

IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 472 of 2009

Shamlal Jotwani & Anr.

Versus

Veena Jotwani

Mr. Aniruddha Mitra

Mr. T. K. Sen

Mr. Anirban Ghosh

.....For the petitioner

Mr. Anubhav Sinha

Ms. Reshmi Hossain

Ms. Farhana Khatun

Ms. Soumita Mukherjee

.....For the respondent

Heard on : 27.06.2022, 30.06.2022, 13.07.2022, 02.08.2022,
24.08.2022, 05.12.2022, 16.01.2023 & 13.02.2023

Judgment on : 30.03.2023

Krishna Rao, J.:

This is an application under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Award passed by the learned Sole Arbitrator dated 27th May, 2009 wherein and where under the Learned Arbitrator awarded an amount of Rs. 17,01,080/- along with interest at the rate of 10% per annum from one month after the date of award till the payment of the awarded amount.

BRIEF FACT OF THE CASE IS AS FOLLOWS :

Premchand Jotwani and Dharamdas Jotwani, were the sons of Late Sugnichand Jotwani. Ginchand Jotwani was the son of Premchand Jotwani. The respondent Smt. Veena Jotwani is the wife of Ginchand Jotwani. The petitioner no. 1 Shamlal Jotwani is the younger son of Late Dharamdas Jotwani. The petitioner No. 2 is the daughter-in-law of Dharamdas Jotwani (Wife of Harilal Jotwani) and the petitioner no. 3 is the wife of Late Dharamdas Jotwani. A partnership Deed was executed on 21st October, 1965 for the purpose of carrying out their business namely Bambino at 40E, Free School Street, Calcutta between the following partners with following shares :

- i. *Ginchand Jotwani (Husband of respondent/claimant).... 40%*
- ii. *Harilal Jotwani (Husband of the petitioner No. 2) 20%*
- iii. *Shamlal Jotwani (Petitioner No.1) 20%*
- iv. *Lajwanti Jotwant (Petitioner No.3) 20%*

In the year 1966, the partnership firm opens a second shop room at 47/2, Gariahat Road, Calcutta. In the year 1982, the partnership firm was dissolved and a new partnership was re-constituted on 1st July, 1982 under which shares of the partners with regard to business of Bambino at Free School Street was divided in the following manner:

i.	<i>Veena Jotwani (Respondent)</i>	 40%
ii.	<i>Shamlal Jotwani (Petitioner No.1)</i>	 20%
iii.	<i>Rachna Jotwani (Petitioner No.2)</i>	 20%
iv.	<i>Lajwant Jotwani (Petitioner No.3, Now deceased)</i>	 20%

As regard the partnership business of Bambino Gariahat was concerned, the shares of the partners were divided in the following manners:

i.	<i>Ginchand Jotwani (Husband of respondent)</i>	 40%
ii.	<i>Kajal Jotwani (Wife of petitioner no.1)</i>	 20%
iii.	<i>Harilal Jotwani (Husband of petitioner no.2)</i>	 20%
iv.	<i>Petitioner no. 3</i>	 20%

The business of Bambino, Free School Street was essentially carried on by the petitioner No. 1 being the sole male partner. The other partners were entitled to participate in the business, none of the other partners took any active part in the day today carrying on business of Bambino, Free School Street. The showroom of Bambino Free School Street was taken on rent by Smt. Lajwanti Jotwani (since deceased) and was paying the monthly

rent in respect of the said premises. Smt. Lajwanti Jotwani allowed the partnership firm to carry on the business from the said premises and accordingly, the business of Bombino had been carried out from the said premises. It was the internal arrangement between the parties that the occupational charges for the said premises shall be paid by the partnership firm directly to the landlord. About early eighties, the firm has also taken the premises No.15, Free School Street on rent for the purpose of godown and the rent of the godown was paid by the partnership firm till December 1995.

As per the case of the petitioners that in the year 1995, the roof of the show room situated in the building at 40E, Free School Street was collapsed and the landlord "Calcutta Muslim Orphanage" issued a letter on 9th October, 1995 along with reminder to the Lajwanti Jotwani to vacate the said premises and accordingly in terms of the decision taken at the meeting of the partners held on 24th August, 1997, the tenancy of the premises was surrendered but inspite of service of notice, the respondent Veena Jotwani did not attend the meeting. The entire stock of the show room was sold to Gariahat shop at "no profit no loss basis" and the entire furniture and fixtures were also sent to Bombino Garahiat Road shop on proper receipt.

It is the further case of the petitioners that the landlord of the godown had expressed his intention to the petitioner No. 1 to sell the said godown and accordingly the partners have called for a meeting on 30th October, 1995 after issuance of Notice dated 15th October, 1995. The respondent has not attended the meeting. In the meeting, it was decided that as none of the

partners have sufficient funds to purchase the said godown, accordingly the petitioner no.1 will purchase the same in his personal capacity. As per decision, the petitioner No.1 had purchased the said godown by way of registered indenture dated 20th December, 1995. On 16th December, 1999, the petitioner no.1 had sold the said godown to one Asta Lavista Internet.

As per the case of the respondent that in the year 1998, the respondent came to know that the petitioner no.1 in collusion and connivance with the petitioner no. 2 and petitioner no. 3 (now deceased) had disposed of entire assets and property of Bombino Free School Street including the business without the knowledge of the respondent. As the respondent raised dispute with regard to the partnership business and has prayed for appointment of Arbitrator to adjudicate the dispute between the parties. Initially both the parties have appointed their arbitrators but arbitrators have not proceeded with the arbitration proceedings and finally as per the Order of the Hon'ble High Court Learned Arbitrator was appointed.

On 27th May, 2009, the learned Arbitrator has published an award which is impugned in the present proceeding.

SUBMISSIONS ON BEHALF OF THE PETITIONER :

Mr. Aniruddha Mitra, learned Advocate representing the petitioners submits that the Award is in conflict with public policy of India as it is contravention with the provisions of Section 15 of the West Bengal Premises Tenancy Act, 1956. He further submits that the learned Sole Arbitrator did

not consider the vital documents in arriving at the decision, which makes the award perverse.

Mr. Mitra submits that the amount awarded is based on no evidence and without any reasons and thus the Award is patent illegal. He further submits that the learned Arbitrator has taken into consideration of irrelevant materials.

Mr. Mitra submits that the learned arbitrator has relied upon two valuation reports dated 25th June, 2007 of Mr. D.G. Chakraborty wherein the said valuer has submitted his report on the basis of the earlier report submitted by the Valuer Shri Supratim Chakladar but has ignored vide two letters dated 9th September, 2002, Shri Supratim Chakladar has withdrawn his reports.

Mr. Mitra submits that in the awards itself, the Arbitrator in its finding recorded that “even though it is not possible to determine the exact amount received by the respondent on account of surrendering two tenancies of show room and godown at Free School Street for want of any direct evidence but considering the report of valuer who was also examined and cross examined by the parties at length and his report appears to be correct and reasonable”.

Mr. Mitra submits that the learned Arbitrator had also recorded that “in the absence of clinching evidence about the value of stock-in-trade etc and the consideration received by the respondents in surrendering the two tenancies it will be just and proper to award Rs.7 lacs only being the

aggregate of Rs. 5 lacs in the 40% share of the claimant on account of consideration.”

Mr. Mitra submits that the finding of the learned Arbitrator that the tenancy of the shop room, which is a partnership property is contrary to the documents on record.

Mr. Miitra submits that the quantification of awarded amount of Rs. 7 Lacs is based on no evidence and the same was made in arbitrary manner. He further submits that the Arbitrator has ignored the vital fact that the annual account of the firm of the year 1996 to 1997 were signed by the respondent without raising any objection. The annual account for the year 1997-1998 was also received by the respondent and no-objection was raised.

Mr. Mitra submits that the entire finding of the arbitrator shocks the conscience of this Court and the learned Arbitrator has acted in contravention of the provisions of the Arbitration and Conciliation Act, 1996.

Mr. Mitra relied upon the Judgment reported in the case of **Associate Builders -vs- Delhi Development Authority (2015) 3 SCC 49** which reads as follows :

“19. When it came to construing the expression “the public policy of India” contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court in *ONGC Ltd. v. Saw Pipes Ltd.* [(2003) 5 SCC 705 : AIR 2003 SC 2629] held: (SCC pp. 727-28 & 744-45, paras 31 & 74)

“31. Therefore, in our view, the phrase ‘public policy of India’ used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good

and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could 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.*

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.

74. In the result, it is held that:

(A)(1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

- (i) a party was under some incapacity, or*
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
- (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.*

(2) The court may set aside the award:

- (i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,*

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable;

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract.”

Mr. Mitra relied upon the Judgment reported in the case of ***Ssangyong Engineering and Construction Co. Ltd. -vs- NHAI (2019) 15 SCC 131*** which reads as follows :

“41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

Mr. Mitra relied upon the Judgment reported in the case of ***PSA SICAL Terminals Pvt. Ltd. – vs- Board of Trustees 2021 SCC OnLine SC 508*** which read as follows :

“43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of “public policy of India”, which has been held to mean “the fundamental policy of Indian law”. A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

44. A decision which is perverse, though would not be a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

45. To understand the test of perversity, it will also be appropriate to refer to paragraph 31 and 32 from the judgment of this Court in *Associate Builders* (supra), which read thus:

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *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 [(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.”

SUBMISSIONS ON BEHALF OF RESPONDET :

Mr. Anubhav Sinha, learned advocate representing the respondent submits that the petitioner has taken the ground of Section 15 of the West Bengal Premises Tenancy Act, 1956 for the first time during argument but the petitioner has neither taken the said ground before the Arbitrator nor has taken in the application under Section 34 of the Arbitration and Conciliation Act, 1996. He submits that the amount of relinquishing the tenancy is received in the form of compensation and it is to be treated as capital gain under Section 45 of the Income Tax Act, 1961. Capital gains come under the category of “income” and tax need to be paid for the said amount.

Mr. Sinha submits that Section 56 of the Income Tax Act, 1956 provides for the chargeability of income of every kind which is not to be excluded from the total income under the Act, only if it is not chargeable to income tax under any of the heads specified in Section 14 items A to E. He submits that there is no dispute that a tenancy right is a capital asset, the surrender of which would attract Section 45 so that the value received would be a capital receipt and assessable if at all only under item E of Section 14. He submits that since the surrender of tenancy is liable to be taxed, it is hence not illegal to receive a consideration from the said surrender.

Mr. Sinha relied upon the Judgment reported in the case of **Commissioner of Income Tax, Mumbai & Ors. -vs- D.P. Sandu Bros. Chembur (P) Ltd. & Ors. (AIR 2005 SC 796)/ (2005) 2 SCC 584** which read as follows :

“12. We agree. A tenancy right is acquired with reference to a particular date. It is also possible that it may be acquired at a cost. It is ultimately a question of fact. In *A.R. Krishnamurthy v. CIT* [(1989) 1 SCC 754 : 1989 SCC (Tax) 202 : (1989) 176 ITR 417] this Court held that it cannot be said conceptually that there is no cost of acquisition of the grant of the lease. It held that the cost of acquisition of leasehold rights can be determined. In the present case, however, the Department's stand before the High Court was that the cost of acquisition of the tenancy was incapable of being ascertained. In view of the stand taken by the Department before the High Court, we uphold the decision of the High Court on this issue.

13. Were it not for the inability to compute the cost of acquisition under Section 48, there is, as we have said, no doubt that a monthly tenancy or leasehold right is a capital asset and that the amount received on its surrender was a capital receipt. But because we have held that Section 45 cannot be applied, it is not open to the Department to impose

tax on such capital receipt by the assessee under any other section. This Court, as early as in 1957 had, in *United Commercial Bank Ltd. v. CIT* [(1957) 32 ITR 688 : 1958 SCR 79] held that the heads of income provided for in the sections of the Income Tax Act, 1922 are mutually exclusive and where any item of income falls specifically under one head, it has to be charged under that head and no other. In other words, income derived from different sources falling under a specific head has to be computed for the purposes of taxation in the manner provided by the appropriate section and no other. It has been further held by this Court in *East India Housing and Land Development Trust Ltd. v. CIT* [(1961) 42 ITR 49 (SC)] that if the income from a source falls within a specific head, the fact that it may indirectly be covered by another head will not make the income taxable under the latter head. (See also *CIT v. Chugandas and Co.* [(1965) 55 ITR 17 : (1964) 8 SCR 332])

14. Section 14 of the Income Tax Act, 1961 as it stood at the relevant time similarly provided that “all income shall, for the purposes of charge of income tax and computation of total income, be classified under the following [six] heads of income”, namely:

- (A) Salaries;
- (B) Interest on securities;
- (C) Income from house property;
- (D) Profits and gains of business or profession;
- (E) Capital gains;
- (F) Income from other sources unless otherwise provided in the Act.

15. Section 56 provides for the chargeability of income of every kind which has not to be excluded from the total income under the Act, only if it is not chargeable to income tax under any of the heads specified in Section 14 Items (A) to (E). Therefore, if the income is included under any one of the heads, it cannot be brought to tax under the residuary provisions of Section 56.

16. There is no dispute that a tenancy right is a capital asset the surrender of which would attract Section 45 so that the value received would be a capital receipt and assessable if at all only under Item (E) of Section 14. That being so, it cannot be treated as a casual or non-recurring receipt under Section 10(3) and be subjected to tax under Section 56. The argument of the appellant that even if the income cannot be chargeable under Section 45, because of the inapplicability of the computation provided under Section 48, it could still impose tax under the residuary head is thus unacceptable. If the income cannot be taxed under Section 45, it cannot be

taxed at all. [See S.G. Mercantile Corpn. (P) Ltd. v. CIT [(1972) 1 SCC 465 : (1972) 83 ITR 700] .]”

The Arbitration Award being challenged on the ground that it lies in contravention with the West Bengal Premises Tenancy Act 1956 does not hold substance and is inapplicable in the instant case.

That the auspices of the Waqf Acts apply to the Free School Street property in question that has been maliciously and surreptitiously surrendered by the Petitioners and hence it cannot be hit with the provisions of the West Bengal Premises Tenancy Act.

The allegation that the Arbitration Award is based on no evidence and violates Wednesbury’s principles of reasonableness is unfounded, unjustified, wholly incorrect and malafide.

Clear misrepresentation of reason by Petitioners behind surrendering tenancy under the false pretext of a Notice issued by landlord (Calcutta Muslim Orphanage) in October 1995 and using that as subterfuge to surreptitiously surrender tenancy in the year 1997 by keeping Respondent in the dark.

The allegation of the Petitioners with regards to the valuation report having no basis is wholly unjustified.

The contention of the valuer not being examined in the Arbitral proceedings is wholly incorrect and been put through as an afterthought, hence the contention cannot be considered as it is being deployed to mislead the Court.

Arbitration Award passed by the Ld. Arbitrator is not in conflict with Public Policy of India.

The Arbitration Award passed by the Ld. Arbitrator is not in violation of the principles of natural justice.

The Ld. Arbitrator has provided full opportunity to the Petitioners to present their case before passing the Award and thus there arises no question as to the independence and impartiality of the Ld. Arbitrator.

The Ld. Arbitrator after giving due consideration to all facts, documentary evidences and arguments, both written and oral as presented before him had passed a reasoned award and as such the Ld. Arbitrator has not failed to appreciate the factual basis and legal principles and has not committed any error of law on the face of it by mis-appreciating the legal principles.

It is not open for the Petitioners to seek re-appreciation of facts and evidence in the instant challenge under Section 34 of the Arbitration and Conciliation Act, 1996.

The Counsel for the respondent relied upon the following judgments:

- i. (2011)10 SCC 573 (M/s Msk Projects (I) (Jv) Ltd. -vs- State of Rajasthan & Anr.).
- ii. AIR 2005 SC 796 (Commissioner of Income Tax Mumbai & Ors. v. D.P. Sandu Bros. Chembur (P) Ltd. & Ors.).
- iii. (1985) 4 SCC (Dharangadhra Chemical Works vs. Dharangadhra Municipality & Anr.).

- iv. (2018) SCC OnLine Cal 8390 (Syed Masoon Ali vs. Abu Naim Siddique & Anr.).
- v. (2019) 15 SCC 131 (Ssangyong Engineering vs. NHA).
- vi. (2015) 3 SCC 49 (Associate Builders vs. Delhi Development Authority).
- vii. (2018) SCC OnLine Del 12918 (Wishwa Mittar Bajaj and Sons vs. Shipra Estate Ltd. and Jaikishan Estates Developers (P) Ltd.).
- viii. 2019 SCC OnLine Del 9345 (Shwetadri Speciality Papers Pvt. Ltd. vs. National Research Development Corp.).
- ix. 2020 SCC OnLine Del 1392 (Steel Authority of India vs. Primetals Technologies).
- x. 2022 SCC OnLine SC 19 (UHL Power Company vs. State of Himachal Pradesh).
- xi. (2019) 4 SCC 163 (MMTC Limited vs. Vedanta Limited).
- xii. (2015) 5 SCC 739 (Swan Gold Mining Ltd. vs. Hindustan Copper Ltd.).
- xiii. Punjab State Civil Supplies Corporation Ltd. & Anr. vs. M/s Ramesh Kumar and Company & Ors. (Civil Appeal No. 6832 of 2021).
- xiv. 2019 SCC OnLine Del (Rites Ltd. vs. Subrata Kumar).
- xv. Haryana Tourism Limited vs. M/s Kandhari Beverages Limited (Civil Appeal No. 266 of 2022)."

CLAIM FILED BY THE RESPONDENT BEFORE THE ARBITRATOR:

Respondent being the claimant before the learned sole arbitrator has filed the following claim :

“31. Apart from being entitled to return of the capital in the firm which as per the balance sheet as 31st March, 1997 stood at Rs. 1,66,080/- until 29th December 1997, the claimant had received a total sum of Rs. 65,000/- on diverse dates and interest thereon and to account for and pay her share of 40% of profits of the firm, the claimant is also entitled to 40 % of the consideration received or reasonably expected to have been received by the respondents in respect of the surrender or the said show-room and godown of the firm and the alleging sale of its fixed and movable assets of the firm. As such the claimant is entitled to an award against respondents for a sum of Rs. 18,94,854.00 as per the following particulars-

(a) Capital of the claimant in the firm as on 29.12.1997	Rs. 1,01,080.00
(b) Interest on capital @ 18% p a	Rs. 56,888.00
(c) 40 % share of the proceeds received and/or reasonably expected to have been received by the respondents against surrender of the tenancy of the show-room and godown and alleged sale of the fixed and moveable assets of the firm.	Rs. 17,36,886.00
	<u>Total Rs. 18,94,854.00</u>

32. In this context it is relevant to state that at all material times interest has been paid by the firm of capital to its partners @ 18 % p a.”

FINDING OF THE LEARNED ARBITRATOR IS AS FOLLOWS:

“15. From the rival submission of the parties and from the documents placed on record, as well as the evidence led before this Tribunal, it appears that the assets of the

Free School Street branch of Bambino have been siphoned off to the Gariahat branch. It cannot be conceived how any prudent person will “sell” goods after goods, without consideration Equally important is to note that the person, at the helm of affairs in both benches at the relevant point of time, was the Respondent no. 1, the sole male partner. Therefore, if there was a chance, that the payment towards sale consideration may not be forthcoming, such an eventuality was definitely within the knowledge of the respondent no. 1, if not of all the respondents.

16. It is equally clear that the defence of the respondents that the claimant was apprised of the situation and the position/status of the assets of the FSST branch is only a bogey. None of the respondents ever informed the claimant of any decision to dispose off the business and assets of Bambino FSST or sought her consent or approval to do so. The alleged notice of meeting wherein the decision to surrender the tenancy in the name of Lajwanti, closure of partnership business and for transferring the tenancy of the godwon at Free School Street in the name of Respondent No. 1 had not been served. Such notice has been manufactured for the purpose of the record in favour of the respondents.

The respondents did not disclose to the claimant either the purpose for which the tenancy was surrendered and the business was closed and stock in trade and furniture etc were disposed off or the consideration received on account of such disposal. The claimant wrote to the respondents requesting them to furnish the up-to-date position of the said business. In reply to such request, by a letter dated 16 June, 1998 the respondent no. 1 wrote to the claimant referring to an alleged “last” joint discussion and decision. The letter was, however, silent as to when such discussion and decision were taken by the partners jointly. More importantly, such a massive business decision, if taken with consent of the claimant, ought to have been recorded and/or reduced to writing, as it tantamounted to a paradigm shift in the assets and rights of the partners. The sequence of events and the manner in which the respondents have progressed ahead, leaving behind the claimant high and dry, would definitely suggest to this Tribunal that the acts and omissions of the respondents, more particularly, the Respondent no. 1 was aimed at defrauding the claimant. The business of partnership was reduced to a surreptitious

proprietorship of the respondent no. 1, to the complete detriment of the claimant.

17. If the siphoning out of the valuable assets of the FSST branch was not enough to suggest that the claimant was being systematically defrauded by the respondents, the surrendering of the tenancy, (allegedly for a steep consideration) being premises no 40/E, Free School Street, Kolkata – 700 016, a property in the heart of the commercial centre of Kolkata, without any categorical consent from the claimant, drives home the point to hilt. Although the tenancy of Free School Street show room was in the name of Lajwanti Jotwani, it is clear from the evidence that it was the partnership property and the rentals were paid out of the partnership funds. The claimant was the single largest holder having 40 % share in the partnership business. No cogent reasons have been forwarded, much less any evidence brought on record to show as to what was the compelling necessity in surrendering the tenancy, which in itself was a valuable asset of the partnership. It is an admitted position that despite the notice of the landlord indicating deteriorating condition of the building where in the ship of Bambino FSTT was located was given in 1992, the business was carried on for a number of years. Even after surrender of the tenancy, a new show room is functioning. The tribunal has no hesitation in finding that Free School Street is a very important commercial hub and the tenancy for the shop room and the godown at Free School Street were very valuable. The tribunal is also of the view that the valuable tenancies could not be surrendered on mere request of the landlord unless there had been an underhand dealing between Lajwanti and or the other respondents for a heavy consideration. The tribunal accepts the report of the valuer filed by the claimant as reasonably correct. The tribunal also records its finding that transferring the tenancy of the godown at Free School Street in favour of respondent no. 1 who was actually managing the partnership business was highly reprehensible and points to highly motivated act on the part of responded no. 1 in collusion with other respondents to defraud the claimant by violating well accepted basic ethics and mortality expected from a partner in a partnership business. The preponderance of probability, which is the standard of proof required in determining an issue as in the present one, is overwhelmingly in favour of the case raised by the claimant herein.

18. That leaves the Tribunal on the question of what could be the quantifiable damages which the claimant may be entitled to from the respondents.

19. The claimant has prayed for an award of Rs. 18,94,854 being [a] aggregate sum of Rs. 1,01,080.00 being her share of capital in the partnership business as on 29.12.1997 [b] interest on the said capital at the rate of 18% p.a. being Rs. 50,888.00 and [c] 40 % share of the claimant in the partnership business of Bambino FSTT on account of proceeds received or reasonably expected to have been received by the respondents for surrendering two tenancies or show room and godown at Free School Street where partnership business of Bambino FSTT had been carried together with claimant's share in partnership business in the sale proceeds of stock in trade, furniture, fixture etc amounting to Rs. 17,36,886.00. The claimant has also prayed for pendentilite interest at 18% per annum on the said sum of Rs. 18,94,854.00.

20. Even though it is not possible to determine the exact amount received by the respondents on account of surrendering two tenancies of show room and godown at Free School Street for want of any direct evidence but considering the report of the valuer who was also examined and cross examined by the parties at length and his report appears to be correct and reasonable to the tribunal and considering the fact that the said tenancies were at one of the most prime business and commercial hubs in the city of Kolkata where a very high premium or salami was reasonably expected and also considering the fact that the stock-in-trade, furniture and fixture of a going concern for several years which had been sold and sale proceeds had been appropriated by the respondents, the claim for a sum of Rs. 17,36,886.00 made by the claimant does not appear to be unjustified, but in the opinion of the tribunal in the absence of clinching evidence about the value of stock-in-trade etc and the consideration received by the respondents in surrendering the said two tenancies, it will be just and proper to award a sum of Rs. 7 lacs only being the aggregate of Rs. 5 lacs in the 40% share of the claimant on account of consideration reasonably expected to have been received in surrendering the said two tenancies and 40% share of the claimant on account of consideration reasonably expected to have been received in surrendering the said two tenancies and 40% share of the claimant in the sale proceeds on account of sale of stock-in-trade etc of Bambino FSTT

and appropriated by the respondents amounting to Rs. 2 lacs. Besides the said amount, the claimant is also entitled for an award of Rs. 1,01,080.00 being her share of capital in the business.

21. The claimant has also made prayer for pendente lite interest at the rate of 18% per annum. Such claim of 18% interest per annum does not appear to be unjust and or unreasonable in commercial dealings but considering the facts and circumstances of the case and keeping in mind the fact that the claimant was deprived of her share in the business capital of the firm and other amounts indicated above for long years since closure of partnership business, the tribunal finds that justice will be met in pendente lite interest is confined to Rs. 7 lacs Rupees seven lacs only].

22. The claimant is also entitled to reasonable cost of arbitration case. Considering long drawn contest of the arbitration case, the tribunal finds that the claimant is entitled to a sum of Rs. 2 lacs on account of cost in the arbitration including arbitrator's remuneration, cost of counsel and other incidental cost.

23. Therefore, the tribunal makes an award of Rs. 17,01,080.00 [Rupees seventeen lacs one thousand and eighty only] for all the above mentioned items in favour of the claimant and against the respondents both severally and jointly.

24. The tribunal also makes an award in favour of the claimant and against the respondents jointly and severally interest at 10% per annum on the said answered sum of Rs. 17,01,080.00. Such interest will run from one month after the date of award till the awarded sum is paid, [one month being given as time to make payment of the awarded sum.

25. Save as aforesaid, there will be no other cost in this arbitration case."

DECISION WITH REASONS :

The 1940 Act, has grounds like "misconduct of arbitrator", "invalidity of arbitral proceedings" and "award otherwise invalid" were wide,

sweeping and open ended which used to give an extensive power to the courts to set aside an award. These expressions were usually interpreted widely by the courts and the awards were most often set aside-especially on the basis of "misconduct" inter alia apparent error of law in the award. Thus, the aim of arbitration which is to reduce the burden of the courts was not being achieved. Rather, due to the number of opportunities in the hand of the litigants to ask the court for intervention regarding the award-the burden was increasing on the courts.

To make the arbitration proceedings effective and binding on the parties who choose for arbitral proceedings, it was imperative to structure a new Act to fill in the loopholes of the 1940 Act. The 1996 Act was thus brought into the picture which tried to fill in the gaps of the previous law of arbitration in the country. The need of an arbitral system favoring nation was to reduce the workload of the courts and give certainty and finality to the arbitration proceedings and the awards thereon. Thus, the 1996 Act under S. 34 lays down restrictive grounds of interference of the courts with the arbitral awards.

Section 34 introduces itself by saying that the grounds mentioned thereunder are the "only" grounds on which an arbitral award may be set aside. However, apart from the grounds mentioned under S. 34, the Act also provides for other grounds as under S. 13, S. 16, S. 75 and S. 81 on the basis of which the award can be set aside.

Section 13 provides for challenge under S. 34 on the ground of lack of independence or impartiality or lack of qualification of the arbitrator regarding the arbitration proceedings.

Section 16 authorizes an arbitration tribunal to rule its own jurisdiction and pass an award. However, an aggrieved party can challenge it under S. 34 to set aside the award.

Section 75 and Section 81 are provided in the explanation of Section 34(2)(b)(ii) which explains the ambit of public policy. Under Section 75, the conciliation agreement and proceedings need to be confidential and if the same is breached, there lies a challenge to an award passed from such conciliation proceeding under Section 34. Under Section 81 if an award is based on the admission of evidence which are not to be considered on a conciliation proceeding, such an award can attract the challenge under S. 34.

Section 5 of the 1996 Act provides that notwithstanding anything contained in any other law for the time being enforce, in matters governed by Part 1, no judicial authority is to intervene, except where so provided in the said part.

Section 34, read in conjunction with Section 5 makes it clear that an arbitral award that is governed by Part 1 of the 1996 Act, can only be set aside on grounds mentioned in Section 34(2) and (3) and not otherwise.

None of the grounds contained in Sub-section 2(a) of Section 34 permit the Court to adjudicate the merits of the decision rendered by an arbitral award.

The grounds given under S. 34(2)(a) are crisp and precise and lay the law as it is without the inclusion of any open-ended expression which otherwise would have given the courts an opportunity to widen their scope of interference with the arbitral awards. The only open-ended expression which can be and has been of concern is the ground of public policy of India. It has been under many cases defined as an unruly horse thus giving the interpretation that it can never be defined or be a certain thing. However, for the purpose of achieving the aim of the new Act, the Act of 1996-the legislature while drafting the Act limited the scope of public policy in its explanation restricted it to:-

a) Fraud

b) Corruption

c) S. 75 or S. 81 (confidentiality breach or admissibility of evidence)

The scope of public policy was, however, widened after Supreme Court in its decision of Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. reported in 2003 (5) SCC 705 interpreted it to include "patent illegality" in its definition. The case mentioned that the term public policy can be construed and understood in a narrow or with a wider meaning and then went ahead to say that it should not have a limited meaning-thus, included the term "patent illegality" within the scope of public policy. "Patent

Illegality" as explained by the Saw Pipes Case meant any error of law on the face of award, however, it did mention that the error which would be taken into consideration should not be trivial in nature. Lord Mansfield in *Holman v. Johnson* stated that the principle of public policy is *ex dolo malo non oritur actio*. No Court of law will lend its aid to a man who founds his cause of action upon an immoral or illegal act. The rule has been further illustrated by Russel by stating that grounds of public policy on which an award may be set aside include: (1) that its effect is to enforce an illegal contract; (2) that the arbitrator, for instance manifested obvious bias too late for an application for his removal to be effective before he made his award.

In its decision in ***Oil and Natural Gas Corpn. Ltd. (supra)***, the Supreme Court has elaborated the concept of public policy at great length. The concept was extended to permit challenge to an arbitral award which is based on an irregularity of a kind which has caused substantial injustice. It is stated:-

"Therefore, in our view, the phrase 'public policy of India' used in S. 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case, it is required to be held that the award could be set

aside if it is patently illegal. Result would be award could 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.

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.

The expression "public policy" or "opposed to public policy" is not defined either in the Arbitration and Conciliation Act, 1996 or in the Contract Act, 1872. The reason is that these expressions are incapable of precise definition. The concept has to be taken to connote larger public interest on public good. Broadly speaking it would mean policy of law and, therefore, whatever tends to obstruct justice or violate a statute, whatever is against good morals is against public policy.

Public policy means the principles and standards regarded by the legislature or by the Court as being of fundamental concern to the state and the whole of the society. The notion of public policy is not static. Ideas on what is good for the public or what is in public interest, keeps changing with time. The enforcement of an award is to be refused as being contrary to

public policy if it is contrary to the fundamental policy of Indian law, country's interests, and its sense of justice and morality. The case in which this point was raised did not involve any such violation, nor any other ground for setting aside could be proved.

The words "public policy" are not to be confined to the Explanation appended to the provision. That would be a very narrow construction of the provision."

In the case reported in **(2006) 11 SCC 181 (Centrotrade Minerals & Metals Inc. -vs- Hindustan Copper Ltd.)**, the Supreme Court has interpreted public policy to include patent illegality and such patent illegality must go to the root of the matter. It should be unfair and unreasonable so as to shock the conscience of the Court. The pleadings of the parties and the materials on record are required to be considered to lay the Court if the award is against public good on public interest.

The law laid down by the Supreme Court in Saw Pipes (supra) has led many other courts to interpret the law to include any error of law to be hit by S. 34 including the subsequent decisions of the Hon'ble Supreme Court, for instance, in the case of Delhi Development Authority v. R.S. Sharma reported in 2008 (13) SCC 80, the Hon'ble Supreme Court summarized the law thus:-

"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 S. 34(2) of the Act.

(b) Award could be set aside if it is contrary to:

(i) Fundamental policy of Indian Law; or

(ii) The interest of India; or

(iii) Justice or morality;

(iv) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court;

(v) 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."

In **ONGC Ltd. Vs. Garware Shipping Corporation Ltd.** reported at reported in **2007 (13) SCC 434**, it was held that under Section 34 of the Act, an award can be set aside on the ground that it is erroneous in law.

The Supreme Court in the case of **McDermott International Inc. -vs- Barun Standard Co. Ltd. reported in (2006) 11 SCC 181** has commented on the scope of the powers of the arbitrator to interpret terms of the contract, and the permissible interference by the courts on the assessment of the arbitrator. It was held:-

"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.

The 1996 Act makes the provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrator, violation of natural justice, etc. The court cannot correct the errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

The Court will not judge the reasonableness of a particular interpretation accorded by the arbitrator to the terms of the contract. Even an error in interpretation, unless patently illegal, will only amount to an error within the jurisdiction of the arbitrator.

In the case of ***Bharat Coking Coal Ltd. -vs- L.K. Ahuja*** reported in **(2004) 5 SCC 109**, the Hon'ble Supreme Court observed as follows:-

"11. There are limitations upon the scope of interference in awards passed by an arbitrator. When the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the court to reappraise the matter as if this were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. So long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for. However, in cases where an arbitrator exceeds the terms of agreement or passes an award in the absence of any evidence, which is apparent on the face of the award, the same could be set aside."

In the case of KV Mohd. Zakir vs. Regional Sports Centre reported at **AIR 2009 SC (Supp) 2517**, it held that the courts should not interfere unless reasons given are outrageous in their defiance of logic or if the arbitrator has acted beyond his/her jurisdiction.

In the case of ***P.R. Shah Shares & Stock Brothers v. M/s. B.H.H. Securities (P) Ltd.*** reported at **2012 (1) SCC 594**, it states that a court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-approaching the evidence. An award can be challenged only on the grounds mentioned in S. 34(2) of the Act.

In the case of ***Steel Authority of India Ltd. v. Salzgitter Mannesmann***; **OMP No. 736 of 2009**, decided on 18th April, 2012 (Delhi HC) it refused to set aside the award in view of court's limited and restricted

powers for judicial intervention as under S. 34 of the Act. The court relied upon the judgment in P.R. Shah Shares (supra) and held that the court cannot sit in appeal over the award of the tribunal by re-assessing and re-evaluating the evidence.

In a fairly recent decision of ***Associate Builders Vs. Delhi Development Authority reported at (2015) 3 SCC 49***, the Hon'ble Supreme Court had the occasion to re-consider the grounds on which an award can be challenged under Section 34 of the Arbitration and Conciliation Act, 1996. In dealing with the grounds on which an award can be challenged, the Hon'ble Supreme Court has noticed the distinction between Section 34(2)(a) and Section 34(2)(b)(ii) and held that it is only when arbitral award is in conflict with Public Policy of India as per Section 34(2)(b)(ii) that merits of an arbitral award are to be looked into under certain specified circumstances it includes if it is in conflict with Public Policy of India. The Hon'ble Supreme Court has subdivided Public Policy of India in four separate and distinct sub-heads, namely:-

- i) Fundamental Policy of Indian Law;*
- ii) Interest of India;*
- iii) Justice or Morality; and*
- iv) Patent Illegality.*

Fundamental Policy of Indian Law was again subdivided in four heads, namely, i) Compliance with statutes and judicial precedents; ii) Need

of judicial approach; iii) Natural justice compliance; iv) Wednesbury reasonableness.

Patent Illegality principle was subdivided in three heads, namely, i) Contravention of substantive law of India; ii) Contravention of Arbitration and Conciliation Act, 1996; iii) Contravention of the terms of the contract.

The Hon'ble Supreme Court in *Associate Builders* (supra) had taken into consideration the object and reason for introduction of the 1996 Act and observed that the said Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration and also to provide that the Tribunal gives reasons for an arbitral award; to ensure that the Tribunal remains within the limits of its jurisdiction; and to minimize the supervisory roles of courts in the arbitral process. The Fundamental Policy of Indian Law requires compliance with statutes meaning thereby that an award which is patently in violation of statutory provisions is in conflict with Public interest and would be regarded as being contrary to the Fundamental Policy of Indian Law. Furthermore, the binding effect of the judgment of a superior Court if disregarded would be equally violative of the Fundamental Policy of Indian Law. The arbitral tribunal being vested with the power to determine the rights and obligations of the parties is required to show fidelity to judicial approach meaning thereby that they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach demands that a decision should be fair, reasonable and objective and not actuated by any extraneous considerations. Equal important and indeed fundamental was that the

arbitral tribunal is required to follow the principles of natural justice. Audi alteram partem principle is Fundamental to the Policy of Indian Law and is also contained in Sections 18 and 34(2)(ii) of the Arbitration and Conciliation Act. The juristic principle of wednesbury reasonableness also forms part of the Fundamental Policy of Indian Law and a decision which is perverse or so irrational that a reasonable person conversant with the facts would not have arrived at the same conclusion is part of the Fundamental Policy of Indian Law and on the ground of which an award can be challenged. It is settled law that where a finding is based on no evidence or an arbitral tribunal takes into account something irrelevant to the decision which it arrives at or includes vital evidence in arriving at its decision. Such decision would necessarily be perverse and on those grounds, an award can be set aside. This later decision of the Hon'ble Supreme Court has reaffirmed its faith in *Saw Pipes Ltd.* (supra) with a word of caution 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, and then he is the last word on facts.

An award can be said to be against justice or morality only when it shocks the conscience of the Court. The instance of it can be whether the Tribunal awards a sum without any acceptable reason or justification. The concept of Patent Illegality was considered by reference to the explanation under Section 34(2)(b)(ii) of the 1996 Act which states that an award is said to be in conflict with Public Policy of Indian Law if the making of the award is induced or affected by fraud or corruption. Patent Illegality would include a contravention of the substantive law of India or if an award is based in contravention of Arbitration and Conciliation Act, 1996-for example, if an arbitrator failed to give any reason for an award in contravention of Section 31(3) of the 1996 Act and in all cases whether the Tribunal failed to decide in accordance with the terms of the contract which in effect would be really a contravention of Section 28(3) of the Arbitration and Conciliation Act. The Hon'ble Supreme Court, however, entered a caveat by stating that an arbitral tribunal must decide in accordance with the terms of the contract but if an arbitrator construes a term of the contract in a reasonable manner, it would not mean that the award can be set aside on this ground. Construction of the terms of the 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 would do, of course, the arbitrator cannot wander outside the contract and deals with the matters not forming the subject matter or allotted to him as in that case he would commit jurisdictional error. The said judgment also recognized and reaffirmed the settled law that where a cause or matters in differences are referred of an arbitrator, whether layer or layman, he is

constituted the sole and final judge of all questions of law and of fact obviously with the limited grounds of interference as alluded to above.

As observed by the Supreme Court in *Associate Builders (supra)*, the 1996 Act was enacted to provide for an arbitral procedure, which is fair, efficient and capable of meeting the needs of arbitration, to provide that the Arbitral Tribunal gives reasons for an arbitral award, to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction and to minimize the supervisory role of Courts.

The merits of an award might only be looked into under certain specified circumstances, when an award is found to be in conflict with the public policy of India, as held by the Supreme Court in *Associate Builders (supra)*.

An award might be set aside as patently illegal, provided the illegality goes to the root of the award. If the illegality is of a trivial nature it cannot be said that the award is against public policy. This proposition was reaffirmed by the Supreme Court in *Hindustan Zinc Ltd. Vs. Friends Coal Carbonization* reported at (2006) 4 SCC 445.

In ***ONGC Vs. Saw Pipes Ltd. (supra)***, the Supreme Court held that an award could also be set aside, if it was so unfair and unreasonable, that it shocked the conscience of the Court.

In ***Associate Builders (supra)***, the Supreme Court held that it must be clearly understood that when a Court is applying 'public policy' test to an arbitral award, it does not act as a Court of appeal and consequently the

errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to be accepted 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 no 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.

Patent illegality may render an award to be in conflict with the public policy of India. Under the explanation to Section 34(2)(b) an award may be said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

In the case of ***Indu Engineering & Textiles Ltd. Vs. Delhi Development Authority reported at (2001) 5 SCC 691***, the Supreme Court held that the Arbitrator being a Judge appointed by the parties, the award passed by him is not to be interfered with lightly. When the view taken by the arbitrator was a possible or a plausible one, on his analysis of evidence and interpretation of contractual and/or statutory provisions and did not suffer from any manifest error, it was not open to the Court to interfere with the award.

Even though the judgment in ***Indu Engineering & Textiles Ltd. (supra)*** was rendered in the context of an application under Section 30 of the Arbitration Act 1940, for setting aside of an award, the same principle would apply to an application for setting aside an award, under Section 34 of the 1996 Act.

In ***Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*** reported at **(2012) 5 SCC 306**, the Supreme Court held that when a clause in a contract was capable of two interpretations and the view taken by the arbitrator was clearly a possible if not a plausible one, it was 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, Court could not interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

In ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd.*** reported at **(2010) 11 SCC 296**, the Supreme Court held:

*"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.* 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."*

The Arbitrator is a Judge chosen by the parties and his decision is final. It is well-settled that the Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law or the arbitrator exceeds the terms of the agreement or passes an award in absence of any evidence. An error apparent on the face of records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is plausible one, the Court will refrain itself from interfering. The said proposition can be found in *Bharat Coking Coal (supra)* and in *State of U.P. Vs. Allied Constructions* reported at (2003) 7 SCC 396 and followed in subsequent decisions.

As regard the submission of Mr. Aniruddha Mitra Learned Counsel for the petitioner that the Award is in contravention with the West Bengal Premises Tenancy Act, 1956 is concern, the petitioner has urged the said issue before this court at the first time. The petitioner has neither raised the said issue before the arbitrator nor any ground is taken in the application under Section 34 of the Arbitration Act, 1996. This Court is of the view that in absence of proper grounds, the Court cannot decide the legality of the award other then the ground mention in the application.

As regard the Award passed by the Sole Arbitrator based on no evidence this Court finds that both the parties have adduced their evidence

and the Learned Arbitrator has considered the evidences and the documents relied by the parties. The Arbitrator has recorded that :

“No cogent reasons have been forwarded, much less any evidence brought on record to show as to what was the compelling necessity in surrendering the tenancy, which is itself was a valuable asset of the partnership. It is an admitted position that despite the notice of the landlord indicating deteriorating condition of the building where in the shop of Bambino FSTT was located was given in 1992, the business was carried on for a number of years. Even after surrender of the tenancy, a new show room is functioning. The tribunal has no hesitation in finding that Free School Street is a very important commercial hub and the tenancy for the shop room and the godown at Free School Street were very valuable. The tribunal is also of the view that the valuable tenancies could not be surrendered on mere request of the landlord unless there had been an underhand dealing between Lajwanti and or the other respondents for a heavy consideration.”

As regard the valuation report, the Arbitrator had accepted the report and while accepting the report, the Arbitrator recorded the reasons that considering the report of the valuer who was also examined and cross examined by the parties at length and his report appears to be corrected and reasonable. The Arbitrator has properly assigned reasons in para 20 of the award as recorded above.

On scrutiny of the award, this Court finds that the petitioners have actively participated in the arbitration proceeding and have submitted all the documents and have examined witnesses and also cross examined the witness of the respondent.

The Arbitrator held that in the absence of clinching evidence about the stock-in-trade etc. and the consideration received by the respondents in surrendering the two tenancies, it will be just and proper to award sum of Rs. 7 lacs only being the aggregate of Rs. 5 lacs in the 40% share of the claimant. It is the admitted case of the petitioner that the respondent was having share of 40% in the said business and the petitioner has not produced any evidence to show that the respondent has consented for surrender or had the knowledge of such surrender.

CONCLUSION :

In view of the above, this Court finds that there is no infirmity in the Award passed by the learned sole Arbitrator dated 27th May, 2007 and does not require any interference.

Accordingly, **AP No. 472 of 2009** is thus **dismissed**.

Parties shall be entitled to act on the basis of a server copy of the Judgment placed on the official website of the Court.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)