

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 29.11.2021

+ **O.M.P. (COMM) 490/2018 & IA 16600/2018, IA 8557/2021**

AIRWIL JKM INFRACON PVT. LTD.

..... Petitioners

versus

CADILLAC INFOTECH PRIVATE LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner :Mr Saurabh Kirpal, Senior Advocate with
Mr Saket Sikri, Mr Manik Dogra, Mr
Davinder Singh, Mr Ajay Pal Singh Kultar,
Mr Arun Rathi, Advocates.

For the Respondent :Mr Harish Malhotra, Senior Advocate with
Mr Kartik Yadav, Mr Manhar Singh Saini,
Mr Karanvir Singh Goraya and Ms Sumedha
Chadha, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereinafter referred to as 'AJIPL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 impugning an arbitral award dated 16.10.2018 (hereafter 'the impugned award') delivered by an Arbitral Tribunal constituted by Justice (Retired) Sh Sudhir Kumar Katriar, a former Judge of the Patna

High Court as the Sole Arbitrator (hereafter the ‘Arbitral Tribunal’). The arbitral proceedings were conducted under the aegis of the Delhi International Arbitration Center (DIAC) and in accordance with its rules.

2. In terms of the impugned award, AJIPL has been directed to hand over vacant and physical possession of the property bearing plot nos. 1, 2, 10, 11 and 12 measuring 20,000 sq. meters situated in Sector 135, Noida, District Gautam Budh Nagar, Uttar Pradesh (hereafter ‘**the Subject Land**’) to the respondent (hereafter ‘**CIPL**’) within a period of four weeks from the date of the award. In addition, the Arbitral Tribunal has awarded CIPL an amount of ₹20,00,000/- per month with effect from 18.07.2015 till the date of payment along with simple interest at the rate of 9%, as damages resulting from AJIPL retaining possession of the Subject Land. The Arbitral Tribunal has further directed CIPL to refund the amount of ₹8,22,56,500 (Rupees Eight Crores, Twenty-Two Lakhs, Fifty Six Thousand and Five Hundred) along with 9% simple interest for the period with effect from 18.07.2015 till the date of payment and, has further directed that this amount be adjusted against the amount awarded in favour of CIPL. The Arbitral Tribunal has also awarded costs of arbitration quantified at ₹25,00,000/- along with interest at the rate of 9% from the date of the award till the date of the payment in favour of CIPL.

Factual Background

3. The disputes between the parties arose in connection with a Property Development Agreement dated 06.09.2014 (hereafter ‘the

PDA'), which was entered into between the parties for development of the Subject Land. The parties had agreed that AJIPL would develop an IT Project on the Subject Land, which would include structures, buildings, recreational areas, open spaces, parking spaces, landscaping, developments, etc. in accordance with the plans sanctioned by the concerned authority (hereafter the '**Project**').

4. AJIPL holds leasehold rights in respect of the Subject Land in terms of lease deed(s) executed by New Okhla Industrial Development Authority (NOIDA) in favour of AJIPL. The Subject Land was allotted by NOIDA for setting up buildings for IT and IT Enabled Services.

5. In terms of the PDA, AJIPL was granted the exclusive development rights in respect of the Subject Land. It was agreed that AJIPL would develop the Project and the parties would share the gross sale revenue in a specified ratio: AJIPL was entitled to 53.75% of the gross sales revenue generated from the sale/allotment of the saleable area of the Project and CIPL was entitled to the remaining 46.25% of the gross sale revenue.

6. In terms of Clause 4 of the PDA, AJIPL agreed to pay a sum of ₹15,00,00,000/- (Rupees Fifteen Crores only) to CIPL as deposit. Out of the aforesaid sum, ₹10,00,00,000/- was agreed to be interest-free refundable deposit and the remaining ₹5,00,00,000/- was agreed to be a non-refundable deposit. Against the aforesaid amount, AJIPL paid a sum of ₹1,00,00,000/- and CIPL acknowledged its receipt in the PDA. It was agreed that the remaining amount would be paid within forty-five days of signing of the PDA. Clause 4 of the PDA is set out below: -

“4. DEPOSIT

- 4.1. As security towards compliance of its obligations under the Development Agreement, the Developer agrees to pay to Owner a sum of Rs.15,00,00,000/- (Rupees Fifteen Crore Only) out of which Rs.10,00,000/- ten crore only) shall be the interest free refundable deposit (“Refundable Deposit”) whereas the remaining Rs.5,00,00,000/- (Rs. Fifteen Crore only) shall be the non refundable deposit (Non Refundable Deposit”). The said deposits shall be payable on signing of this Agreement.

The owner hereby acknowledges the receipt of Rs.1,00,00,000/- (Rupees One Crore only) from the developer details are as follows:

Cheque no. 354558 dated 11.06.2013 for Rs.1,00,00,000/- drawn on HDFC Bank, branch at Sector-16, Noida, issued by M/s JBK Developers Pvt. Ltd.

The remaining amount i.e. Rs.14,00,00,000/- (Rupees Fourteen Crore only) of security deposit shall be paid by the developer to the owner with 45 day from the signing of present agreement.

- 4.2. The Refundable Deposit shall be refunded to the Developer from the revenue share of the Owner from Ist sale as will be agreed to between the parties.”

7. AJIPL failed to pay the due amount of ₹14,00,00,000/- within the agreed period of forty-five days. In this regard, CIPL sent notices to AJIPL for payment of the balance amount and thereafter, issued a legal notice dated 18.06.2015 to AJIPL for termination of the PDA under Clause 10.2(i) of the said agreement, with effect from 18.07.2015. CIPL also called upon AJIPL to deliver vacant and peaceful possession of the Subject Land. But AJIPL did not do so. On 05.07.2015, AJIPL published an advertisement inviting bookings for the proposed construction on the Subject Land.

8. CIPL issued a legal notice on 29.07.2015 objecting to the publication of the advertisement by AJIPL and once again called upon AJIPL to deliver vacant and peaceful possession of the Subject Land as AJIPL had failed to pay the balance amount due under Clause 4 of the PDA.

9. AJIPL responded to the legal notice and requested for extension of time till 31.03.2016 for payment of the balance amount under the PDA. CIPL agreed to the said request, however, it claims that AJIPL paid only an amount of ₹4,70,00,000/- till 06.05.2016.

10. Accordingly, CIPL issued another legal notice dated 06.05.2016 whereby it revived its earlier legal notice dated 18.06.2015 and called upon AJIPL to deliver vacant and peaceful possession of the Subject Land. CIPL, in its legal notice, asserted that AJIPL was in un-authorised occupation of the Subject Land since 18.06.2015 and was liable to pay use and occupation charges quantified at ₹75,00,000/- per month.

AJIPL did not respond to the said legal notice.

Arbitral Disputes

11. In view of the above dispute, CIPL issued a notice dated 03.06.2016 invoking the arbitration agreement as embodied in Clause 12 of the PDA and sought reference of the disputes to arbitration. Accordingly, a Sole Arbitrator was appointed. The parties referred the dispute to the Arbitral Tribunal.

12. Before the Arbitral Tribunal, CIPL filed its Statement of Claims claiming an amount of ₹15,75,00,000/- on account of usage and occupation charges of the Subject Land along with interest at the rate of 18% per annum from the date of filing the Statement of Claims till the date of realisation. CIPL claimed that, AJIP had failed and neglected to perform its contractual obligations in terms of the PDA and caused a wrongful loss on account of its failure to pay the remaining security deposit. AJIPL had continued occupation/possession of the Subject Land without payment of the amounts due. CIPL claimed that despite several assurances, AJIPL had not paid the remaining security deposit and had therefore, deceived CIPL into signing the PDA. CIPL further claimed that AJIPL failed to vacate the Subject Land despite being called upon to do so, even after the PDA was terminated by CIPL on account of AJIPL's failure to perform the contractual obligations.

13. AJIPL disputed the claims raised by CIPL. Before the Arbitral Tribunal, AJIPL contended that CIPL and AJIPL's associate company, Airwil JKM Infrastructure Pvt Ltd (hereafter the '**Infrastructure**

Company’), had entered into a Memorandum of Understanding dated 07.08.2013 for development of the Subject Land (hereinafter ‘the **MOU’**). At the material time, CIPL owned only four plots of land (Plot_nos. 1, 2, 11 and 12 situated in Sector -135, Noida, District Gautam Budh Nagar, Uttar Pradesh) measuring 16,000 sq. meters and was in the process of acquiring the adjacent plot of land (plot no. 10) measuring 4,000 sq. meters. Whereas buildings constructed on land measuring 20,000 sq. meters and above could be sold in parts, buildings constructed on land parcels less than 20,000 sq. meters could not be sold in such manner. Therefore, acquisition of plot no. 10 was essential for developing and monetizing the Project. It was pointed out that the MOU expressly provided that a sum of ₹12 crores would be paid by the Infrastructure Company to CIPL within a period of two months from signing of the MOU and, the said amount would be utilized for acquisition of the additional plot of 4000 sq. meters of land. The MOU also contemplated that it would be superseded by a Property Development Agreement (PDA) on the conditions precedent being met. AJIPL further claimed that in all ₹16.75 crores was paid by the Infrastructure Company and other group companies. It is stated that CIPL had acknowledged the amount of ₹15.75 crores in its Balance Sheet. In addition to the said amount, a further sum of ₹1 crore was paid to AJIPL from the account of Airwel Business Park Private Limited by two cheques of ₹50 lakhs each.

14. AJIPL contended that the terms of the MOU dated 07.08.2013 were substantially similar to the terms of the PDA and, in terms of the

MOU, AJIPL had already paid a sum of ₹15,00,00,000/- and an additional sum of ₹1,75,00,000/- to CIPL. However, CIPL had failed to acquire one of the plots (that is, plot bearing no. 10) within the prescribed period stipulated under the MOU and, accordingly the MOU was cancelled.

15. AJIPL stated that on 21.07.2014, NOIDA granted CIPL permission for amalgamation of the five plots constituting the Subject Land. Sh D.K. Gupta, of CIPL once again approached Sh Vinod Kumar Sachdeva of AJIPL for development of the Project on the Subject Land. AJIPL claimed that the deposits by the Infrastructure Company made in terms of the MOU would be adjusted or otherwise accounted for under the fresh agreement.

16. The PDA was signed by Mr Manoj Kumar on behalf of CIPL and Mr Vinod Sachdeva on behalf of AJIPL. The same persons had also signed the MOU on behalf of the parties thereto. AJIPL claimed that it was subsequently decided that CIPL would start refunding the amount received under the MOU to the Infrastructure Company, and AJIPL would correspondingly make payments of the respective amount to CIPL under the PDA. It was further stated that Mr Vinod Sachdeva (of AJIPL) had suggested that the amount paid under the MOU should be mentioned in the PDA but Mr D.K. Gupta of CIPL had suggested otherwise as according to him, it was not advisable for tax and accounting purposes.

17. AJIPL claimed that the corporate veil of the parties and

Infrastructure Company should be lifted as, essentially, the parties to the MOU and PDA were one and the same.

18. In addition to the above, AJIPL further contended it could not perform its obligations under the PDA for reasons attributable to CIPL. CIPL had failed to execute a General Power of Attorney in favour of AJIPL in terms of Clause 2.9 of PDA, which was necessary to obtain sanction of the plans and to develop the Project. AJIPL contended that both the MOU and PDA were signed by the same set of persons.

19. AJIPL also sought counter-claims, which are set out below:

“a. Pass an award of specific performance against the claimant and in favour of the respondent thereby directing the claimant to specifically perform its obligation under the Property Development Agreement dated 06.09.2014;

b. Pass an award against the claimant and in favour of the respondent thereby directing the claimant to pay the interest on the amount of Rs. 15,00,00,000/0 lying with the claimant as deposit along with @15% per annum from 06.09.2014 till the claimant performs its obligations and the sanction plans of the project are approved;

c. Pass an award, thereby directing the claimant to refund of the excess amount of Rs. 1,75,00,000/- paid to the claimant along with interest @ 15% p.a. w.e.f. date of respective payments till realization;

d. Pass an award, thereby directing the claimant to refund the sum of Rs. 2,25,00,000/- paid to the claimant

by the respondent along with interest @ 15% p.a. w.e.f. date of respective payments till realization;

e. Award the costs of the false and frivolous proceedings initiated by the claimant against the respondent in favour of the respondent;

f. Such other and further relief(s) as this Hon'ble Tribunal may deem just and proper in the circumstance stated hereinabove."

The Impugned Award

20. The Arbitral Tribunal observed that the disputes relating to the MOU could not be adjudicated in the present proceedings as the Infrastructure Company which was a party to the MOU was not a party to the PDA or the present proceedings. And, AJIPL was not a party to the MOU. The Arbitral Tribunal also rejected AJIPL's contention that the corporate veil of AJIPL and its other group companies including the Infrastructure Company, be lifted. In this view, the Arbitral Tribunal held that the need to examine the payments made under the MOU or to refund same did not arise.

21. The Arbitral Tribunal rejected AJIPL's contention that the PDA was a sequel to the MOU as it was AJIPL's own stand in the rejoinder filed, in response to CIPL's reply to its counter-claims, that the group of shareholders involving Mr Manoj Kumar and Mr Vinod Sachdeva did not wish to involve another group of shareholders of the Infrastructure Company, and thus, the PDA was entered into with AJIPL and not with the Infrastructure Company.

22. The Arbitral Tribunal accepted CIPL's contention that the terms

and conditions as agreed between the parties should be ascertained from the express terms of the PDA and, if CIPL was required to account for funds received under the MOU, the same would have been stated under the express terms of the PDA. Since the the payments made under the MOU were not referred to in the PDA, the same could not be accepted as payments under the PDA.

23. The Arbitral Tribunal examined CIPL's claim regarding loss caused on account of unauthorised use and occupation of the Subject Land. It held that since the Subject Land was not handed over to CIPL in due time, it had incurred a loss due to delay in development of the Project. However, the Arbitral Tribunal further held that CIPL had not substantiated the said claim. Notwithstanding the above finding, the Arbitral Tribunal resorted to the principle of Best Judgment Assessment, and assessed the loss at the rate of ₹20,00,000/- per month with effect from 18.07.2015 till the date of handing over the possession of the Subject Land.

24. The Arbitral Tribunal further held that CIPL had admittedly received a sum of ₹8,22,56,500/- from AJIPL under the PDA and it was liable to refund the same or adjust it against the amount of compensation receivable for the unauthorised use and occupation of the Subject Land.

25. The Arbitral Tribunal also awarded interest at the rate of 9% on the sums awarded to the parties. The Arbitral Tribunal also awarded costs of arbitration quantified at ₹25,00,000/- along with interest at the rate of 9% from the date of the award till the date of the payment.

26. Aggrieved by the impugned award, AIJPL has filed the present petition.

Submissions

27. Mr Kirpal, learned senior counsel appearing for AJIPL, submitted that the principal dispute between the parties was whether the payments made to CIPL under the MOU were required to be considered as payments made under the PDA. The entire case of CIPL rests on the allegation that AJIPL had failed to deposit the amounts as required under Article 4 of the PDA and, CIPL was well within its right to terminate the PDA and, seek possession of the Subject Land. Mr Kirpal submitted that the Arbitral Tribunal had accepted the aforesaid contention and disregarded a vital piece of evidence produced by AJIPL. In this regard, he stated that AJIPL's witness had produced a receipt dated 09.10.2014 signed by Mr D.K. Gupta of CIPL, which clearly acknowledged the receipt of the deposits under the PDA. However, that receipt (Ex.CW/X5) was rejected only on the ground that it was produced at a belated stage, and the issues regarding payments by the Infrastructure Company could not be adjudicated in the present arbitration. Mr Kirpal contended that the aforesaid grounds were *ex facie* erroneous. First of all, the receipt had not been produced at a belated stage as it was mentioned in the rejoinder filed by AJIPL to CIPL's reply to the counter-claims raised by AJIPL. He further contended that the Arbitral Tribunal had also rejected AJIPL's request for examining Mr D.K. Gupta, who had executed the said receipt and thus, denied AJIPL full opportunity to present its case.

28. Mr Kirpal further contended that the Balance Sheet of CIPL clearly acknowledged the receipt of payments, and thus, there was

overwhelming evidence to establish that CIPL has been paid the amounts as agreed in terms of the PDA. He submitted that the said evidence was also erroneously rejected by the Arbitral Tribunal.

29. Next, he submitted that the entire transaction was a commercial transaction and was required to be considered in that perspective. There was clear evidence that CIPL had entered into an MOU for development of the Project on the Subject Land; that the Infrastructure Company was a related party belonging to the same group as AJIPL; that the MOU had been signed on behalf of the respective parties by the same persons who had signed the PDA; payments had been made under the MOU which were in performance of similar obligations as undertaken by AJIPL in terms of Article 4 of the PDA; and, CIPL had not taken any immediate precipitate steps for non-payment of the money under the PDA as it already held funds *albeit* provided in terms of the MOU. Thus, the facts clearly evidenced that AJIPL had discharged its obligations under the PDA.

30. He contended that the Arbitral Tribunal had completely ignored the group of companies doctrine as accepted by the Supreme Court in ***Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc. and Ors.: (2013) 1 SCC 641*** and, had further overlooked the settled principles which warranted lifting of the corporate veil. He submitted that if the said principles were applied, it would be clear that the identity of AJIPL and the Infrastructure Company was the same; yet, the Arbitral Tribunal declined to examine this aspect.

31. Lastly, Mr Kirpal submitted that the Arbitral Tribunal had found that CIPL had failed to establish its claim for charges for unauthorised use and occupation of the Subject Land and yet, has awarded a sum of ₹20 lacs per month on account of alleged loss suffered by CIPL.

Reasons and Conclusion

32. As is apparent from the above, there are four principal questions that arise for consideration. First, whether the impugned award is vitiated by patent illegality on the face of the record as the Arbitral Tribunal has rejected the evidence produced by AJIPL (the receipt dated 09.10.2014) purportedly issued by CIPL acknowledging the receipt of ₹15 crores. Second, whether the impugned award is liable to be set aside as AJIPL was not given a full opportunity to present its case as required under Section 18 of the A&C Act. Third, whether the impugned award is opposed to the fundamental policy of Indian law and no reasonable person could possibly accept the Arbitral Tribunal's view. And fourth, whether the award in favour of CIPL for an amount of ₹20 lacs per month as a loss on account of unauthorised use and occupation of the Subject Land, is patently illegal and contrary to the public policy of India as CIPL had failed to substantiate the same.

33. The Arbitral Tribunal had evaluated the material and evidence produced by the parties. It found that the MOU was executed between the Infrastructure Company on one part and CIPL on the other part and did not include an arbitration clause. The Arbitral Tribunal held that without an arbitration agreement to refer the disputes in connection with

the MOU to arbitration, and in absence of the Infrastructure Company as a party to the arbitral proceedings, AJIPL's contention that the corporate veil of the Infrastructure Company and AJIPL should be lifted could not be accepted. The Arbitral Tribunal held that it was imperative that the Infrastructure Company be a party to the arbitral proceedings before any claim, involving the Infrastructure Company could be adjudicated. Considering that the Infrastructure Company was not a party to the arbitral proceedings and the MOU did not include an Arbitration Clause, the Arbitral Tribunal held that no issue arising out of the MOU could be adjudicated in the given proceedings.

34. More importantly, the Arbitral Tribunal found that even according to AJIPL's pleadings, the identity of the Infrastructure Company was not the same as AJIPL. The Infrastructure Company included a group of shareholders who were not shareholders in AJIPL. The relevant extract from the rejoinder filed by AJIPL to CIPL's reply to its counter-claim is set out below:

“ After cancellation of the Agreement dated 07.08.2013, since the group of Mr. Manoj Kumar did not wish to involve one of the group shareholders of Airwil JKM Infrastructure Pvt. Ltd. in the project as such the new Agreement was entered into with the respondent herein wherein only the two groups were shareholders, one group being the group of Sri Vinod Sachdeva.”

35. In view of the above, the Arbitral Tribunal reasoned that the aforesaid pleadings indicated that Mr Manoj Kumar and Mr Vinod

Sachdeva were dealing with the Subject Land in their personal capacity rather than as corporate entities and, this completely demolished AJIPL's case that the PDA was a sequel to the MOU. Clearly, if the shareholders /shareholding pattern of the Infrastructure Company and AJIPL were not common – as is apparent from AJIPL's pleadings – the decision of the Arbitral Tribunal to reject AJIPL's case for lifting the corporate veil, cannot be faulted.

36. Next, the Arbitral Tribunal found that the terms of the PDA were clear and did not make any reference to the MOU or acknowledge that the payments made under the MOU were required to be considered as payments under the PDA. It is AJIPL's case that the parties had agreed that CIPL *“shall start refunding the said Deposit to Airwil JKM Infrastructure Pvt. Ltd. (Infrastructure Company) and correspondingly the respondent (AJIPL) shall make payment of the respective amounts to the claimant (CIPL) under the new Property Development Agreement dated 06.09.2014 (PDA)”*. However, the PDA did not record any such understanding or agreement between the parties. The Arbitral Tribunal accepted that in terms of Sections 91 and 92 of the Indian Evidence Act, 1872, oral evidence cannot be led for the purposes of contradicting, varying, adding to, or subtracting from the terms of the written contract.

37. AJIPL's claim that the PDA was a sequel to the MOU, is contrary to its own pleadings. According to AJIPL, the MOU had been cancelled as CIPL had failed to acquire the plot no. 10. The same was acquired after cancellation of the MOU and the permission for amalgamation of the plots (bearing nos. 1, 2, 10, 11 and 12) was granted by the NOIDA

Authorities on 21.07.2014. Therefore, as far as the MOU is concerned, it was AJIPL's case that the same was terminated. However, Mr D.K. Gupta of CIPL had again approached Mr Vinod Kumar Sachdeva of AJIPL to take up development of the Subject Land and a fresh agreement (PDA) was entered into.

38. In view of the above, the decision of the Arbitral Tribunal to accept CIPL's claim that AJIPL had breached the terms of the PDA by not depositing the funds as agreed in terms of Clause 4 of the PDA, cannot be held to be perverse or patently illegal.

39. The contention that the impugned award is vitiated by patent illegality as the Arbitral Tribunal has disregarded vital evidence, of the receipt produced by AJIPL, is also unmerited. This is so for several reasons. First, that the Statement of Defence and the counter-claims filed by AJIPL did not mention the receipt. Second, the contents of the receipt runs contrary to AJIPL's pleadings in its Statement of Defence and counter-claims. It was not AJIPL's case that it had made the deposit under Article 4 of the PDA by making deposit of the requisite amount. It was its case that the amounts paid by the Infrastructure Company to CIPL under the MOU was required to be refunded by CIPL and the parties had agreed that on such refunds being made, AJIPL would make a corresponding deposit with CIPL. In view of these pleadings, a receipt purportedly acknowledging receipt of funds on account of AJIPL would run contrary to AJIPL's pleadings before the Arbitral Tribunal.

40. In the aforesaid respect, Mr Kirpal had referred to the averments made in the rejoinder filed by AJIPL to CIPL's reply to its counter-claims. Paragraph 4 of the rejoinder as referred to, is set out below:

“4. ...It is further reiterated that whenever the respondent through its directors insisted on expediting the refund etc. they were told by the directors of the claimant that the claimant is not insisting on the Deposit under the Property Development Agreement dated 06.09.2014 as they have already received the said Deposit under the earlier MOU dated 07.08.2013 and as such no prejudice is being caused to the respondent due to the delay in refund. In fact, one receipt was also executed by the claimant through its Director Shri. D.K. Gupta at the relevant time for the comfort of the respondent.”

41. It is apparent from the above that AJIPL did not mention any particulars of the receipt. More importantly, it did not set up a case that CIPL had received the deposit under the PDA. It reiterated its stand that CIPL was required to refund the deposit made by Infrastructure Company under the MOU and AJIPL was to make payments under the PDA. However, for the first time, in its rejoinder AJIPL mentioned that a receipt had been executed by it “for the comfort” of AJIPL. Thus, even according to AJIPL, the receipt was not issued as an acknowledgement of payment under the PDA but only ‘for comfort’ and, once the Infrastructure Company would receive the funds paid under the MOU, AJIPL would make payments under the PDA.

42. The Arbitral Tribunal found that the receipt was produced at a belated stage. It was not a part of the documents as disclosed. The only reference made to a receipt (without any particulars) was in the rejoinder to the reply to the counter claims and, CIPL had no occasion to controvert the same. The receipt was also disputed. In this context, the Arbitral Tribunal found that the receipt did not inspire any confidence. This Court finds no reason to interfere with the said finding. The scope of interference with the award on the ground of patent illegality is very limited. This Court cannot re-evaluate and reappraise the evidence as the first appellate court to supplant its opinion over that of the Arbitral Tribunal. The view expressed by the Arbitral Tribunal is, clearly, a plausible one and thus, the impugned award cannot be set aside in these proceedings on this ground.

43. Admittedly, the Balance Sheet of CIPL did not acknowledge any payment from AJIPL. According to AJIPL, CIPL's Balance Sheet reflected ₹ 12,50,00,000/- outstanding to the Infrastructure Company and receipt of various amounts aggregating to ₹2,50,00,000/- from other group companies of AJIPL. In view of the Arbitral Tribunal's decision to reject AJIPL's contention that the corporate veil of these companies should be lifted, these amounts could not be considered as paid by AJIPL under the PDA.

44. The contention that the Arbitral Tribunal had violated Section 18 of the A&C Act as it had denied AJIPL full opportunity to present its case, is equally unmerited. AJIPL had full opportunity to produce the documents at the relevant stage and also lead oral testimony. AJIPL

applied for summoning of Mr D.K. Gupta after it had examined three witnesses in defence, and that too for proving a receipt which was not disclosed at an earlier stage nor did it find any mention in its Statement of Defence.

45. Section 18 of the A&C Act cannot be construed to mean that a party would be entitled to summon witnesses at any stage of the proceedings. Clearly, denial of AJIPL's request does not amount to denying it an opportunity to present its case.

46. Written submission filed on behalf of AJIPL also includes submissions in regard to the counter claims set up by AJIPL. It is contended that CIPL had breached the covenants of the PDA and the same disentitles CIPL from seeking any relief. Mr Kripal had not made any oral submissions to the aforesaid effect. Notwithstanding the same, this Court has examined the same and finds no merit in the submission that the arbitral award is required to be interfered with on this ground. The Arbitral Tribunal had found that the alleged defaults (non-execution of GPA in favour of AJIPL and mortgage of the Subject Land) was not of much relevance. No prejudice had been caused to AJIPL on that count as the stage at which AJIPL could have possibly been impeded in securing sanction for developments of the plans had not reached. The Arbitral Tribunal held that AJIPL had defaulted in depositing the amount as required under Article 4 of the PDA (which was to be done within a period of forty-five days from signing of the PDA) and, the stage where a GPA was required to enable AJIPL to perform its other obligation, had not reached. The said view is a

plausible view. The same is, clearly, outside the limited scope of interference under Section 34(2) or Section 34(2)(A) of the A&C Act.

47. Mr Kirpal's contention that the entire matter is required to be looked at from a commercial perspective, is persuasive. The Balance sheet of CIPL reflected the amounts paid by the Infrastructure Company and certain other companies which AJIPL asserted were from the same group. CIPL had acknowledged receipt of a cheque of ₹ 1 crore in the PDA and the same cheque was also referred to in the MOU. But the PDA did not mention other payments. Perhaps, the Arbitral Tribunal could have taken a view different. Clearly, the defence raised by AJIPL was not insubstantial. However, as stated above, the scope of examination under Section 34 of the A&C Act does not extend to reappreciation or re-evaluation of the evidence to determine the correctness of an arbitral award. The decision of the Arbitral Tribunal, both on questions of law and on fact, is final. Although the award can be interfered with on the ground of patent illegality or as offending the Public Policy of India; but as explained by the Supreme Court, in ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.:*** ***2021 SCC OnLine SC 695***, the same does not entail re-evaluation and reappreciation of evidence. An award may be erroneous but that does not warrant any interference under Section 34 of the A&C Act. The award would be vitiated by patent illegality if it goes to the root of the matter and the Arbitral Tribunal's view is, *ex facie*, so perverse that no reasonable person could possibly take that view.

48. The last question to be examined is whether the decision of the Arbitral Tribunal to award loss quantified at ₹20 lacs per month in favour of CIPL is patently illegal. The Arbitral Tribunal had returned a clear finding that CIPL had not taken any care to substantiate its claim and yet the Arbitral Tribunal had awarded a sum of ₹20 lacs per month as damages for the loss suffered by it. Paragraph 21 of the impugned award reads as under:

“21. The Claimant has claimed charges for unauthorised use and occupation charges for the five plots at the rate of Rs. seventy-five lacs w.e.f. 18.07.2015, the date on which the claimant terminated PDA. But the claimant has not taken care to substantiate the claim. There cannot be any doubt about the two-fold position that the land is very valuable, has immense commercial potential, the claimant has surely been wronged, and has so far been deprived of the benefits (which would have accrued to the claimant) for reasons attributable to the respondent. Furthermore, had the claimant received possession of the land on 18.07.2015, it would have started developing the lands earlier. I am, therefore, left with the only option of resorting to the principle of Best Judgment Assessment, if I can use the expression and borrow the concept from taxation jurisprudence. I, therefore, assess the losses to the claimant at the rate of Rs. twenty lacs per month till the date possession of the lands is handed over to the claimant, and financial scores are settled.”

49. Clearly, the aforesaid decision is unsustainable. After having concluded that CIPL had failed to substantiate its claim, there was no occasion for the Arbitral Tribunal to *suo motu* assess a sum of ₹20 lacs per month as the quantum of loss suffered by CIPL on account of being

deprived of possession of the Subject Land. This Court had pointedly asked Mr Malhotra, learned counsel appearing for CIPL, whether there was any material on record which could support the quantification of loss of ₹20 lacs per month. He had fairly stated in the negative.

50. The Arbitral Tribunal had observed that it was assessing the loss by borrowing from the concept of Best Judgment Assessment. Clearly, the concept of Best Judgment Assessment has no relevance of assessing a claim for damages. Under the provisions for Best Judgment Assessment under the Income Tax Act, 1961, an Assessing Officer is required to assess the income chargeable to tax on the material as available before him. As the taxman, he has a duty to assess and recover the tax for the State. There is no duty for an Arbitral Tribunal to embark on an exercise of determining the loss especially when the party has failed to prove the same. It is relevant to refer to Section 28(2) of the A&C Act which expressly provides that the Arbitral Tribunal shall decide “*ex aequo et bono* or as *amiable compositeur*” only if the parties have expressly authorized it to do so and not otherwise. The phrase “*ex aequo et bono*” means according to equity and conscience. It empowers the arbitrator to dispense with consideration of the law and to take decisions on notions of fairness and equity. The term ‘*amiable compositeur*’ is a French term and means an unbiased third party who is not bound to apply strict rules of law and who may decide a dispute according to justice and fairness.

51. In the present case, the Arbitral Tribunal was required to decide CIPL’s claim on the principles of law and not as an ‘*amiable*

compositeur'. Admittedly, CIPL could have established the loss incurred by it by placing material and evidence on record. It is not CIPL's case that such a loss could not be established. In these circumstances, the finding of the Arbitral Tribunal that CIPL had not taken care to substantiate its claim would be fatal to CIPL's claim for compensatory damages for the loss incurred by it.

52. In *Union of India v. Zeman Technogroup: OMP (COMM) 28/2015, decided on 02.03.2017*, a Co-ordinate Bench of this Court has held as under:

“24. It requires to be noticed that there is a very categorical finding in the majority Award about the failure of the Respondent to lead evidence to prove its loss. The extracted paragraphs of the majority Award unambiguously conclude that “the Claimant has made no averments nor led any evidence to prove that the boots produced by them were incapable of being sold to a third party. They also did not place any material on record to show that the boots got wasted lying in the warehouse.

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27. In light of the above findings of the majority, and its conclusion that “the Claimant has not been able to set out its case insofar as the actual loss suffered by the Claimant is concerned” it is inexplicable how it proceeded to allow 25% of the total amount of \$7,494,480 as claimed by the Respondent. This part of the Award suffers from a patent illegality and is opposed to the fundamental policy of Indian law inasmuch as it is based on no evidence and is not supported by reasons. It is contrary to the statutory requirement under Section 31(3) of the Act which mandates that the conclusions of the AT have to be

supported by reasons. In the present case, the reasons given by the majority of the AT far from supporting the above conclusion, contradict it. Consequently, the Court has no hesitation in setting aside the impugned majority Award to the extent that it awards to the Respondent 25% of the total amount of \$7,494,480.”

53. In view of the above, the impugned award is set aside to the limited extent that it directs payment of a sum of ₹20 lacs per month from 18.07.2015, in favour of CIPL and against AJIPL for the unauthorized use and occupation of the Subject Land.

54. The petition is disposed of, in the aforesaid terms.

NOVEMBER 29, 2021
pkv/RK

VIBHU BAKHRU, J

नित्यमेव जयते