

Pallavi

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL APPELLATE DIVISION
COMMERCIAL APPEAL NO. 581 OF 2019
IN
COMM ARBITRATION PETITION NO.570 OF 2017
WITH
NOTICE OF MOTION NO.999 OF 2019
IN
COMMERCIAL APPEAL NO. 581 OF 2019**

Garuda Aviation Services Pvt Ltd	... Appellant
<i>Versus</i>	
Airport Director of Pune Airport	...Respondent

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Mr Amir Arsiwala, with Farzeen Pardiwalla and Nupur Shah, for the Appellant.
Mr Mayur Khandeparkar, with Lopa Munim i/b Rajesh Kothari & Co for the Respondent.

**CORAM G.S. Patel &
 Madhav J. Jamdar, JJ.
DATED: 8th July 2022**

PC:-

1. The Appeal is under Section 37 of the Arbitration and Conciliation Act 1996 (“**the Arbitration Act**”). It assails an order

dated 16th April 2019 made by GS Kulkarni J on a Section 34 Petition challenging an Award dated 20th November 2017 by a learned sole Arbitrator, a Senior Counsel of this Court.

2. The facts are not in dispute. Indeed, before us the Appeal has been argued with admirable restraint and compactness by Mr Arsiwala having regard to the state of the law. The Airport Authority of India (“AAI”), the Respondent to the Appeal, invited tenders for granting a license for car parking contract at Pune Airport. The license was to be for five years and the car parking area was to cover about 11000 sq mtrs in the proximity of the Pune Airport Terminal Building at Lohegaon. The contract provided for a lump sum license fee per month irrespective of the profit or loss of the contractor with a 10% annual escalation each year. The Petitioner, Garuda Aviation Services Pvt Ltd (“**Garuda Aviation**”), was the successful bidder and there came to be executed a five year License Agreement dated 3rd March 2010. This was to run from 13th February 2010 until 12th February 2015 unless earlier terminated. Clause 15 of the License Agreement (at page 106 of the Appeal paper book) allowed AAI to change the location of the premises at any time and to direct the licensee to move to an alternate location. The costs were to be borne by the licensee, the clause forbade any compensation claim. It read:

15. That the authority reserves to itself the right to change the location of the Premises at any time and may at its discretion call upon the Licensee to vacate the site and may give him an alternative premises for the purposes of this license. In such a case, the licensee shall be bound to vacate the premises immediately and accept the said alternate premises. The entire expenditure on such shifting

shall be borne by him **and the licensee shall not be entitled to claim any compensation or revised [sic] in the license fee on that score.**

(Emphasis added)

3. The License Agreement also had a schedule of the premises. General terms and conditions of contract, including an Arbitration Clause were also part of the Agreement.

4. It seems that some time in July 2011, apparently from an advisory from the security committee, AAI decided to shift the premium car parking from the front of the terminal building to parking area III across the approach road. This was to be done from 17th July 2011 onwards. There was a high alert/security situation. AAI asked Garuda Aviation to cooperate, and to close the premium car parking immediately for this period. Garuda Aviation responded by saying that in view of the closure it should be granted a rebate in the license fee so long as the premium car parking remained closed. AAI did not agree.

5. Garuda Aviation complained that an alternative location had not been allotted. It once again sought a rebate in the license fee, this time of 50%. Correspondence went on in this regard until March 2012. There was further correspondence thereafter until March 2014, when AAI, by its letter of 27th March 2014 told Garuda Aviation that if Garuda Aviation wanted to foreclose the car parking contract, it could do so.

6. The fact that the car parking location was shifted is undisputed.

7. Garuda Aviation invoked arbitration. AAI did not appoint an arbitrator. Garuda Aviation came to this Court in an application under Section 11 (6) of the Arbitration Act. By an order of 10th December 2014, this Court appointed a Senior Counsel as the sole Arbitrator.

8. Very many things were argued in Arbitration. A few of them were re-agitated in the Section 34 Petition. Before us, there is a smaller subset of arguments was based on paragraph 17 of the Award at pages 311 to 312. It would probably be best to reproduce the paragraph. The Claimant in arbitration was Garuda Aviation. AAI was the Respondent.

17. The next question that arises is whether after the shifting of the Premises, the Claimant was compensated with the same amount of the area as was originally allotted to it under the terms of the License, viz., 11,000 sq. metres. It is the Respondents' case that in view of the fact that the Claimant was disputing that the area to which they had been shifted was equal to the area originally allotted to them, the Airport Director constituted a committee of four officers of the Respondent to undertake a measurement of the area to which the Claimant was shifted. All these four officers have signed the measurement sheet which was produced before me. From their designations all these four persons appear to be fairly senior. They were the Manager Engineering, the Manager Finance, AGM-TM and the Manager, Commercial. It is the Respondents' case that an officer of the Claimant was present when this measurement

was taken and that the Claimants were informed by a letter dated 17th–21st November 2011 of the fact that the area to which the Claimant had been shifted was equal to the area originally allotted to the Claimant. This letter, according to the Respondents, has never been disputed by the Claimant. In the circumstances, I have no reason to disbelieve the veracity of the measurement sheet, and on the basis of the measurement sheet to come to the conclusion that on the Premises being shifted, the Claimant was adequately compensated with an equivalent area.

9. The submission before us is that the measurement sheet in question “was not proved” or, at any rate, cannot be said to have been proved as required by law.

10. In the state of the law as it currently stands this submission puts the Appellant out of Court immediately. Not only is the *Ssangyong Engineering & Construction Co Ltd v National Highways Authority of India*¹ line of authority abundantly clear that there can be no re-appreciation of evidence in Section 34 and that the Arbitrator is the sole and best judge of evidence as also the master of the evidentiary records, but subsequent decisions also clarify that a re-appreciation of evidence is not an aspect or facet of “patent illegality”. Paragraph 29 of the Supreme Court decision in *Delhi Airport Metro Express Pvt Ltd v Delhi Metro Rail Corporation Ltd*² says:

29. Patent illegality should be illegality which goes to the root of the matter. **In other words, every error of law committed by the Arbitral Tribunal would not fall**

1(2019) 15 SCC 131.

2(2022) 1 SCC 131.

within the expression “patent illegality”. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression “patent illegality”.

(Emphasis added)

11. That is not the only difficulty in Mr Arsiwala’s way. The statute itself says in Section 19(1) that an arbitral tribunal is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. Section 19 says:

19. Determination of rules of procedure.—(1) The arbitral tribunal shall not be bound by the Code of Civil

Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) **Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.**

(4) **The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.**

(Emphasis added)

12. Even if we read this Section to mean that some *basic* rules of evidence and procedure are to be applied (and not that fundamental rules of fairness can be thrown to the winds), the statutory mandate is clear to leave it to arbitral discretion to decide, absent a consensus by the parties, how and in what manner a document should be held to be proved and what procedure should be followed.

13. In paragraph 17, the learned Sole Arbitrator did not merely accept the document in question, the measurement sheet, for the asking. He looked at three contemporaneous facets: *first*, that it was signed by fairly senior officers of AAI, which undoubtedly gave it a certain gravitas. *Second*, that Garuda Aviation was represented when the measurement was taken. And, *third*, that the measurement sheet was formally sent on by AAI to Garuda Aviation as an enclosure to AAI's letter of 17th–21st November 2011, which Garuda Aviation

never disputed. Surely this was enough to establish the correctness of the document. Indeed, we believe that even in a civil court it would have been well-nigh impossible for Garuda Aviation to dispute the correctness of the measurement sheet with a bland denial.

14. Above all this, there is, of course, the limited scope for interference to which we have alluded earlier.

15. As to the scope of Section 37 Appeal, we may profitably refer to the decision of a three-judge Bench of the Supreme Court in *UHL Power Company Limited v State of Himachal Pradesh*.³ In paragraphs 16 and 17, the Supreme Court said:

16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In *MMTC Ltd v Vedanta Ltd* [(2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293], the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of

³(2022) 4 SCC 116.

India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223 (CA)] reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.”

17. A similar view, as stated above, has been taken by this Court in *K Sugumar v Hindustan Petroleum Corpn Ltd* [(2020) 12 SCC 539] , wherein it has been observed as follows: (SCC p. 540, para 2)

“2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. **Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to**

the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.”

(Emphasis added)

16. In *UHL Power*, the Supreme Court also reaffirmed the well established principle that where there are two plausible interpretations of the contract or two possible views on merits, and the arbitrator has taken one, a Section 34 Court will not interfere.

17. In the impugned order, we must make special note of the findings returned by the learned Single Judge in paragraphs 18, 22 and 23. Kulkarni J was asked to consider whether in light of the terms of the contract, Garuda Aviation could even claim compensation. The claim for ‘rebate’ was transformed in the statement of claim to a *claim for loss suffered and for compensation for loss of business*. In opposition, AAI relied on Clause 15. In paragraph 22, Kulkarni J found that Clause 15 did not entitle Garuda Aviation to make *any* claim for compensation. In correspondence, Garuda Aviation it had claimed a rebate, but in arbitration it elevated this to a claim for damages for loss of business. More importantly, in paragraph 23, Kulkarni J found that Garuda Aviation had not adduced, an “iota of material/evidence on the basis of which a claim for quantum of damages as made could be granted” in keeping with the provisions of Section 73 of the Contract Act 1872.

18. Even before us it is not shown how this finding of the learned Single Judge is possibly incorrect.

19. We see no infirmity in the impugned order. There is no merit to the Appeal. It is dismissed.

20. Notice of Motion in the Appeal is infructuous and is disposed of as such.

21. There will be no order as to costs.

(Madhav J. Jamdar, J)

(G. S. Patel, J)