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

RESERVED ON – 28th March, 2022
DATE OF DECISION ON -7th April, 2022

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+ **FAO (OS) (COMM) 75/2022**

DELHI DEVELOPMENT AUTHORITY Appellant
Through: Mr. Ramesh Singh, Sr. Advocate with
Mr. Vaibhav Agnihotri, Advocate.
versus

M/S EROS RESORTS AND HOTELS LTD Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J :

C.M.No. 14983/2022

Exemption allowed, subject to all just exceptions.

Accordingly, the application stands disposed of.

FAO (OS) (COMM) 75/2022

1. The present appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 read with Section 37 (1) (c) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'Act') has arisen out of the impugned order dated 22nd March 2021 in OMP (COMM) No. 455 of 2019



passed by learned Single Bench under Section 34 of the said Act. In the impugned order, the learned Single Judge has upheld the award of the Arbitral Tribunal pertaining to claim no. 1, however, the Tribunal set aside the award pertaining to claim No.2. It is pertinent to mention that the Arbitral Tribunal had rejected claim nos. 3 and 4 made by the respondents and rejected all the counterclaims raised by the appellant.

2. Short of the details, the facts in brief are that pursuant to a public notice issued by the appellant for auction of plots for the construction of hotels in Delhi, respondent submitted its bid and was awarded contract for the Hotel Plot nos. 13 A and 13 B located at District Centre, Mayur Vihar, Centre, New Delhi. The possession of the plots was handed over to the respondent on 5th December 2006 with the stipulation that work was to be completed on 5th June, 2010. However, the work actually completed on 20th December, 2010. The work related to the project was pertaining to Commonwealth Games and was considered to be a project of national significance. The parties agreed to the general terms and conditions of the auction which were part of the auction notice. Clause – 3.14 of the general terms and conditions which is germane to the present controversy reads as under;

“Clause 3.14 Performance Security

The construction of the hotel will have to be completed and made functional within a period of 42 months from the date of possession site/land. The intending auction purchaser shall be required to deposit the performance security to the tune of 5% of the bid amount before the time of execution of the conveyance deed, which shall be in nature of bank guarantee in an approved form valid for 4 years. The institution furnishing such security shall be subject to the approval of the same by the Authority. The penalty for delay in the completion of the hotel beyond 42 months shall be levied as under:



<i>SI. No.</i>	<i>Delay Period beyond 42 months</i>	<i>Penalty Amount</i>
<i>1</i>	<i>Above 1 day and upto 30 days</i>	<i>1% of the Bid amount</i>
<i>2</i>	<i>Above 31 days and upto 90 days</i>	<i>2% of the Bid amount</i>
<i>3</i>	<i>Above 91 day s and upto 180 days</i>	<i>4% of the Bid amount</i>
<i>4</i>	<i>Above 181 days and upto 365 days</i>	<i>5% of the Bid amount</i>

Bank guarantee amount, to the extent there is a delay in completion of hotel, will be encashed as per the schedule mentioned above. The date of completion will be treated as the date on which the necessary completion certificate is obtained by the intending auction purchaser.”

3. In accordance with the terms of the clause – 3.14 of general terms and conditions of the auction, respondent furnished the performance bank guarantee which was duly accepted by the appellant. Subsequent to the issuance of the No Objection Certificate by the DDA (Appellant) on 9th November, 2006, the respondent submitted building plans to DDA for approval on 4th December, 2006. The possession was handed over by the appellant to the respondent on 5th December, 2006 and as per the terms and conditions respondent was required to complete and make the hotel functional by 5th June, 2010 i.e. within 42 months of the delivery of possession of plots. Though, the appellant granted permission for escalation work in respect of plot nos. 13 A and 13 B to the respondent vide communication dated 22nd December, 2006, but imposed a condition that no



structure/construction including erecting pillars, flooring etc. would be raised till the building plans are sanctioned by the concerned agency.

4. Perusal of the record indicates that the respondent submitted five set of drawings of its hotel project of Mayur Vihar vide communication dated 20th March, 2007 with a request that the drawings be forwarded to the Delhi Urban Art Commission (DUAC) and the Fire Department for grant of No Objection Certificates for the sanction of the project. DUAC and the Delhi Fire Services (DFS) granted approval to the drawing by letters dated 18th May, 2007 and 4th June, 2007 respectively with certain observations.

5. The appellant carried out certain corrections in the drawings and approved the plans on 11th September, 2017. The respondent vide communication dated 20th September, 2017 informed the appellant that the changes made by them were not acceptable. DDA in its first technical committee meeting (16.01.2008) approved the changes sought by Respondent vide Minutes of Meeting dated 31st January, 2008.

6. The respondent submitted the revised building plans on 19th March, 2008. The appellant/DDA forwarded the set of building plans to DUAC and Chief Fire Officer (CFO) for approval as informed to the respondent by communication dated 5th May, 2008. The appellant also communicated to the respondent regarding grant of provisional permission *“for taking up construction of the hotel building up to plinth level pending the statutory licenses of the building plans by the DUAC, CFO and MOEF”* subject to certain conditions. However, thereafter, till the mid of September, 2008, communications were exchanged between the DUAC, DFS, appellant and the respondent. On 16th September, 2008, DUAC communicated its



approval of the plan to the appellant in respect of Plot no. 13 A and approval was granted in respect of Plot No. 13B on 19th September, 2008.

7. Pursuant to this, DDA asked the respondent to submit the correct building plans incorporating suggestions of DUAC/Chief Fire Officer (CFO) within 15 days. The respondent, it seems on the same day, submitted the corrected revised building plans incorporating corrections/suggestions made by CFO and DUAC with a request to expedite the sanction of revised building plans. Finally, the appellant vide communication dated 15th December, 2008 granted the sanction to *“erect/re-erect/add to/alteration in the building to carry out the development specified in the said application”* in respect of Plot Nos. 13A and 13B. It was informed that the building plans have been approved with certain conditions stipulated in the said letters.

8. The appellant vide communication dated 4th September, 2009 informed regarding invocation of clause 3.14 and stated that the performance security to the extent of 5% of the bid amount, shall be encashed as per the schedule mentioned therein and the said period would expire on 5th June, 2010. The respondent was asked to submit a copy of the completion certificate and proof of making the hotel functional prior to 5th June, 2010. The respondent vide communication dated 14th October, 2009, explained the reasons for the delay in completion of the project and requested to withdraw its communication dated 4th September, 2009. However, DDA again vide the letter dated 23rd December, 2009, reiterated that in case of failure to complete the hotel within the stipulated period, its Performance Security in respect of hotel Plot Nos. 13A and 13 B will be forfeited as per the terms and conditions. Finally, the appellant on 20th



October, 2010 informed that since the period of 42 months for construction of the hotel and making it functional have expired on 5th June, 2010, the Performance Security would be forfeited without any further notice. The respondent thereafter, approached the High Court by filing OMP No. 637/2010 and OMP No. 638/2010 under Section 9 of the Act. The Court vide order dated 27th October, 2010 restrained the appellant from encashing the performance security furnished by the PNB for bank guarantee. The respondent also filed a petition (AA No. 326/2011 and AA No. 327/2011 under Section 11 (6) of the Act. The Court vide order dated 8th November, 2011 and 30th November, 2011 appointed Justice (Retd.) Anil Dev Singh, former Chief Justice of Rajasthan High Court as the Sole Arbitrator. In respect to Plot Nos. 13A and 13B, the claims made by the respondent in the statement of Claims are as follows:

<i>Claim No.1</i>	<i>Release the performance bank Guarantee of Rs 5.90 crores to the respondent.</i>
<i>Claim No.2</i>	<i>Rs 15,16,464.00 towards the expenses incurred for renewing the bank Guarantee.</i>
<i>Claim No.3</i>	<i>Interest @ 24% P.a. on the amount spent on renewing the bank Guarantee and on the amount kept as margin money with the bank for keeping the bank Guarantee alive.</i>
<i>Claim No.4</i>	<i>Rs 37 lakhs on account of cost of arbitration.</i>



The appellant also made the following counterclaims;

<i>Counter Claim No.1</i>	<i>The Respondent is liable to pay the amount of the said performance bank Guarantee i.e. Rs 5.90 crores for the various acts, omissions, breaches and defaults of respondents particularly its failure to perform the obligations under the contract.</i>
<i>Counter Claim No.2</i>	<i>The Respondent is liable to pay interest on the amount of performance bank Guarantee of Rs 5.90 crores @ 18 % P.a. in the amount of Rs 1,48,68,000 from 06.06.2010 till 31.04.2012 and further till the proceeds of bank Guarantee.</i>
<i>Counter Claim No.3</i>	<i>Pendente Lite and future interest at 18 P.a on the counter claims amount.</i>
<i>Counter Claim No.4</i>	<i>Cost of various litigations quantified at Rs 2,00,000 as well as the actual cost of the arbitral proceedings including specifically the fee of the arbitrator.</i>

9. Learned arbitrator vide award dated 02.06.2019 allowed claim no. 1 and partially allowed claim no. 2 of the respondent and rejected claim Nos. 3 and 4 of the respondents and all the counter claims raised by the appellant. The Tribunal directed the release of the performance bank guarantee of 5.90 crores in favour of the respondent and allowed a sum of Rs. 12 lakhs against claim No. 2 and also allowed the interest @12% per annum on the amount



awarded in its favour from the date of award till its realization. The appellant filed the FAO (OS) (COMM.) No. 75.of 2022. The learned Single Judge meticulously examined the arbitral award and also reflected on the submissions of the parties and *inter alia* held as under;

“69. This Court finds no ground to interfere with the aforesaid decision. It is well settled that the scope of interference under Section 34 of the A&C Act is limited. This Court does not act as the first appellate Court and cannot re-evaluate the evidence and supplant its opinion over that of the Arbitral Tribunal. The said principle has been clearly explained in the following oft-quoted passage from the decision of the Supreme Court in Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49, in the following words:

“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.”

10. Learned Single Judge considered the contentions of the appellant that since the Arbitral Tribunal has not held DDA responsible for the entire delay therefore the damages were required to be apportioned, but rejected the same.



11. However, the learned Single Judge, found that Arbitral Tribunal was silent as to the reasons that had persuaded it to quantify the claims of Rs. 12 lakhs and thus, set aside the impugned award to a limited extent i.e. awarded 12 lakhs against claim no. 2 in each of the cases.

12. The appellant aggrieved by the order of the learned Single Judge has invoked the jurisdiction of this Court and has challenged the impugned judgment primarily on the ground that the Arbitral Tribunal and learned Single Judge, has not correctly appreciated the import of clause 3.14 of the terms and conditions. Allegedly, the Arbitral Tribunal and the learned Single Judge did not consider that even a small period of delay would entitle the appellant to claim the proportionate amount and invoke the bank guarantee to the appellant.

13. The appellant stated that re-writing the terms between the parties, substituting his own views in place of the agreed case of the parties and ignoring the mandate of clause 3.14 amounts to the learned Arbitrator imposing a new agreement to the respondent which was never agreed by the parties which is impermissible and against the fundamental policy of India. It was stated that learned Arbitrator had failed to exercise its jurisdiction with respect to dispute referred including the counter claim of the appellant. The award passed by the Arbitral Tribunal was stated to be self contradictory as learned Arbitrator has *inter alia* held that the respondent was “largely and substantially” responsible for the delay.

14. The appellant also challenged the award on the ground that the same has been passed without examining the evidence and material documents on record. The appellant stated that both the parties had agreed for payment of amounts as stipulated in clause 3.14 in the event of a delay. The graded



amount indicated in clause 3.14 is in fact genuine pre-estimate of losses, which otherwise were not quantifiable. It was stated that this clause had in fact, provided the mechanism for calculating the amount of liquidated damages. The appellant stated that since it was a project of national importance and made for public utility and therefore mere delay in completion of the project was a loss and inconvenience to the general public and defeated the very purpose of auctioning plots, for the construction of hotel /service apartments.

15. The appellant stated that it had not caused any delay and, therefore, it was justified in invoking the bank guarantee. In short, the appellant in the appeal has assailed the interpretation of clause – 3.14 of the terms and conditions by the learned Arbitrator and the learned Single Judge and challenged the award and final order of the learned Single judge on the ground that clause 3.14 was in the form of assessing the liquidated damages.

16. Sh. Ramesh Singh, learned Senior Advocate appearing on behalf of the appellant, argued emphatically that the order of the learned Single Judge is not sustainable in the eyes of law as it has failed to correctly interpret clause 3.14 of the general terms and conditions entered into between the parties. The learned Senior Advocate submitted that clause 3.14 was agreed upon between the parties and therefore the learned Arbitrator and learned Single Judge were not correct in re-writing the same. It was argued that it was a public utility project being part of the Common Wealth games and the essence of the contract was timely completion. Therefore, it was specifically stipulated that the project must be completed in the 42 months. Learned Senior Advocate invited our attention to clause 3.14 to emphasize that it was a graded imposition and has to be read as a liquidated damage clause.



Learned Senior Advocate submitted that in such like cases, it is not necessary for the party to prove the actual loss of damage. The non-completion of the project in time certainly results in loss and therefore it has to be assumed. Learned Senior Advocate submitted that in such like cases, the party in breach has to prove that no loss is caused. Learned Senior Advocate submitted that in the pleadings before the learned Arbitrator a specific case was made out for the cause of damages. Learned Senior Counsel has relied upon the judgment of Supreme Court titled as ***Construction & Design Services v. Delhi Development Authority*** (2015) 14 Supreme Court Cases 263 decided on 4th February, 2015 and referred to the findings as follows;

3. *The respondent – Delhi Development Authority awarded a contract vide agreement dated 4th October, 1995 to the appellant for constructing a sewerage pumping station at CGHS area at Kondli Gharoli at Delhi. Clause 2 in the agreement provided as follows:*

“ the contractor shall comply with the said time schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer Delhi Development Authority (whose decision shall be final) may decide on the said estimated cost of the whole work for everyday that the due quantity of work remains incomplete; provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten percent of the estimated cost of work as shown in the tender. ”

14. *There is no dispute that the appellant failed to execute the work of construction of sewerage pumping station within the stipulated or extended time. The said pumping station certainly was of public utility to maintain and preserve clean environment, absence of which could result in environmental degradation by stagnation of water in low lying areas. Delay also resulted in loss of interest on blocked capital as*



rightly observed in para 7 of the impugned judgment of the High Court. In these circumstances, loss could be assumed, even without proof and burden was on the appellant who committed breach to show that no loss was caused by delay or that the amount stipulated as damages for breach of contract was in the nature of penalty. Even if technically the time was not of essence, it could not be presumed that delay was of no consequence. 15. Thus, even if there is no specific evidence of loss suffered by the respondent-plaintiff, the observations in the order of the Division Bench that the project being a public utility project, the delay itself can be taken to have resulted in loss in the form of environmental degradation and loss of interest on the capital are not without any basis.

15. Once it is held that even in absence of specific evidence, the respondent could be held to have suffered loss on account of breach of contract, and it is entitled to compensation to the extent of loss suffered, it is for the appellant to show that stipulated damages are by way of penalty. In a given case, when highest limit is stipulated instead of a fixed sum, in absence of evidence of loss, part of it can be held to be reasonable compensation and the remaining by way of penalty. The party complaining of breach can certainly be allowed reasonable compensation out of the said amount if not the entire amount. If the entire amount stipulated is genuine pre-estimate of loss, the actual loss need not be proved. Burden to prove that no loss was likely to be suffered is on party committing breach, as already observed.

17. Applying the above principle to the present case, it could certainly be presumed that delay in executing the work resulted in loss for which the respondent was entitled to reasonable compensation. Evidence of precise amount of loss may not be possible but in absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the Court has to proceed on guess work as to the quantum of compensation to be allowed in the given circumstances. Since the respondent also could have led evidence to show the extent of higher amount paid for the work got done or produce any other specific material but it did not do so, we are of the view that it will be fair to award half of the amount claimed as reasonable compensation.”



17. The Senior Advocate further in his arguments invited our attention to Section 74 of the Indian Contract Act, 1872 and submitted that in fact, a bare perusal of Section 74 of the Indian Contract Act, 1872 provides that it has three parts which include liquidated damages, compensation and penalty. Learned counsel submitted that it was a fit case, where on account of non-completion of the project within the stipulated period, the appellant/DDA was justified in the invocation of the bank guarantee. The learned counsel further submitted that the learned Arbitrator reached a wrong conclusion which was unfortunately upheld by the learned Single Judge.

18. Learned Senior Advocate further invited our attention to the arbitral award wherein the learned Arbitrator *inter alia* held that since the respondent was given temporary permission by the appellant to open the hotel before the commencement of the Common Wealth Games there is no question of, the appellant or public at a large suffering loss or any legal injury by the consequences of delay in acquiring completion certificate of the hotel from the appellant in terms of the contract. Learned senior advocate submitted that temporary permission was given only to mitigate the loss and not to extinguish the same. Learned counsel submitted that since admittedly the hotel was not wholly functional it certainly caused loss and legal injury to the appellant and the public at large. The attention was also invited to the arbitral award where learned Arbitral Tribunal while making cause of delay noted that after the submission of the revised plans both the parties were equally responsible for the time consumed until the final selection of the plans. It was submitted that in view of these findings



even the learned Arbitrator *inter alia* held that the appellant alone was not responsible for the delay and therefore, on the face, he passed the award illegally. The learned Senior Advocate submitted that the Arbitrator and the learned Single Judge have gone contrary to the law award.

19. We have considered the submissions of the learned senior counsel and perused the record carefully.

20. The endeavor of the legislation is to make arbitration more responsive to the contemporary requirement as an alternative dispute redressal mechanism. One of the objectives is to minimize the supervisory role of the Courts. It has repeatedly been held by the Constitutional Courts that a court while dealing with objections under Section 34 of the Arbitration and Conciliation Act (hereinafter referred to as 'the Act') does not sit in appeal over the arbitral award. The courts can exercise their jurisdiction to interfere and can travel on the well-settled limited grounds. An award can be set aside only if it is contrary to substantive provisions of the law or the provisions of the Act or against the terms of the contract. Interference can be made only if the award suffers from patent illegality. (***M.V.Elisabeth vs. Harwan Investment and Trading Private Limited*** (1993) Suppl (2) SCC 433.

21. In ***Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Limited*** 2003 SCC online SC 545, it was *inter alia* held that the award would 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. It was further *inter alia* held that illegality must go to the root of the matter. If the illegality is of trivial nature it cannot be held that award is against the public policy. The Apex Court said that Award could also be set aside if it



is so unfair and unreasonable that it shocks the conscience of the Court and the award is opposed to public policy and is required to be adjudged void. It is also a settled proposition that interference under Section 37 of the Act by the appellate court also cannot travel beyond the restrictions laid down under Section 34 of the Act. [**MMTC Limited vs. Vedanta Limited** (2019) 4 SCC 163] The scope of jurisdiction under Section 37 of the Act also came up for consideration before the Supreme Court in **UHL Power Company Ltd. vs. State of Himachal Pradesh 2022** SCC OnLine SC 19 wherein it was inter alia held as under:

“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 Limited v. Vedanta Limited, the reasons for vesting such a limited jurisdiction on the High Court in the exercise of powers under Section 34 of the Arbitration Act has been explained in the following words:

“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 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 v. Wednesbury Corpn., [1948] 1 K.B. 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 Corporation Ltd. , where it has been observed as follows:

“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.”

18. It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned Arbitrator proceeds to accept one interpretation as against the other. In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. , the limitations on the Court while exercising powers under Section 34 of the Arbitration Act has been highlighted thus:

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards



should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.”

19. In Parsa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited , adverting to the previous decisions of this Court in McDermott International Inc. v. Burn Standard Co. Ltd. and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran , wherein it has been observed that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside on this ground, it has been held thus:

“9.1It is further observed and held that construction of the terms of a contract is primarily for an Arbitrator to decide unless the Arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. It is further observed by this Court in the aforesaid decision in paragraph 33 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. It is further observed that 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.

9.2 Similar is the view taken by this Court in NHAI v. ITD Cementation (India) Ltd., (2015) 14 SCC 21, para 25 and SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63, para 29.”

[emphasis supplied]

20. In Dyna Technologies (P) Ltd. (supra), the view taken above has been reiterated in the following words:

“25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

21. An identical line of reasoning has been adopted in South East Asia Marine Engg. & Constructions Ltd. [SEAMAC Limited] v. Oil India Ltd. and it has been held as follows:

“12. It is a settled position that a court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the courts. Recently, this Court in Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656] laid down the scope of such interference. This Court observed as follows : (SCC pp. 11-12, para 24)



“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.”

“13. It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning. This Court in Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656] observed as under : (SCC p.12, para 25) 25. Moreover, umpteen number of judgments of this Court have categorically held that the Court should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

[emphasis supplied]



22. It was also inter alia held in ***UHL Power Company Ltd.***'s case (supra) that if the view taken by the arbitrator regarding the interpretation of the relevant clauses is both possible and plausible then merely because another view could have been taken, can hardly be a ground to interfere with the Arbitral award. Thus, a bare perusal of the settled legal proposition, it is crystal clear that the scope of the jurisdiction under Section 37 of the Act of this Court is very limited. Thus, we have to see whether, within this limited jurisdiction, the case of the appellant is sufficient to exercise that jurisdiction.

23. The sum and substance of the contentions taken by the learned Senior counsel for the appellant is that it was a project of public importance being part of the Common Wealth Games, the respondents were bound to complete the hotel within the period of 42 months. The respondents agreed to clause 3.14 of the general terms and conditions. This clause provided graded damages. The simple interpretation of this clause makes it clear that the appellant was justified in the invocation of the bank guarantee. However, before proceeding further it is also necessary to look at Section 74 of Indian Contract Act, 1872 which reads as under:

“74 Compensation for breach of contract where penalty stipulated for:- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.— A stipulation for increased interest from the date of



default may be a stipulation by way of penalty.

Exception- When any person enters into any bail bond recognizance or other instruments of the same nature or under the provisions of any law, or under the order of the Central Government or of any State Government gives any bond for the performance of any public duty or act in which the public are interested he shall be liable upon breach of the condition of any such instrument to pay the whole sum mentioned therein.

Explanation- A person who enters into a contract with the government necessarily thereby undertakes any public duty, or promise to do an act in which the public are interested."

24. The contentions of learned Senior Counsel for the appellant was that the learned Arbitrator and learned Single Judge have not been correct in appreciating the true import of Section 74 of the Indian Contract Act, 1872. The appellant has also assailed the award on the ground that the learned arbitrator has wrongly relied upon ***Kailash Nath Associates vs. DDA*** (2015) OnLine SC 19. We have gone through the ***Kailash Nath Associates's*** case (supra) wherein it was *inter alia* held as under :

"33. Section 74 occurs in Chapter 6 of the Contract Act, 1872 which reads "Of the consequences of breach of contract". It is in fact sandwiched between Sections 73 and 75 which deal with compensation for loss or damage caused by breach of contract and compensation for damage which a party may sustain through non-fulfilment of a contract after such party rightfully rescinds such contract. It is important to note that like Sections 73 and 75, compensation is payable for breach of contract under Section 74 only where damage or loss is caused by such breach.



In *Kailash Nath Associates's* case (supra), the Supreme Court has further held as under;

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-

43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3 .Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4. The Section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6 The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named



in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7 Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

25. The main contention between the parties is regarding the interpretation of clause 3.14 of the General Terms and Conditions. The claim of the appellant is that it is entitled to encash the bank guarantee as the delay in completion of the project was in excess of 365 days, whereas the case of the respondent is that the delay in completion of the project is attributable to DDA/Appellant. The Arbitral Tribunal had found that DDA/Appellant was substantially responsible for delaying the hotel project.

26. The perusal of the Arbitral award would indicate that the learned Arbitrator had minutely examined the delay in completion of the hotel project and reached a finding that the delay was attributable to the DDA. The findings of the Arbitral Tribunal were based on the material placed by the parties. The finding of the Arbitral Tribunal was duly upheld by the learned Single Judge. The learned Single Judge had rightly remarked that it cannot re-evaluate the evidence and supplant its opinion over that of the Arbitral Tribunal. The Arbitral Tribunal had *inter alia* held that no loss was suffered by the DDA /Appellant on account of the delay. The Arbitral Tribunal had also rejected the contentions of the appellant that clause 3.14 of the General Terms and Conditions of the auction referred to the damages. The Arbitral Tribunal held that it referred to the impost as a penalty for the delay in completion of the hotel.



27. We consider that the appellant has not brought any material on record to show that there was any patent illegality, misconduct, jurisdictional error or any other infirmity in the arbitral award or the order passed by the learned Single Judge. The plea of the appellant that the learned Single Judge and the Arbitrator have not properly construed Clause 3.14 of the General Terms and Conditions and therefore, have acted against the fundamental policy of Indian Law is not persuasive at all and is liable to be rejected. It may be reiterated that merely because the arbitrator has taken a view that is plausible and there may be another view also, the award cannot be interfered with. The award can be interfered with only if the view taken by the arbitrator is patently illegal or against the fundamental policy of India.

28. We do not find any patent illegality or violation of the fundamental policy of India in the conclusion arrived at by the Arbitral Tribunal and which has been upheld by the learned Single Judge. We consider that the appellant has miserably failed to make out any case to interfere with the order of the learned Single Judge. Thus, we dismiss the appeal.

DINESH KUMAR SHARMA, J

MANMOHAN, J

APRIL 7, 2022

Pallavi/rb