding the damages invoking section 70 of the Contract Act only leads to unjust enrichment.

16. Be that as it may. Learned Arbitrator has awarded damages only on the just and equitable ground. It is to be noted that Section 28(2) of the Arbitration and conciliation Act 1996 is as follows:

> *28 (2) The arbitral tribunal shall decide ex aequoet bono or as amiable compositeur only if the parties have expressly authorised it to do so.*

Only when the parties have specifically agreed to decide the reference on just and equitable basis Arbitral Tribunal can decide the issue on that basis.

17. The Apex Court in ***ONGC vs. Saw Pipes Ltd., [(2003) 5 SCC 705]*** has held as follows:

> *"22. The aforesaid submission of the learned senior counsel requires to be accepted. From the judgments discussed above, it can be held that the term 'public policy of India' is required to be interpreted in the context of the jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the Court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under Code of Civil Procedure that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or nullity. But in a case where the judgment and decree is challenged before the Appellate Court or the Court exercising revisional jurisdiction, the jurisdiction of such Court would be wider. Therefore, in a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term 'public policy of India'. On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the arbitral tribunal*

could be set aside. If narrow meaning as contended by the learned senior counsel Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the Arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "arbitral tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28.Section 28(2) specifically provides that arbitrator shall decide ex aequo et bono [according to what is just and good] only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any *reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of 'patent illegality'."*

18. The above makes it very clear that only when the parties have specifically authorised the Arbitrator to decide according to what is just and good he can pass Award on just and equitable ground, which is not in the given case. Therefore, any Award passed which is against the statutory provisions of the Act cannot be given a legal sanctity.

19. In the latest judgment of the supreme court in ***Ssangyong Engineering & Construction Co.Ltd., case (supra),*** the Apex Court considered the amendment made in Section 34 of the Act and held as follows:

"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."

From the above judgment which makes it clear that the finding based on no evidence at all or an award which ignores vital evidence in arriving decision would be perverse and liable to be set aside on the ground of patent illegality.

20. A Division Bench of this Court in ***Maniappa Pillai vs. Anthonisami Mudaliar and Ors [(1949) 2 MLJ 725]*** has held that the measure of such damages cannot be the profit which the defendant might have made by trading with the goods he obtained as the quota for the firm.

21. In ***State of Rajasthan and Another vs. Ferro Concrete Construction Pvt. Ltd., [(2009) 12 SCC 1]*** the Honourable Apex Court has held that Award is passed merely on the basis of the claim statement without any evidence to substantiate the damages, cannot be sustained.

22. In the given case, Memorandum itself clearly indicate that the advance paid by the Respondent is only to settle the liabilities and get back the documents and the evidence before the Tribunal does not indicate any amount has been spent towards the construction and the Respondent is also received back amount advanced with interest. In such a view of the matter in the absence of any evidence to prove the actual damages on account of

said amount, awarding compensation on just and equitable ground, certainly against the provision of law. Further, without any evidence awarding such huge amount also violation of fundamental policy of India. In such a view of the matter, the Award passed by the Arbitrator is liable to be set aside and it is set aside.

23. Accordingly the Original Petition is allowed.

Sd/- N.S.K.J.
12/08/2021

//Certified to be true copy//
Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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