

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

BEFORE:-

THE HON'BLE JUSTICE RAJASEKHAR MANTHA

AP 383 of 2020
M/s SOUTH CITY PROJECTS (KOLKATA) LIMITED AND ANR.

VERSUS
KOLKATA METROPOLITAN DEVELOPMENT AUTHORITY

WITH

AP 351 of 2020
KOLKATA METROPOLITAN DEVELOPMENT AUTHORITY
VERSUS
SOUTH CITY PROJECTS (KOLKATA) LTD. AND ANR.

For the KMDA	:	Mr. Kishore Dutta, Sr. Adv. Mr. Avishek Guha, Adv. Mr. Sirsanya Bandopadhyay, Adv. Mr. Rahul Kr. Singh, Adv. Ms. Debarati Das, Adv. Ms. Akansha Chopra, Adv.
For the South City Projects (Kolkata)	:	Mr. Abrajit Mitra, Sr. Adv. Mr. Saptarshi Datta, Adv. Mr. Satadeep Bhattacharyya, Adv. Ms. Srinjita Ghosh, Adv. Mr. Pourush Kanti Pal, Adv.
Hearing Concluded on	:	13.07.2023
Judgment On	:	20.07.2023

Rajasekhar Mantha, J.:-

FACTS OF THE CASE

1. The subject matter of challenge in the instant proceeding under Section 34 of the Arbitration and Conciliation Act of 1996 is an award dated 22nd June 2020 passed by Shri Jayanta Kumar Mitra, Sole

Arbitrator, appointed by this Court on 3rd May 2017 in AP 302 of 2017.

2. The petitioner nos. 1 and 2 [M/s South City Projects (Kolkata) Limited and M/s Merlin Projects Limited, respectively] (claimants) are, inter alia, engaged in the development of properties. The Kolkata Metropolitan Development Authority (KMDA) had invited bids for the development of residential-cum-office complexes at two separate sites, measuring about 132.20 cottahs at Mouzas, Laskarhat and Nonadanga (hereinafter referred to as 'Ruby Complex') and 1.487 acres at Kasba (hereinafter referred to as 'Nilachal Complex'). The petitioners submitted a bid jointly which was accepted by the KMDA.
3. A memorandum of understanding was entered into on 17th December 2007 by the claimants, with the respondent KMDA. Upon execution of the MOU, a sum of Rs.10 crores was paid by the petitioners to the KMDA. In further compliance of the terms of the MOU, a Joint Venture Company, called "Kolkata Metropolitan South City Development Limited", was formed.
4. A development agreement was to have been executed thereupon. The claimants were thereafter to construct and develop the aforesaid two building complexes. Leases for 99 years with a right to renew them for one more year, were to be executed by the KMDA in favour of the Joint Venture Company.
5. No development agreement was, however, executed by and between the parties in terms of Clause 6 of the MOU, since vacant physical possession of the two sites was not handed over to the claimants.

Hence the project remained stalled. Negotiations and discussions ensued between the parties.

6. A supplemental MOU came to be executed between the parties on 16th November 2011. The claimants from 2007 up to 2012 and from November 2011 to March 2016 continued to demand compliances of the terms of the MOU and the supplemental MOU by the KMDA.
7. By a letter dated 20th April, 2016, the claimant no. 1 terminated the MOU dated 17th December 2007 and the supplemental MOU dated 16th November 2011.
8. There was admittedly an arbitration clause in the MOU dated 17th December 2017. The arbitration clause was invoked by the claimants.
9. Pursuant to order dated 3rd May 2017 passed by consent of the parties, in AP 302 of 2017, a Co-ordinate Bench appointed the Arbitrator who entered upon the reference.
10. The claimants filed a statements of claim, praying as follows:-
 - a) Award for a sum of Rs. 43,70,76,495 as pleaded in paragraph 51 thereof;
 - b) Award for a sum of Rs. 1,76,76,527 as pleaded in paragraph 55 thereof;
 - c) Award for damages for a sum of Rs. 61 crores as pleaded in paragraph 58 hereof and in the alternative, an enquiry into damages as suffered by the claimants and an award for such sums which may be found due and payable upon such enquiry being made;
 - d) Interim interest and interest upon Award at the rate of 15% per annum;
 - e) Receiver;
 - f) Injunction;

- g) Attachment;
- h) Costs;
- i) Such further or other relief or reliefs.

11. The KMDA filed a counter-statement and counter-claim.

12. The learned Arbitrator framed the following issues:-

C. ISSUES:

It is pertinent to mention herein that the learned Arbitral Tribunal in course of the arbitral sitting held on 19th June, 2019 had settled the following issues:

- a) Whether the MOU dated 17th December 2007 was executed in violation of orders of injunction passed in respect of any lands forming the subject matter of the agreement?
- b) By reason of exchange of the letters dated 2nd February 2012 and 28th/31st July 2012, whether the MOU dated 17th December 2007 became confined to 83 cottahs of land?
- c) Whether the parties have discharged their respective obligations under the MOU dated 17th December 2007 after 31st July 2012 in respect of 83 cottahs of land?
- d) Have the parties discharged their respective obligations in respect of the balance quantity of land in terms of the MOU dated 17th December 2007?
- e) Whether the Respondent under the MOU dated 17th December 2007 was required to discharge the obligations as claimed by the Claimants in paragraph 44 of the Statement of Claim? If so, did the Respondent discharge such obligations?
- f) To what reliefs are the parties entitled against each other?

13. The claimants examined two witnesses in support of its claim, CW 1 Mr. Promodh Chowdhury and CW 2 was Sushil Mahato. The KMDA called two witnesses RW1 Sanjay Mukhopadhyay, Joint Secretary and RW 2 Sarabjit Dey. The witnesses who deposed were cross-examined. A huge number of documents were filed by both sides. Learned Arbitrator held over a large number of sittings. Detailed arguments were advanced by the parties and the Arbitrator awarded as follows:-

14. After having discussed oral and documentary evidence in detail, analyzing the arguments advanced by the parties, and having considered several decisions in law, in over 49 paragraphs, the learned Arbitrator answered the issues framed as follows:-

(i) Whether the MOU dated 17 December 2007 was executed in violation of orders of injunction passed in respect of any lands forming the subject matter of the agreement?

In view of discussions contained in paragraphs 28 to 33 above, this Issue is answered in the negative

(ii) By reason of exchange of the letters dated 24 February 2012 and 28/31 July 2012, whether the MOU dated 17 December 2007 became confined to 83 cottahs of land?

As discussed in paragraphs 32 to 41 above, by reason of exchange of the said letters, the scope of the Project for the time being was restricted to 83.52 cottahs of land, but in respect of the land comprised in Site-I and Site-II, the provisions of the MOU remained fully effective, and the parties were obliged to comply with the same. In fact, the letter dated 28th/31 July 2012 written by the Respondent (Exhibit-X) itself records that "for the time being", the scope of the Project was limited to 83.52 cottahs under Plot No.1-26 and "shall be extended to other parcels of land as and when such land is/are made available without encumbrances "

Hence, I answer this Issue in the negative, and hold that parties to the MOU continued to be bound by the provisions of the MOU for the rest of the land comprised in Sites I and II iii)

(iii) Whether the parties have discharged their respective obligation under the MOU dated 17th December 2007 after 31st July 2012 in respect of 83 cottaha of land?

I have discussed in paragraphs 42 to 60 hereinabove that the Respondent was unable to remove all the existing encroachments from the said 83.52 cottahs of land so much so that the Respondent was not in a position to hand over possession of the subject plot to enable the Joint Venture Project to take off. I, therefore, hold that it is the Respondent who has failed to discharge its obligations under the MOU to make available the said 83 52 cottahs of land to the JV Company to undertake the Project.

(iv) Have the parties discharged their respective obligations in respect of the balance quantity of land in terms of the MOU dated 17th December 2007?

Issue Nos. (iii) and (iv) to some extent overlaps with each other. As held in paragraphs 56 to 60 above, implementation of the Project was dependent upon the Respondent having sufficient title to and possession of the land. The Respondent has failed to prove either. On the basis of the evidence on record, I have come to the conclusion that failure of KMDA to comply with and carry out its aforesaid fundamental obligations has prevented the JV Company to undertake and implement the development of the Project in terms of the MOU. I answer the above Issue accordingly against the Respondent

(v) Whether the Respondent under the MOU dated 17 December 2007 was required to discharge the obligations as claimed by the Claimants in paragraph 44 of the Statement of Claim? If so, did the Respondent discharge such obligation?

I have held in paragraph 56 above that the implementation of the Project under the MOU was predicated upon fundamental assumptions that Respondent was in possession of the lands comprised in Sites I and II, and had title thereto. In fact, clause 4 in the Bid Document records an assertion that the Respondent was in possession of Sites I and II. Similarly, recital (c) of the MOU contains a representation that the Respondent is seized and possessed of and otherwise well and sufficiently entitled to the said plots Recital (D)(g) and clause 6.2 of the MOU record and assurance by the Respondent to make over to the JV Company vacant possession of the said two Sites within 30 days of signing of the Development Agreement. By and under Clause 6.7 of the MOU, the Respondent has undertaken an obligation to make out a clear and marketable title to the said two Sites free from all encumbrances. Clause 15.1(v) of the MOU records a representation and a warranty by the Respondent that the Claimants were entitled to the two Sites, and that there were no pending litigations or disputes and/or any third party claims in relation to the said two Sites.

I have discussed and shown in earlier paragraphs that the Respondent/KMDA has failed to satisfy the Tribunal that it had complied with any of its aforementioned representation, assurance, assertion, understanding, warranty or promise regarding its title.. possession or absence of litigation or disputes or third party claims in respect of the land comprised in the two Sites. As seen earlier, even in respect of 83.52 cottahs of land, though shown to have become free from litigation, the Respondent could not get the said, entire land freed from encroachments so as to make the same available for development

Thus, upon assessment of the entire evidence, I have come to the conclusion in respect of the allegations in paragraph 44 of the Statement of Claim that the Respondent had not been able to prove that it had lawful title to the said plots comprised in Site-I and Site-11, that there were several suits and proceedings in respect of the said plots, that possession of the said plots was not available with the Respondent at the material time, since substantial portions thereof were encroached upon by various entities and persons.

I answer the above Issue accordingly.

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69. I give hereinbelow in several subparagraphs the reason why I am of the view that the Claimants have failed to justify their claim for damage on account of loss of profit:-

- (a) The first question that should fall for my consideration is whether the Arbitral Tribunal as the adjudicating authority should be justified in relying upon the evidence adduced by the Claimants, through CW2, when such evidence was totally outside the pleadings in the Statement of Claim. As noted above, apart from a bald statement in paragraph 61 of the Statement of Claim that Rs.61 crore would have been the profit the Claimants could have reasonably earned if the MOU had been implemented, nothing else had been stated. On 9th July 2018, the Claimants filed an amended Statement of Claim, but nothing more was stated in support of its claim of Rs.61 crore as damage. On 8th March 2018, the Claimants filed affidavit of evidence of CW2 before the Arbitral Tribunal annexing voluminous documents purporting to support their claim for damages on account of the loss of profit with an application for condonation of delay. On the same day, i.e. on 9th March 2018, the Respondent filed an application before the Arbitral Tribunal that the documents disclosed by the Claimants in the affidavit of evidence of CW2 be expunged. These facts have been recorded in the Minutes of the 9th meeting of the Tribunal held on 9th March 2018. After filing of affidavits by the parties, I finally heard the two applications, and by an order dated 25th March 2018, though I condoned the delay by the Claimants in disclosing the documents through the evidence of CW2 upon payment of costs of Rs.50,000/- to the Respondent, I had expressly held in my order that the Claimants had taken a blatantly casual approach in their belated disclosure of documents, and had not furnished any justifiable and acceptable explanation for not filing the documents earlier. This finding of mine would have been sufficient and good ground for dismissal of the Claimants' application. However, since I did not want to completely shut out the Claimants from leading evidence on the issue of damage solely on the ground of delay in disclosure of documents, I allowed their prayer. However, now time has come for me to consider acceptability of such evidence.

It was stated by Lord Dunedin in *Siddik Md. -Vs- Saran* reported in AIR [1930] P.C. 57, "no amount of evidence can be looked into upon a plea which was not put forward", which was reiterated by the Supreme Court in *Trojan & Co -Vs- Nagappa Chettiar*: AIR [1953] SC 235 at 240, when it held that "It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case."

It is to be noted that in the instant Reference, the case pleaded by the Claimants in the Statement of Claim was not proved, and what the Claimants sought to prove through the affidavit evidence of CW2 was not pleaded at all. It is noteworthy that as per the evidence of CW2, the Claimants had done the calculation in December 2017 (Q.103- 106), and their finance and accounts department had done it even earlier (Q.107). If that be so, there could have been no justification for not pleading their claim for damage on account of loss of profit fully in the amended Statement of Claim. I am of the view that without such amendment, the Tribunal will not be justified in granting any relief on the basis of the evidence of CW2 which was not pleaded. In an adversarial litigation like the one before the Tribunal, the Respondent is entitled to know exactly what case he has to meet by way of a clear plea as to the damage the Claimants are alleged to have suffered, and he must be afforded an opportunity to investigate the details of the claim, so that he may call evidence about it if he can, and attack the Claimants' estimate of damages as well as the basis on which it is grounded. These are the observations of Justice Vivian Bose in the decision of *Jamshed Musalman -Vs- KH. Kalar* reported in AIR [1938] Nagpur 530 at 531.

- (b) The second question which arises in this case regarding the claim for damage arising from the alleged loss of profit is whether the Claimants have been able to prove the amount of loss flowing from the breach, even if the Tribunal takes into consideration the evidence adduced by CW2 on prayer (c) of the Statement of Claim. In other words, have the Claimants proved the amount of their loss through the evidence led by them?
 - i) "A plaintiff claiming damages must prove his case. To justify an award of substantial damages he must satisfy the Court both as to the fact of damage and as to its amount. If he satisfies the Court on neither, his action will fail, or at the most he will be awarded nominal damages, where a right has been infringed." This is what McGregor on the Laws of Damages (13th Edition) Para 252 at page 181 says. I am fully aware of the proposition that the fact that damages are difficult to assess because of its nature should not disentitle the Claimants to compensation for

the loss resulting from the breach committed by the Respondent, and the Court should fix damages as best as it can on the available evidence. As will be seen from the discussions hereinbelow on the evidence adduced by the Claimants through their second witness (CW2), the nature and the quantity of the evidence is such that the fact of damage by way of loss of profit and its amount cannot be said to have been proved so as to entitle the Claimants to claim anything more than a nominal damage.

- ii) Secondly, as emanating from the evidence of CW2, in paragraph 86 of his affidavit (Pp.46-47), he himself states on oath that the profits which the Claimants would have earned, had the MOU been implemented, would be reasonably assessed at Rs.61 crore. Soon thereafter, the witness had gone on to justify the Claimants' claim for damage by way of loss of profits at Rs.221.68 crore, much in excess of Rs.61 crore (CW2: Paras 88-100). Thus, the Claimants themselves were not certain as to the damages they have purported to have suffered by way of loss of profit. Furthermore, even the claim of Rs.221.5 crore by way of compensation is shown to be dependent upon various assumptions and ambitious guess-works. When we look to the evidence of CW2, who by way of his affidavit-evidence has brought in all these records and third party documents, I find that a lot of such evidence is based upon various assumptions and ambitious plans, which are dependent upon hypothesis and conjectures.

I have considered the evidence of CW2, in particular, his answers given in cross-examination. In answer to Question Nos.69 to 72, CW2 stated as follows:-

69. Did the Claimant decide on the numbers of floors which were to be built at the sites? / No plans were prepared. So, no decision about number of floors.
70. In the residential complex, would there be one flat or two flats per floor? / Same answer as above.
71. Would your answer be the same for the commercial complex on the other site? / Same as above.
72. Would there be swimming pools, landscaping, banquet halls? / No plans were prepared."

In answer to a question put by the Arbitrator, as to who would decide with regard to the plan of the building, CW2 answered that the same was to be decided "on the basis of advices of Marketing Department by the Board of the Claimants." (Q.73). When asked as to whether he had any personal knowledge of the encumbrances at site, CW2 answered that he had no knowledge of the encumbrances at site. It is to be recollected that in his evidence, CW2 has stated that there would be 3,05,000 square feet of saleable area in Site-I. When asked in Question 89 as to the document on which such calculation was based, CW2

stated that in paragraph 95 at page 81 of his affidavit of evidence, it has been mentioned that 3,05,000 square feet was in respect of only one Site. In Question 90, when he was asked where was the calculation for coming to the conclusion that there would be 3,05,000 square feet of saleable area in Site-1, CW2 answered that it was "based on available FAR as per KMC By-rules, on the quantum of land at Site-1." The evidence of CW2 is that his assertion that 3,05,000 square feet of saleable area at Site-I was based upon paragraph 88 of his affidavit-evidence where he has mentioned that FAR at Site-I was 2.75, and that was the basis of his calculation. However, when asked as to whether he could produce any supporting document to show that Site-I would give a saleable area of 3,05,000 square feet, CW2 said that he would have to check up before he could answer, and he further said that his answer would be same in respect of Site-II. When the case of Claimants throughout has been that because of the encroachments by outsiders on the said Sites, it was not possible to demarcate the lands even by a boundary wall, it is not understood how the Claimants, without being able to identify the periphery of Site-1, could have drawn the inference that a saleable area of 3,05,000 square feet would be available at Site-1. In this regard, it will be worthwhile to quote his evidence [his answers to Q.94-99] on this aspect:-

94. *3,05,000 square feet saleable area at Site 1 would involve structures of how many floors? It will depend on the final planning of the project.*
95. *Would 3,05,000 square feet of area be spread over one floor ? / No.*
96. *Have you calculated the number of floors?/ Not, so far.*
97. *Without calculating the number of floors, can you compute floor area ratio? Yes.*
97. *Without calculating the number of floors, can you compute any floor ratio?/ Yes.*
98. *Without calculating the number of floors, can you come to a conclusion that a particular plot of land will give you a particular saleable area? / Yes and I would like to demonstrate it in the following manner:
Suppose there is a plot land of 10 cottahs, which is equivalent to 7,200 square feet. Now, if the allowable FAR as per building By-rules is 2.75, the land area of 7,200 square feet is to be multiplied by 2.75 that gives the answer as to what is the potential of development on such 10 cottahs plot of land.*
99. *I suggest to you that your previous answers as well as your example do not give a clear picture and are incorrect. What do you say to that? / I do not agree. [Witness adds] I am doing real estate for last three generations and have personally spent 30 years in the*

real estate business. Therefore, the FAR calculations are done mathematically first and thereafter final plans are prepared."

When asked in Question 100, where those mathematical calculations were, the witness's answer was "this was done on a rough calculation sheet for this affidavit." However, when asked about such "rough calculation sheet", the witness said that it was not there and that "it must be in my working pad, which I shall produce on the next sitting CW2 in further cross-examination said that he himself did the calculation sometime in the month of December 2017. However, he could not produce the calculation sheet. When asked who else did the calculation, the answer was "our finance and accounts department has done that before." However, he could not produce any document to show how and when the finance or accounts department made such calculations. When asked about the cost of construction on the said Sites, in answer to Q.114, CW2 said that he had calculated with the help of his construction team. When asked about the calculations, he said that the calculation is given in Annexure-ZZZ starting from page 486 of his affidavit.

- iii) The witness said that he himself made the calculation "on a rough calculation sheet", which "must be in my working pad" [CW2: Q.100-102] When asked about FAR calculations and his conclusion that an area of 3,05,000 square feet would be available for the construction to be made [CW2: Q.90-91], what prevented the Claimants from disclosing such particulars and making such statements in their pleadings. The original Statement of Claim was filed on 13th July 2017 and the amended Statement of Claim was filed on 9th January 2018, Surprisingly, there is no mention of any such calculation in their claim for damage in either of the aforesaid pleadings. In spite of the fact that CW2 stated that the calculation sheets were prepared by himself with the help of his construction team as early as in December 2017 [CW2: Q.103-107], the claim for damage was not amended nor any particulars were furnished.
- iv) In Annexure-ZZZ to the Affidavit of Evidence of CW2, rates have been mentioned in the fourth column, and when asked as to whether the Claimants have produced any document which would justify the rates that have been mentioned in the fourth column, the witness answered that most of these were taken from PWD Schedule of Rates applicable at the relevant point of time, and some items which are not mentioned in the PWD Schedule of Rates were considered on the basis of costs spent on similar type of projects done by the Claimants at the relevant point of time (Q.119). However, no evidence has been produced as

to which similar types of projects were taken into consideration for the preparation of the cost sheets, and what costs were incurred in which "similar types of projects" and when. In Q.120, CW2 was asked as to whether PWD Schedule has been produced by the Claimants, to which the witness answered that it was not annexed but the same could be produced and he further added that PWD Schedule is available in public domain and one could lay one's hands on it at any time. However, he added that the rates which are not in the PWD Schedule of Rates were based upon the other projects of the Claimants (Q.121). The documents in support of the above statement of CW2, however, have admittedly not been produced in evidence (Q.122). The second and the third columns in Annexure-ZZZ mention "Unit" and "Quantity". The Tribunal is provided with no material but guesswork how the figures mentioned therein were arrived at. It is to be noted that CW2 has heavily relied upon the calculations mentioned in Annexure-ZZZ, and he stated that detailed calculations were there. However, in Questions 124-126, when asked whether the calculations which are the basis of Annexure-ZZZ have been produced, the witness answered that the detailed working and note sheets have not been produced.

- v) It is to be noted that it has not been the case of the Claimants that the particulars contained in Annexure-ZZZ were not available or within the knowledge of the Claimants or could not be produced earlier. In such situation, the probative value of such evidence diminishes to a large extent, and the authenticity thereof becomes a suspect.
- vi) In answer to various questions, CW2 tried to compare the project which the Claimants would develop with Urbana, which was located behind the Ruby Hospital. However, admittedly, Urbana Project is situated on a much larger space (CW2: Q.135-136), and consequently houses a number of multistoried buildings and bungalows, which facilities would not be available to projects on Site I or II. In Q.141, when the witness was asked whether there was anything on record produced by the Claimants that would show that many of the facilities which are provided in Urbana would also be provided at the complex to be erected at the subject plot, the witness answered that final plans were not made and as such nothing was on record, but considering the size of the plot and the location, it was possible to develop a premium project. However, the question still remains unanswered that when admittedly final plans for the Project were not made and the area on which the proposed Project was to come up was not identified and remained uncertain, how the Claimants were purporting to claim damage on the basis of an

imaginary premium project sought to be developed on the said plots of land. In Q.143, when asked about the area of lawns and gardens, which the Claimants have taken into account, while making the cost calculation, CW2 frankly admitted that final plannings were not done and therefore "as a thumb rule, cost of development has been considered for the same." In answer to Q.148, the witness answered as follows:-

"148. Without a plan how did the Claimants ascertain the number of piles which would be required? / Certain assumptions were made as is evident in page 496 of my affidavit of evidence, Vol. II. We have considered the total built up area which is proposed to be divided in 10 floors, which gives area of each floor. In other words, the size of floor plate is available and based on the size, the number of piles and the other details about the piles can be arrived at."

Significantly, in answer to Q.148, the witness has stated that it was proposed to be divided in 10 floors, and in support thereof, he referred to page 496 of his affidavit-evidence, whereas in answer to Q.96, the witness had stated that he had not calculated the number of floors so far.

- vii) Another aspect which I took note of is that the claim for loss of profit made by the Claimants is contingent on so many uncertain factors, including acts and omissions of third parties, like the Kolkata Municipal Corporation, persons allegedly in wrongful possession of various portions of the subject land, the result of pending litigations in the Civil Courts in respect of Site I and/or Site II etc. as indicated hereinabove. It must be appreciated that the Claimants' claim for loss of profit is their claim for loss of a chance to earn profit through the implementation of the Project, and the same was fraught with numerous contingencies. To quote Justice Ashworth in Hall -Vs- Meyrick reported in [1957] 2 Q.B. 455 at 471: "The more the contingencies, the lower the value of the chance or opportunity of which the plaintiff was deprived."
- viii) In the above state of evidence, I have come to the conclusion that there was no sufficient material to prove with any degree of certainty as to the loss or damage the Claimants claimed to have suffered. When the witness (CW2) himself admits that no plans were prepared in respect of residential or commercial complex and no decision was taken with regard to the number of floors, that no decision was taken as to the number of flats per floor, one is left to ponder how Annexure-ZZZ and the evidence of CW2 could be sustained as the basis of a hefty claim for damage. The claim of the Claimants for loss of

profit is founded upon an unplanned project based wholly on hypothesis, the foundation of which is on guesswork and thumb rule. When the Project for which the MOU was executed did not at all proceed, so much so that even the area on which the Project was to come up had admittedly not been identified and demarcated, the Arbitral Tribunal, as an adjudicatory body, would not be justified in proceeding on the basis of evidence, the foundation of which was wholly based upon so-called plans, which admittedly were not prepared even when CW1 was called to give evidence.

ix) In the above circumstances, though I have held that there had been infraction of a legal right of the Claimants by reason of acts and/or default of the Respondent, I am unable to award anything more than nominal damage @ Rs 100/- in favour of the Claimants against their claim for damage on account of loss of profit.

(c) The third aspect arising from the claim of the Claimants for damage on account of the loss of profit is the entitlement of the Claimants to claim recovery for both the loss of expectation interest and the reliance interest. The former relates to the gains which the Claimants expected to receive from the completion of the promised performance of the obligations by the Respondent, which were prevented by the breach committed by it; and the reliance interest relates to expenses or loss the Claimants have incurred/suffered in reliance of the promised performance. As the law is stated in Pollock and Mulla on the Law of Contract, 14th Edition: Vol.II, page 1164 that in protecting expectation interest, the law redresses the innocent party's defeated financial expectation and compensates him for his loss of bargain. In the instant case, prayer (c) in the Statement of Claim can be said to be an attempt of the Claimants for recovery of such expectation loss. Pollock and Mulla's above Treatise at page 1164 says that "the reliance interest of a party to a contract lies in avoiding wasted outlay under a broken contract, and while protecting this interest the law aims at compensating the parties for the expenses incurred and losses suffered in reliance on the contract, and which have been rendered futile by the breach; this is a negative interest. The plaintiff is to be put into the position in which he would have been if the contract had never been made." In the instant Arbitration Reference, prayers (a) and (b) are the relief through which the Claimants are seeking to recover the reliance loss, being the infructuous expenses incurred by the Claimants in reliance on the MOU.

After explaining the respective scope and ambit of expectation interest and reliance interest, the said Treatise goes on to say as follows (at page 1165):-

"No Recovery for both the Expectation Loss and the Reliance Loss. Although the rules as to damages seek to protect both the

expectation and the reliance loss, viz, loss of profit, and reliance loss, viz, expenses incurred in reliance of the promise, that would involve double counting. He has to choose between the two measures."

The above passages from Pollock and Mulla on the Treatise on Contract have been cited with approval and relied on by the Supreme Court in *Kanchan Udyog -Vs- United Spirits Ltd.* reported in [2017] 8 SCC 237 at 254 (Para 30) cited before me on behalf of the Respondent.

The above principle when applied to the facts of the instant case, leads me to the conclusion that the breach of contract by the Respondent causing infraction of legal rights of the Claimants, which I have held earlier in this Award, does not entitle the Claimants to damage by way of loss of profit (Chitty on Contracts, 25th Edition, Vol. I: Para 1674). In such event also, the Claimants become entitled only to a nominal damage, which I have assessed at Rs. 100/- only in Paragraph 66 Subparagraph (b)(ix) above.

70. Now, regarding costs of and in relation to the instant arbitration proceedings. Section 31A of the Arbitration and Conciliation Act, 1996 makes provisions for the Regime for Costs, and has invested the Arbitral Tribunal with the discretion to determine, inter alia, whether costs are payable by one party to another and the amount of such costs, notwithstanding anything contained in the Code of Civil Procedure.

- (a) I have held in this Award that the entire venture of implementation of the Project of development of Site-I and Site-II in accordance with the provisions of the MOU dated 17th December 2007 failed due to breach by the Respondent of the fundamental terms of the Contract, which as a matter of course should entitle the Claimants to damages, including the loss of profit. However, I have also held that the Claimants are entitled only to a nominal damage for reasons which I discussed in details elsewhere in this Award.
- (b) I am of the view that having held that it has been clearly established that it is the Respondent who has committed infraction of legal rights of the Claimants as enshrined in the said MOU, the proceedings initiated by the Claimants in the instant Arbitration is in order to pursue a genuine and bona fide claim to establish their legal rights under the MOU, irrespective of whether any substantial relief by way of recovery of profit could be obtained by them or not. Though I have allowed only a nominal damage towards loss of profit in favour of the Claimants, however, to quote the language of Maule J. in *Beaumont- Vs- Greathead*: (1846) 2 C.B. 494 at 498, nominal damages are "a mere peg on which to hang costs." See Chitty on Contracts 25th Edition: Vol. I Para 1674 Page 918.

(c) I, therefore, award costs of the Arbitration proceedings in favour of the Claimants. There had been 75 sittings in the Arbitration proceedings. The Claimants' share of costs of the Arbitrator and his secretariat is reasonably assessed at Rs. 45,00,000/-, which the respondent is directed to pay and bear for reasons stated in the last preceding paragraphs.

(d) Though the general rule is that the unsuccessful party should be directed to pay the costs of the successful party, in the instant case, though the Claimants have been successful only partially in the sense that they have been able to establish that due to wrongful breach on the part of the Respondent, their right under the MOU has been infringed, forever, the Claimants were unsuccessful in proving the damage allegedly suffered by them by way of loss of profit. I am, therefore, directing the Claimants and the Respondent to pay and bear their own respective costs of the proceedings.

71. I, therefore, make my Award in the instant proceedings as follows: There will be an Award in favour of the Claimants against the Respondent as follows:-

- | | | | |
|-------|-----|--|---------------------|
| (i) | (a) | The principal sum as mentioned in paragraph 54 of the Statement of Claim: | Rs. 11,41,40,000.00 |
| | (b) | Interest on the said sum at the rate of 15% per annum from 17 th December 2007 till the date of the Award: | Rs. 21,25,85,750.00 |
| (ii) | (a) | Damage by way of expenses incurred by the Claimants towards preliminary and other expenses as claimed in prayer (b) of the Statement of Claim: | Rs. 62, 33, 172.00 |
| | (b) | Interest on the said sum as stated in paragraph 67(i): | Rs. 22,43,943.00 |
| (iii) | | Damage under prayer (c) of the Statement of Claim: | Rs. 100 |
| (iv) | | Interest on the Awarded sums at the rate of 12% per annum from the date of the Award till payment | |
| (v) | | Costs of the proceedings: | Rs. 45,00,000.00 |

The object and purpose of setting out the award in some detail is to apply and address the tests laid down by the Hon'ble Supreme Court while dealing with an application under Section 34 of the Act of 1996.

ARGUMENTS ON BEHALF OF THE M/s. SOUTH CITY PROJECTS

15. In support of the award, Mr. Abhrajit Mitra, Learned Senior Counsel, relied upon the case of ***Associate Builders v. Delhi Development Authority*** reported in **(2015) 3 SCC 49** at paragraphs 43 and 45 thereof that the learned Arbitrator is the final authority with regard to the interpretation of a contract. Reliance is also placed in the decision of ***Mcdermott International Inc. V. Burn Standard Co. Ltd. and Ors.*** reported in **(2006) 11 SCC 181** at para 112.
16. On the principle that the evaluation of facts is within the exclusive domain of the learned Arbitrator, reliance is placed on the decision of ***UHL Power Company Limited v. State of Himachal Pradesh*** reported in **(2022) 4 SCC 116** at para 15.
17. Similarly, on the question of the interpretation of documents and analysis of the evidence on record being within the exclusive power of the Arbitrator, reliance is placed on the case of ***Associates Builder (supra)*** and ***UHL Power Co. Ltd. (supra)***.
18. On the principle of failure to consider the application of Sections 65, 70, and 72 of the Contract Act, reliance is placed on ***Westdeutsche Landesbank Girozentrale v. Council of London Borough of Islington*** reported in **(1996) 2 AER 961**.
19. On the argument that the rejection of the claim for damages of the petitioner by the Arbitrator is erroneous. Reference is placed in the case of ***MSK Projects India (JV) Limited v. State of Rajasthan and Anr.*** reported in **(2011) 10 SCC 573**.

ARGUMENTS OF THE KMDA

20. Per contra, Mr. Kishore Datta, Learned Senior Counsel, appearing for the KMDA, has advanced the following arguments:-

- a) The joint venture company formed pursuant to MOU dated 17th December 2007 called Kolkata Metropolitan South City Development Limited could have alone maintained any claim and not M/s. South City Ltd. or M/s. Merlin Projects Ltd.
- b) The termination of the contract by claimant nos. 1 and 2 is illegal and unilateral for being without consent.
- c) The only remedy that the claimant was to breach the shareholder of KMDA in the joint venture company. There was a breach on the part of the respondent.
- d) There was no prior notice by the claimants on the KMDA to cure the breach, hence the termination is illegal.
- e) The termination of the MOU was not in terms of Clause 20.1 of the MOU.

21. It was further argued that, in the absence of any valid notice of termination of the MOU by the claimants, no claim ought to have been entertained by the Arbitrator. Reliance is placed to the decision of ***Kailash Nath Associates v. Delhi Development Authority and Anr.*** reported in **(2015) 4 SCC 136** at para 20 and 21 and the case of ***Hind Construction Contractors v. State of Maharashtra*** reported in **(1979) 2 SCC 70** at para 10 and ***Bombay Housing Board v. Kharbase Naik & Co.*** reported in **(1975) 1 SCC 828** at para 21 and 22. No case

of fundamental breach or reputation has been pleaded to justify the termination of the contract. After the formation of the joint venture company, the constitution of the consortium namely claimant nos. 1 and 2 had no independent legal existence. Only the joint venture company could have maintained any claim against the KMDA. The joint venture company has not raised any such claim.

22. The finding of the learned Arbitrator, that the obligation to develop the project did not stand reduced to 83.52 cottahs and there was no novation of the MOU in terms of the agreement dated 5th July 2012, is erroneous. It was the obligation to claim to execute the draft development agreement. The Arbitrator erred in ignoring the same with evidence to that effect.
23. KMDA would have removed encroachments from the 83.52 cottahs of land within 30 days of execution of the development agreement between the joint venture company and the KMDA. The Arbitrator erred in law in holding that the KMDA was not in a position to hand over the vacant possession of land to the joint venture company from the claimants. The claimants themselves requested KMDA to complete the entitlement to the land. They were ready for the same and only transfer from the State to KMDA was pending. The KMDA did not have title to the land.
24. On 4th February 2011, the Government of West Bengal settled 83.52 cottahs of land in favour of the KMDA. There was no time limit stipulated under the MOU for the performance of obligations in respect of handing over 83.52 cottahs of land.

25. The claimants did not provide the draft development agreement to the respondent and hence could not insist on the performance of any obligations by KMDA. Reliance is made to the decision of **Narendra Lal Khan v. Manmotha Ranjan Pal** reported in **AIR 1919 Cal 1000** and **Jiwa Ram v. Man Singh** reported in **AIR 1934 Lah 84(1)**.
26. The claims to the consortium are barred by the terms of the MOU which the Arbitrator failed to appreciate.
27. The only relief that the claimants could have been entitled to is the specific performance of Articles 20.01, 20.02, 20.08, 20.09, 20.10, and 20.12 of the MOU. Since the only other remedy that could have been awarded to the claimants is 50% shareholder of the joint venture company by the KMDA, the learned Arbitrator travelled outside the scope of the contract between the parties.
28. In violation of section 34(2)(b)(ii) read with section 28(3) of the Arbitration and Conciliation Act, reliance is placed on the decision of **J.G. Engineers (P) Ltd. v. Union of India** reported in **(2011) 5 SCC 758** para 10 and 28 and **Steel Authority of India Limited v. Vizag Seaport Private Limited** reported in **2022 SCC Online Cal 2299** para 20, 21, 26, 39 and 40.
29. A sum of Rs. 10.914 crores and 50 lacs were a loan advanced to the JVC and could have only been recovered from the JVC. The KMDA is not liable to pay the same. The claim for Rs. 62.33 lacs towards expenditure incurred by the claimants for removing the jungle and cutting bushes has not been proved. The award dated 22nd June 2020 modified by order dated 14th August 2020 ought to be declared against

the public policy of India and public interest and is therefore liable to be set aside.

THE COURT'S ANALYSIS AND FINDINGS

30. The principal thrust of the argument of the KMDA is that the Learned Arbitrator failed to appreciate that the claimant did not have the right to terminate the MOU much less invoke the arbitration clause. It is argued that the only remedy that the claimant had was to seek transfer of the shares of KMDA in the Joint Venture Company, in their favour. It is stressed by Mr. Dutta that it is only the Joint Venture Company namely “Kolkata Metropolitan South City Development Ltd.” that could have maintained any sustainable claim against the KMDA.
31. This Court finds that this argument was not even raised before the Arbitrator. There was no evidence led in this regard. Even assuming that this is a question of law based on some evidence already on record, the matter ought to have been first raised in the proceedings before the Coordinate Court under Section 11 of the Arbitration and Conciliation Act. No such plea has been raised or even shown as raised in the course of the Arbitration, before this Court.
32. The KMDA could have also filed an application under Section 16 of the Arbitration and Conciliation Act before the Arbitrator, questioning the locus and authority of the claimants to invoke the arbitration clause, which has not been done.
33. Even in the written statement of defense filed before the Arbitrator, no such question was raised. No suggestion appears to have been made to the witnesses of the claimant by the KMDA as regards its authority to

invoke the arbitration clause. Learned Counsel for the KMDA admits and states that it is only in notes of argument filed before the Ld. Arbitrator at the fag end of the proceeding, that the issue was raised for the first time. The Arbitrator has therefore rightly declined to address the same. The issue has been argued by KMDA before the Court. It would be grossly inappropriate and unfair to permit the KMDA to raise the issue before this Court at this stage.

34. The finding that the KMDA failed to make over the entire land free from occupation, encroachment, and encumbrance is clear and evident on record. The Arbitrator clearly found that the termination of the MOU and the claims made against the KMDA are justified and sustainable in the facts of the case. To accept the arguments of the KMDA, the Ld. Arbitrator would have been required to alter the terms and conditions of the MOU between the parties.

35. The principal sum awarded was Rs.11,41,40,000/-, being the actual advance paid by the claimants to the KMDA before and after the MOU was drafted. The interest on the said sum from the year 2011 till the date of the award @ 15% per annum is the commercial rate applied to any lawful business investment. Such amount was found payable in view of the clear and abject failure on the part of the KMDA to give possession of the entire lands mentioned in the MOU. The KMDA was found without title to parts of the land.

36. The other findings of fact of the learned Arbitrator, incorrectness of which has been argued at length by Mr. Kishore Dutta, cannot be gone into or entertained by this Court in view of the dicta of the Supreme

Court in the case of **UHL Power (supra)**, particularly Paragraph 15 thereof.

“15. This Court also accepts as correct, the view expressed by the appellate court that the learned Single Judge committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking an entirely different view in respect of the interpretation of the relevant clauses of the implementation agreement governing the parties inasmuch as it was not open to the said court to do so in proceedings under Section 34 of the Arbitration Act, by virtually acting as a court of appeal.”

37. The interpretation of the contract and/or the MOU in the facts of the case are also within the exclusive domain of the Arbitrator as decided by the Hon’ble Supreme Court in paragraphs 43 and 45 of the case of **Associate Builders (supra)**.

“43. In *McDermott International Inc. v. Burn Standard Co. Ltd.* [*McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , this Court held as under: (SCC pp. 225-26, paras 112-13)

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission* [(2003) 8 SCC 593 : 2003 Supp (4) SCR 561] and *D.D. Sharma v. Union of India* [(2004) 5 SCC 325] .]

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

45. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* [(2012) 5 SCC 306] , the Court held: (SCC pp. 320-21, paras 43-45)

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL v. Gupta Brother Steel Tubes Ltd.* [(2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy*

Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (*Sumitomo case* [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

‘43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.’”

38. It is now well settled that the only grounds for interfering with an arbitral award, post the amendment to Section 34 of the 1996 Act, are if the award in question is against the fundamental policy of Indian Law, the interest of India, or against the principle of justice or morality. The Hon'ble Supreme Court had occasion to address the issue of the scope of interference with an arbitral award in the case of **Ssangyong Engineering & Construction Co. Ltd. Vs. NHAI** reported in **(2019) 15 SCC 131**. It was held as follows:-

“19. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of “public policy of India” in *ONGC v. Saw Pipes Ltd.* [*ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705] [“*Saw Pipes*”] and *ONGC v. Western Geco International Ltd.* [*ONGC v. Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] [“*Western Geco*”] has been done away with, and a new ground of “patent illegality”, with inbuilt exceptions, has been introduced. Given this, we declare that Section 34, as amended, will apply only to Section 34 applications that have been made to the Court on or after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.

22. However, this Court, in *Saw Pipes* [*ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705] , added yet another ground, namely, that of “patent illegality” to the three grounds mentioned in *Renusagar* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644] in order to set aside an award under Section 34 of the 1996 Act. This ground was added in the following terms : (*Saw Pipes case* [*ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705] , SCC p. 728, para 31)

“31. ... [Patent] Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.”

23. Given this interpretation of the law, insofar as Section 34 was concerned, this Court, in *DDA v. R.S. Sharma and Co.* [*DDA v. R.S. Sharma and Co.*, (2008) 13 SCC 80], summarised the law as it stood at that point of time, as follows : (SCC pp. 91-92, para 21)

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

a. An award, which is

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

or

- (iii) against the terms of the respective contract; or
- (iv) patently illegal; or
- (v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

- b. The award could be set aside if it is contrary to:
- c. fundamental policy of Indian law; or
- d. the interest of India; or
- e. justice or morality.
- f. The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.
- g. It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.”

24. Yet another expansion of the phrase “public policy of India” contained in Section 34 of the 1996 Act was by another judgment of this Court in *Western Geco* [*ONGC v. Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], which was explained in *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] as follows : (SCC pp. 73-77, paras 28-34)

“28. In a recent judgment, *ONGC v. Western Geco International Ltd.* [*ONGC v. Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held : (SCC pp. 278-80, paras 35 & 38-40)

“35. What then would constitute the “fundamental policy of Indian law” is the question. The decision in *ONGC* [*ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression “fundamental policy of Indian law”, we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The *first and foremost* is the principle that in every

determination, whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a “judicial approach” in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.***

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated *audi alteram partem* rule, one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at, the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of *Wednesbury* [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223 (CA)] principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

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

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

30. The *audi alteram partem* principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:

...
...
...

32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons* [*Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons*, 1992 Supp (2) SCC 312] , it was held : (SCC p. 317, para 7)

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

In *Kuldeep Singh v. Commr. of Police* [*Kuldeep Singh v. Commr. of Police*, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held : (SCC p. 14, para 10)

‘10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.’

42. Given the fact that the amended Act will now apply, and that the “patent illegality” ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(a)(iii) and (iv) as applicable to the facts of the present case.”

39. In the aforesaid decision, the earlier judgments of the Hon’ble Supreme Court in the case of **Renusagar Power Co. Ltd. Vs. General Electric Co.** reported in **1994 Supp. (1) SCC 644**, the case of **Associate Builders Vs. DDA** reported in **(2015) 3 SCC 49** and the other decisions in the case of **ONGC Ltd. Vs. Saw Pipes Ltd.** reported in **(2003) 5 SCC 705** and **ONGC Ltd. Vs. Western GECO International Ltd.** reported in **(2014) 9 SCC 263** have been carefully considered.

40. From the above decisions the following principles may be culled out.

An award may be interfered with only if:-

- a) It is perverse i.e. the conclusions are not based on the evidence on record and/or based on extraneous considerations and/or material.
- b) No reasonable man can arrive at the conclusion arrived at by the Arbitral Tribunal.
- c) The findings of the Tribunal are such that would shock the conscience of a reasonable person.
- d) The award is patently illegal or irrational.
- e) The award is against the basic and/or fundamental and/or public policy of India or Indian Law.
- f) Any of the parties have been denied a reasonable opportunity to put forth their case or an equal opportunity is not given to the parties and there is denial of the principles of natural justice and the procedure followed is dehors a judicial approach.
- g) If the award is against the specific term of the contract and against the substantive law of India.

The above are not exhaustive since there is no straight jacket formula to prescribe when ipso facto an award may be interfered with. There is also a power of remand by a Court to the Arbitrator, in very limited cases, to enable the Tribunal reconsider and fill in any matters not dealt with, that were in fact required to be dealt with.

41. Applying the above principles this Court is of the view that the findings of the Arbitrator, that the claimants are not entitled to damages from the respondents; the breach of the MOU on the part of the KMDA, recorded before the Arbitrator, are sustainable and supported in law and the facts of the case.
42. The refusal of the Arbitrator to accept the arguments of the KMDA that the scope of the project stood reduced to 83.52 cottahs of land and the novation of the terms of the MOU by the agreement dated 5th July 2012, cannot be deemed as patently illegal or so incredible as to fall within the expression “against the fundamental policy or public policy” of India. None of the findings of the Arbitrator are perverse, or such as to shock the conscience of this Court.
43. This Court even otherwise finds that the Arbitral Tribunal entertaining the petitioners’ monetary claims against the respondents in the facts and circumstances of the case is appropriately justified and cannot be deemed as incredible or being in contravention of fundamental policy of Indian Law or against the basic notions of morality or justice. There is no patent illegality in the award. Sufficient reasons are available on record to support each finding and conclusion arrived at by the Arbitrator. Each of the conclusions and findings arrived at by the learned Arbitrator is based on material evidence on record.
44. The decisions cited by the KMDA referred to in the proceeding paragraph would have no matter of application in view of the decision

of the Supreme Court in the **Ssangyong (supra)** case as set out hereinabove.

45. It is also explicit and clear from the award itself that the same is based on detailed and sound reasoning and the conclusions flow out of such reasoning.

46. This Court also finds that the claim for damages made by the claimant has been rightly rejected by the Ld. Arbitrator. The Arbitrator awarded only Rs.100/- as damages since the advance made by the claimants to the KMDA was directed to be refunded with interest @ 15% per annum. The award of expenses and costs is equally justified in law and the facts of the case.

47. The claim of the claimants for damages before this Court and challenge to the award to that extent must, therefore, also stand rejected, for the same reasons and by applying the same principles of law and tests, set out in the decision referred to hereinabove while dealing with the arguments of the KMDA.

48. In view of the foregoing discussion, AP 383 of 2020 and AP 351 of 2020 shall stand dismissed. The award dated 22nd June 2020 is upheld as valid and binding on the parties.

49. There shall, however, be no order as to costs.

50. Urgent Photostat Certified server copy of this judgment, if applied for, be supplied to the parties on urgent basis.

(Rajasekhar Mantha, J.)